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ROBOTS, NEW TECHNOLOGY, AND INDUSTRY 4.0 IN CHANGING WORKPLACES. IMPACTS ON LABOR AND EMPLOYMENT LAWS

PROFESSOR RON BROWN*

Structural changes in economies driven by digitalization, demographic changes, and migration are changing the shape of jobs and workplaces. Technological advances have the potential to deliver enormous benefits to society but will also have profound consequences on employment and the quality thereof.[1]

* Professor of Law, University of Hawaii Law School

The article was presented at the Sixteenth International Conference in Commemoration of Professor Marco Biagi at Marco Biagi Foundation, University of Modena and Reggio Emilia in Modena, Italy March 20, 2018.

1. *See G7 Labour Summit: Just Transition Principles Must Underpin the Future of Work*, INT'L TRADE UNION CONFEDERATION (Sept. 26, 2017), [hereinafter *G7 Labour Summit*], https://www.ituc-csi.org/g7-labour-summit-just-transition?lang=fr (arguing that the changing workplace fits into a larger pattern of depreciation of worker protections); *see also Vatican Convenes with Labour Leaders to Discuss Threats to the World of Work*, INT'L TRADE UNION CONFEDERATION (Jan. 11, 2018), https://www.ituc-csi.org/vatican-convenes-with-labour ("The increase in automatization, individualization, inequality, precarity, mass unemployment, poverty and the phenomena of exclusion and the 'discarding' of people puts the 'common home' at risk. These trends present serious challenges for all social and institutional players and in particular for the world of work."); *id.* ("An international meeting of more than 300 trade union leaders convened by the Dicastery for promoting integral human development and hosted by the Vatican has called on intellectuals, business leaders, employers, civil society, international organizations and governments to act in solidarity for integral, inclusive and sustainable development, with 'work, land and housing for all.'").

I. INTRODUCTION: CHANGING WORKPLACE ENVIRONMENT

The very issues created by corporate restructuring and changing workplace environments, with their infusion of new technology, also create emerging employment law issues in regulating the changes and in addressing the challenges in evaluating performance. The workplace environment significantly affects an employee's work product, both in quality and efficiency.[2]

Measuring worker productivity/performance amid the ongoing restructuring of companies and changing traditional employment relationships caused by fissurization, platformization, digitalization, robotization, new technology, and remote and cross-border workplaces, and the challenges for the also changing techniques of measuring worker performance, all within the limits of employment law, are the topic of this Article.

And then there is the somewhat cynical prospect that under Industry 4.0,[3]

2. Leslie Allan, *Workplace Environment and Employee Performance*, BUS. PERFORMANCE PTY LTD, http://www.businessperform.com/workplace-training/workplace_environment.html (last visited Sept. 25, 2018).

3. *See* Martin, *Industry 4.0: Definition, Design Principles, Challenges, and the Future of Employment*, CLEVERISM (Jan. 16, 2017) [hereinafter *Industry 4.0*], https://www.cleverism.com/industry-4-0/ (defining Industry 4.0 as the fourth industrial revolution, the cyber physical age, that followed the earlier ages of mechanization, mass production, and computer and automation); *id.* ("The fourth industrial revolution takes

there will be a decreasing need for measuring worker performance due to robotization and new technology.[4] Studies predict that approximately forty-seven percent of the total U.S. employment market is at high risk of being displaced by technology, while, in Thailand and India, approximately seventy percent of total employment is at risk.[5]

> Technological advances have the potential to deliver enormous benefits to society, but will also have profound consequences on employment and the quality thereof . . . . [E]stimates on jobs displacement due to automation and the rise of [AI] vary between an alarming [fifty] per cent and a more nuanced nine per cent of occupations being displaced altogether.[6]

Industry 4.0 is a global trend taking place outside traditional employment structures because traditional employment has higher wage costs.[7]

Assessing worker performance in a technologically advancing labor market,[8] while involving many Human Resources Management ("HRM")

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the automation of manufacturing processes to a new level by introducing customized and flexible mass production technologies. This means that machines will operate independently, or cooperate with humans in creating a customer-oriented production field that constantly works on maintaining itself. The machine rather becomes an independent entity that is able to collect data, analyze it, and advise upon it. This becomes possible by introducing self-optimization, self-cognition, and self-customization into the industry. The manufacturers will be able to communicate with computers rather than operate them."); *see also Industry 4.0: The Fourth Industrial Revolution — Guide to Industrie 4.0*, I-SCOOP, https://www.i-scoop.eu/industry-4-0/ (last visited Sept. 25, 2018).

4. *Students Today Have to Learn More and Faster Than Their Parents Ever Did — A Q+A With NY Times Best Selling Author Daniel Pink*, MICH. ROSS (Sept. 8, 2017), https://michiganross.umich.edu/ross-news-blog/2017/09/08/students-today-have-learn-more-and-faster-their-parents-ever-did-qa-ny (describing a pro-employee defensive strategy for students preparing to enter the workplace where their performance will be evaluated on how to avoid being displaced by technology as presented by best-selling author Daniel Pink); *id.* ("[QUESTION]: As [AI] and automation are rapidly changing workplace roles, what are the most important skills that our students should focus on developing now to prepare them for future success? [ANSWER]: The top-level answer is to build skills that are hard to automate, hard to outsource, that deliver on the new demands of rising living standards, and that augment machine intelligence. The more granular answer is: Communication skills (especially writing); empathy; design thinking; the ability to compose; basic quantitative skills; synthesis and symphonic thinking; grit, the willingness to practice, and a strong work ethic; and anything 'multi' — multi-lingual, multi-cultural, multi-disciplinary.").

5. *See* Gerlind Wisskirchen, *Digitalization and Automatization and Their Impact on the Global Labor Market*, EUR. AM. CHAMBER COM. N.Y., https://www.eaccny.com/news/member-news/digitalization-and-automatization-and-their-impact-on-the-global-labor-market/ (last visited Sept. 21, 2018).

6. *G7 Labour Summit*, *supra* note 1.

7. *See id.* (discussing how algorithms and outsourcing will replace traditional office functions in new job structures because of the lower costs).

8. *See* Boris Ewenstein, Bryan Hancock, & Asmus Komm, *Ahead of the Curve: The Future of Performance Management*, MCKINSEY&CO. (May 2016), https://www.mc

issues,[9] also provides the opportunity to consider the employment law implications[10] when evaluated workers are "wired" to their jobs by working at remote, but "connected," locations abroad or across town, or have a "robo-boss" or robot co-workers. There are three threshold questions. First, *who* evaluates and can place consequences on evaluations, and how is that determined by the employment relationship (employer-employee/independent contractor or third-party contractor) where there is an outside, alternative workplace? Second, *how* (by what means) and by what and whose standards is the evaluation conducted (objective vs. subjective factors; use of technology in evaluations)? And third, *whether* there is legal justification for differential evaluations under anti-discrimination laws, as variant workplaces and technological efficiency may disparately impact age, gender, and disability factors in increasingly diverse workplaces.

Performance evaluations may be done by humans or technology, and most often by both, with the latter assisting the former.[11] Concerns regarding privacy and the impact of unions on restructuring and performance evaluations must be considered, even as the traditional employment relationship is transformed into models often falling outside the existing labor and employment law regulations.[12]

Familiar legal issues may arise, though perhaps with unfamiliar applications.[13] Not all jobs fall under the changing labor market conditions

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kinsey.com/business-functions/organization/our-insights/ahead-of-the-curve-the-future-of-performance-management (analyzing how performance management will change when abandoning traditional performance analysis); *see also* Judith Heerwagen, Kevin Kelly, & Kevin Kampschroer, *The Changing Nature of Organizations, Work, and Workplace*, WHOLE BUILDING DESIGN GUIDE (Oct. 5, 2016), https://www.wbdg.org/resources/changing-nature-organizations-work-and-workplace (exploring the changes in the workplace and the effects on performance); *The Future at Work—Trends and Implications*, RAND CORP. (2004), http://www.rand.org/pubs/research_briefs/RB5070/index1.html (discussing data and trends regarding the future of work).

9. Allan, *supra* note 2 (discussing the nine key workplace environment factors which determine an employee's level of performance in the workplace).

10. *See generally* Daniel A. Van Bogaert, *New Legal Battlegrounds for Performance Evaluations*, https://studylib.net/doc/8184704/new-legal-battlegrounds-for-performance-evaluations (last visited Sept. 21, 2018) (analyzing performance law issues arising out of the evaluation process).

11. *See, e.g.*, Scott Fanning, *The Internet of Things Impacts Employment Law*, INSIDE COUNS., July-Aug. 2015, at 20 (stating that performance evaluations include employee behavior, and "[c]ompanies that can track employee movement through their badges can see where they are and even how active they are" and can include such data in evaluations).

12. *Infra* Section II.

13. *See, e.g.*, Fanning, *supra* note 11; Adam S. Jacoff, Elena R. Messina, & John Evans, *Performance Evaluation of Autonomous Mobile Robots*, 29 INDUS. ROBOT 259, 259 (Feb 1, 2002) (claiming that times are changing so much that even robots are

and for those cases, traditional evaluations that measure and evaluate productivity and performance may be aided by electronic technology.[14] But for those many workers, now and in the future, working in a changing or alternative work environment[15] (at home, in a different city, or overseas), or in an ambiguous or "joint employment" relationship, questions regarding the legal application of contractual wages and statutory benefits, safety and health requirements, workers compensation, and especially anti-discrimination laws arising from these performance evaluations may create novel situations in still-developing areas of law and legal solutions.[16]

This Article addresses the employment law implications of evaluating workers in the changing labor market, especially regarding the market's workplace environments and uses of technology. Following the introduction in Part I, Part II of this Article describes the changing workplace environment with its restructuring of companies and resulting changes in the employment relationship that raise issues concerning who is the evaluator of worker performance and by what means and by whose standards an evaluation is undertaken, as well as the role of technology and unions in that evaluative process. Part III examines the legal implications of a changing workplace environment and new technology on workers and performance. Part IV analyzes the relationship between the performance evaluations arising in the changing work environment and the labor and employment laws within which performance evaluations take place and suggests possible reforms of existing employment law and performance evaluation approaches. Part V concludes.

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evaluating performances of autonomous mobile robots).

14. *See* Fanning, *supra* note 11.

15. *See generally* Joe Aki Ouye, *Five Trends that are Dramatically Changing Work and the Workplace*, KNOLL WORKPLACE RES. (2011), https://www.knoll.com/media/18/144/WP_FiveTrends.pdf (discussing alternative workplace programs, their benefits, and their detriments).

16. *See* Dorrie Larison, *The Modern Workplace—Technological Change in Employment Practices—The Law Struggles to Keep Up*, EMP. L. ALLIANCE (Apr. 12, 2012), http://www.employmentlawalliance.com/firms/gpmlaw/articles/the-modern-workplacetechnological-change-in-employment-practicesthe-law-str (contemplating the use of gaming techniques in the workplace); Michael Pooler, *Robot Army is Transforming the Global Workplace*, FIN. TIMES (Nov. 20, 2017), https://www.ft.com/content/f04128de-c4a5-11e7-b2bb-322b2cb39656 (reporting that there are "armies of robots . . . spreading throughout factories and warehouses around the world, as the accelerating pace of automation transforms a widening range of industries" in both advanced countries and emerging economies); *id.* (summarizing a report by the International Federation of Robotics that stated that 2016 global industrial robot sales "increased by [eighteen percent] to $13.1bn").

II. CHANGING WORKPLACES IN GLOBAL ECONOMIES

Measuring worker performance has become more complicated and sophisticated in light of the internal re-structuring of companies and the many changing workplace environments.[17] While the local flower shop may be able to easily observe and measure a worker's performance, for larger employers, and those with external and global connectivity, including domestic and multinational corporations ("MNCs") using contract employers and labor chain workers across jurisdictional borders, measuring performance in an increasingly blurry employment relationship is more problematic. A core issue is the employment relationship between the employer and the employed under traditional legal rules and the changing nature of employers and workers in vertical and horizontal relationships, including "platform employers,"[18] joint-employers, and MNCs, with workers categorized as employees, independent contractors, etc. Additionally, the workers may be placed in varying locations and diverse workforce compositions, external to the company's place of business, necessitating modified performance evaluation approaches. The foregoing complicates who makes a performance evaluation, how it is made, and by whose or what standards, and what is the role of technology, the union, and privacy rights? As digitalization, robotics, and technological performance measurement programs are used, new legal issues arise around the traditional task of evaluating a worker's performance.

17. DAVID J. WALSH, EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE ch. 16 (5th ed. 2016). *See generally* Ronald C. Brown, *Made in China 2025: Implications of Robotization and Digitalization on MNC Labor Supply Chains and Workers' Labor Rights in China*, 9 TSINGHUA L. REV. 186 (2017) (discussing the change in Chinese workplaces through robotization and digitization and their implications on restructuring how companies produce cheap goods); Eric Feigenbaum, *Employee Evaluation Laws*, CHRON, https://smallbusiness.chron.com/employee-evaluation-laws-4880.html (last visited Sept. 29, 2018) (discussing a standard way to conduct a thorough employee evaluation).

18. *See generally* Rebecca Smith, *'Marketplace Platforms' and 'Employers' Under State Law — Why We Should Reject Corporate Solutions And Support Worker-Led Innovation*, NAT'L EMP. L. PROJECT (May 18, 2018), https://www.nelp.org/publication/marketplace-platforms-employers-state-law-reject-corporate-solutions-support-worker-led-innovation/ (analyzing various state laws that use the phrase "marketplace platforms" to define companies like Uber, who's "platform workers" are, in many of these laws, statutorily independent workers, rather than employees of the "marketplace platform").

A. Employers, Employment Relationships, and Workplace Environments

1. Restructuring of Companies

American businesses are changing with new technological applications. Especially in big companies, hierarchy levels are being eliminated, resulting in smaller organizational units and companies focusing on their core competencies and outsourcing other activities.[19]

Scheduling, shipments, and production processes are increasingly using the algorithms in digitalization and robotization, as are the evaluative mechanisms to review performance of those who do the work.[20] This technological change takes place in an increasingly global economy where companies, large and small, are restructuring to cut costs and limit liabilities. Approximately "[e]ighty [percent] of world trade and [sixty percent] of global production" is undertaken by MNCs using global labor supply chains that often cross borders.[21] A recent study showed that the top fifty MNCs had only six percent "employees" in the traditional employment relationship, while the other 116 million workers in the labor supply chain were technically employed by other companies.[22] This process of shifting worker costs and liabilities outside of the traditional employment relationship is called fissurization.[23] Fissurization is usually executed by shifting work to subcontracted companies and using independent contractors internally (vertically) and externally (horizontally).[24] In that case, who is the

19. *See* Wisskirchen, *supra* note 5 (assessing the EU labor market, and concluding that, "an automatic supply chain connection between the company's systems and the systems of its external providers will be the basis for success in the digital world").

20. *See* Brown, *supra* note 17, at 193-97 (analyzing China's changing economy and the changing structures of its companies); Ted Greenwald, *How AI Is Transforming the Workplace*, WALL ST. J. (updated Mar. 10, 2017, 6:21 PM), https://www.wsj.com/articles/how-ai-is-transforming-the-workplace-1489371060?ns=prod/accounts-wsj (describing the various AI workplace applications, including worker performance evaluations).

21. *Supply Chains Resources Hub*, INT'L TRADE UNION CONFEDERATION, https://www.ituc-csi.org/supply-chains-resources-hub (last visited Sept. 28, 2018); *see also* Press Release, United Nations Conference on Trade and Development, 80% of Trade Takes Place in 'Value Chains' Linked to Transnational Corporations, UNCTAD Report Says (Feb. 27, 2013), http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=113.

22. *See ITUC Report Exposes Hidden Workforce in Supply Chains*, INDUSTRIALL GLOBAL UNION (Jan. 19, 2016), http://www.industriall-union.org/ituc-report-exposes-hidden-workforce-in-supply-chains.

23. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 43-44 (2017); Ronald Brown & Olga Rymkevich, *U.S.-Russia-East Asia Comparisons of Dispatch (Temporary) Worker Regulations*, 5 RUSSIAN L. J. 6, 10 (2017).

24. *See* WEIL, *supra* note 23, at 11-15.

"employer" in the employment relationship responsible for evaluating and controlling the worker? A 2015 report by the United States Government Accountability Office, found that the United States ("U.S.") "contingent" workforce had increased twenty-five percent over the prior ten years to forty percent of the U.S. workforce.[25]

Employers may also use alternative workplaces, including locations outside the company location, such as home, remote, mobile, or even cross-border locations.[26] Alternative workplaces can raise legal issues, such as *if*, *how*, and *which* employment laws apply.[27] For example, the safety of the workplace can affect performance and consequential evaluations (e.g., does the U.S. Occupational Safety and Health Act (OSHA) apply?).[28] Similarly, the algorithmic allocation of younger and not disabled workers to remote or high-tech workplaces can impact anti-discrimination laws regarding age and disability.[29] Using alternative business models, such as platforms used by Uber and Lyft, can further compound the issues.[30] For example, it is reported that Uber has "160,000 contractors, but just 2,000 employees": an eighty to

25. U.S. GOV'T ACCOUNTABILITY OFFICE, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 3-4, 12 (Apr. 20, 2015), http://www.gao.gov/assets/670/669766.pdf (explaining that some estimates, depending on varying definitions, range between five to thirty-three percent); *id.* ("[B]roader definitions include agency temps and day laborers, although most are standard part-time workers or independent contractors. Applying a broad definition to analysis of 2005 CWS data, our prior work estimated that 30.6 percent of the employed workforce could be considered contingent. Applying this broad definition to our analysis of data from the General Social Survey (GSS), we estimate that such contingent workers comprised 35.3 percent of employed workers in 2006 and 40.4 percent in 2010."). *See generally* Brown & Rymkevich, *supra* note 23, at 7, 8 (comparing and contrasting how the United States, Russia, and East Asia regulate their "dispatch" (temporary) workers).

26. *See* GARRY MATHIASON ET AL., LITTLER MENDELSON, P.C., THE TRANSFORMATION OF THE WORKPLACE THROUGH ROBOTICS, ARTIFICIAL INTELLIGENCE, AND AUTOMATION: EMPLOYMENT AND LABOR LAW ISSUES, SOLUTIONS, AND THE LEGISLATIVE AND REGULATORY RESPONSE 13 (2016), http://www.jdsupra.com/legalnews/the-transformation-of-the-workplace-95769/ (download PDF from link for full Publication).

27. *Id.* at 13-17.

28. *Id.* at 12-13.

29. *Id.* at 8-9.

30. *See* Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 685-87 (2017) (summarizing the "share economy"); Amy L. Groff, Paul Callegari, & Patrick M. Madden, *Platforms Like Uber and the Blurred Line Between Independent Contractors and Employees*, K&L GATES (Dec. 2015), http://www.klgates.com/files/Publication/04dcde30-9c10-4003-b663-f7f5f2cdec32/Presentation/PublicationAttachment/805ddc72-69b2-426b-ad51-fe92be45434e/CLRI_2016.pdf (discussing the effects of labeling employees as "independent contractors").

one ratio.[31]

Measuring worker performance is typically undertaken by the "employer." With the diminishing number of traditionally-defined "employees" through fissurization, the legal protections may be diminished, though there are legal doctrines, such as "joint employment," expanding the definitions of "employer" and "employee."[32] Likewise, the changing methods of performance evaluation of employees internal and external to the company location raise issues of who evaluates and how. This is not a new issue, but when the use of changing technology, such as robotics, affects worker performance, the evaluations may need to change and new challenges arise to adapt and to stay within the limits of employment laws.

2. Workplace Technology

The introduction and integration of new technology has re-shaped the workplace environment and the methods of measuring worker performance. A recent McKinsey Report describes Industry 4.0 as the new phase in the digitization of the workplace.[33]

> [It is] driven by four disruptions: the astonishing rise in data volumes, computational power, and connectivity, especially new low-power wide-area networks; the emergence of analytics and business-intelligence capabilities; new forms of human-machine interaction such as touch interfaces and augmented-reality systems; and improvements in transferring digital instructions to the physical world, such as advanced robotics and 3-D printing.[34]

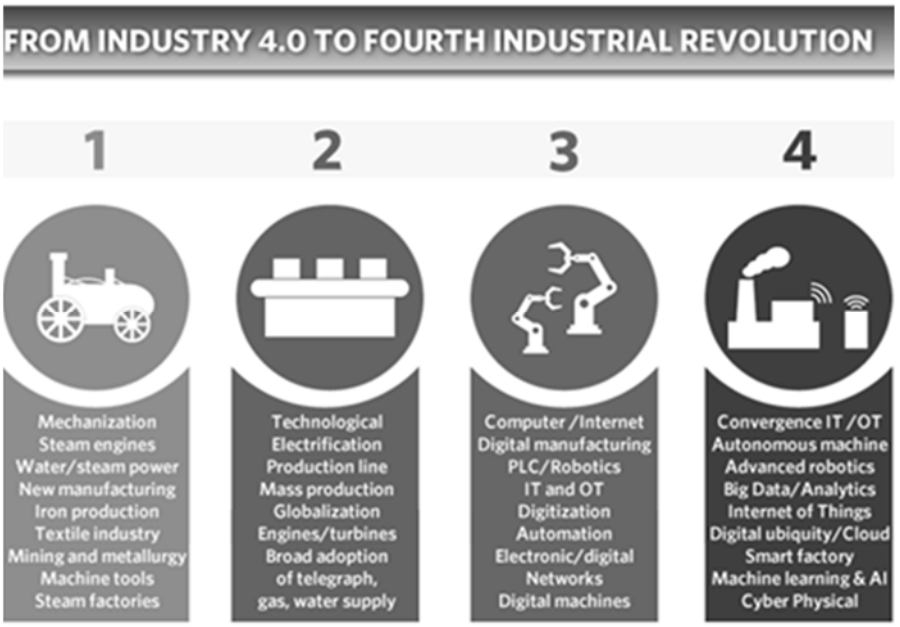
31. Tad Milbourn, *In the Future, Employees Won't Exist*, TECHCRUNCH (June 13, 2015), https://techcrunch.com/2015/06/13/in-the-future-employees-wont-exist/.

32. *See* WEIL, *supra* note 23, at 207 (analyzing the definition of "joint employment" and how it has morphed in the courts).

33. *See* Cornelius Baur & Dominik Wee, *Manufacturing's Next Act*, MCKINSEY&CO. (June 2015), http://www.mckinsey.com/business-functions/operations/our-insights/manufacturings-next-act.

34. *See id.* (discussing how some tech companies have automated many evaluation activities that managers elsewhere perform manually); *see also* Ewenstein, Hancock, & Komm, *supra* note 8 (discussing how some tech companies have automated many evaluation activities that managers elsewhere perform manually).

Figure 1[35]



Measuring worker performance in the coming years will involve understanding the increasing uses of digitalization and robotization, and the new business models emerging using platforms.[36]

> Big data analyses and intelligent algorithms are increasingly replacing or supporting humans also in the service sector. In the industry sector, automation and the use of production robots will lead to considerable savings with regard to the cost of labor and can release workers from hard and dangerous, repetitive and monotonous work . . . In the European automotive industry one working hour in production costs more than €40; the costs for using a robot range from €5 to €8 per hour. A production

35. *Industry 4.0, supra* note 3.

36. *See* Baur & Wee, *supra* note 33 (discussing the increased use of platforms (not just with Uber or Lyft) "in which products, services, and information can be exchanged via predefined streams"); *id.* ("Think open-source software applied to the manufacturing context. For example, a company might provide technology to connect multiple parties and coordinate their interactions. SLM Solutions, a 3-D-printer manufacturer, and Atos, an IT services company, are currently running a pilot project to develop such a marketplace. Customers can submit their orders to a virtual broker platform run by Atos. Orders are then allocated to SLM's decentralized network of production sites, and subsequently produced and shipped to the customer. Some companies are also trying to build an "ecosystem" of their own, as Nvidia has in its graphics-processor business. It provides software developers with resources, and offers start-ups help to build companies around Nvidia technologies.").

robot is thus only slightly cheaper than a worker in China.[37]

Human workers will also be new, improved, and more productive, working with changing automated technologies including not only wearable and performance-enhancing devices, but also devices for telepresence, telemanipulation, remote work, and, cognitive computing.[38] Artificial Intelligence (AI) is also gaining use because it combines machines and software with intelligence that can interact and solve problems using algorithms; likewise, "cognitive computing" is designed and used to solve multiple problems.[39]

Evaluating how the robot or the human is performing the job may become increasingly blurred as humans have robotic assistants and wearable robotic equipment, and are even implanted with microchips or carry other location-identifying GPS tracers:

> On Aug. 1, [2017] employees at Three Square Market, a technology company in Wisconsin, [could] choose to have a chip the size of a grain of rice injected between their thumb and index finger. Once that is done, any task involving RFID technology — swiping into the office building, paying for food in the cafeteria — can be accomplished with a wave of the hand.[40]

Of course, company-owned technology can have changing uses, once implanted, which introduces privacy and health concerns: "[a] microchip implanted today to allow for easy building access and payments could, in

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37. *See* Wisskirchen, *supra* note 5.

38. *See* MATHIASON ET AL., *supra* note 26, at 2.

39. *Id.* at 3; *see* YUVAL NOAH HARARI, HOMO DEUS: A BRIEF HISTORY OF TOMORROW 400-01 (2017) (explaining that some predict humans will continue to combine with technology to become hybrid with it in a search to be god-like); *see also* Kevin Kelly, *The Technium and the 7th Kingdom of Life*, EDGE (July 18, 2007), https://www.edge.org/conversation/kevin_kelly-the-technium-and-the-7th-kingdom-of-life ("Technology as a whole system . . . seems to be a dominant force in the culture . . . One way to think of the technium is as the 7th kingdom of life. There are roughly six kingdoms of life according to Lynn Margulis and others. As an extropic system that originated from animals, one of the six kingdoms, we can think of the technium as a 7th."); Laura Khalil, *IBM's Watson Computer and the Future of Artificial Intelligence*, KQED SCIENCE (Nov. 13, 2011), https://ww2.kqed.org/quest/2011/11/23/ibms-watson-computer-and-the-future-of-artificial-intelligence/; *Technium,* COLLINS, https://www.collinsdictionary.com/us/submission/12841/the+Technium (last visited Sept. 15, 2018) (defining technium as "the greater, global, massively interconnected system of technology").

40. Maggie Astor, *Microchip Implants for Employees? One Company Says Yes*, N.Y. TIMES (July 25, 2017), https://www.nytimes.com/2017/07/25/technology/microchips-wisconsin-company-employees.html ("The program — a partnership between Three Square Market and the Swedish company Biohax International — is believed to be the first of its kind in the United States, but it has already been done at a Swedish company, Epicenter").

theory, be used later in more invasive ways: to track the length of employees' bathroom or lunch breaks, for instance, without their consent or even their knowledge."[41]

The introduction of new technology also raises a host of legal issues under a variety of labor and employment laws as well as challenges to worker performance evaluations. For example, wearable and performance-enhancing devices (e.g., exoskeletons), telepresence and telemanipulation technology (more easily enabling remote work), and cognitive computing (e.g., AI and "Big Data") each present difficult legal questions regarding regulatory compliance, extraterritoriality, privacy, and discrimination, among other issues.[42]

> [These] pose unique compliance challenges and opportunities under laws relating to workers' compensation, OSHA, wage and hour, and disability accommodation . . . . The increasing sophistication of telepresence and telemanipulation technology and the large-scale adoption of crowdsourcing implicate questions about the extraterritorial application of state and national law. Recent controversies over the extraterritorial application of wage and hour law and the justice of independent contractor standards for remote piecework are likely preludes to the legal challenges to come in this space. These technologies may also raise privacy concerns and potential challenges to the viability of the current models of taxation and social welfare . . . . Artificial intelligence, cognitive computing, and the increasing use of "Big Data" will raise first-of their-kind issues under laws relating to workplace privacy, discrimination, and electronic discovery.[43]

3. Other Factors

An employee's relationship with their workplace affects many things, including the quality of work product and productivity. Specifically, "how well the workplace engages an employee impacts their desire to learn skills and their level of motivation to perform. Skills and motivation level then influences an employee's . . . [performance and resulting evaluation]."[44]

a. Work Locations

Where an employee physical works impacts the ability of his or her superiors to evaluate performance. How performance is managed and measured for workers at home or in remote locations, and for those who are

41. *Id.*
42. MATHIASON et. al., *supra* note 26, at 2.
43. *Id.*
44. Allan, *supra* note 2.

mobile or cross-border, may compel reformulated performance assessment systems due to less on-site supervision.[45] Additionally, with all employees, an increased use of on-line evaluation systems also compels reformulated performance assessment systems as an efficient and cost-effective approach.[46]

The need for new approaches of supervisory monitoring and changing evaluative performance criteria at work locations, near and far, is clear, as advances in science and technology will transform jobs themselves, with new jobs requiring higher levels of qualification, fewer manual and routine functions, and different skills than more traditional jobs. Thus, some location supervision will be more challenging than others and likely will require technological variations in evaluation approaches.

As the younger generation has keen interest in the link between working hours and issues of work-life balance, members of the generation may demand more flexibility in working hours and workplace locations that can present the employer with productivity and staffing issues, as well as performance evaluation challenges, particularly at high activity and remote locations.[47]

b. Impact of Unions

The role of unions has been to protect workers' job security against the impact and erosion by automation that comes with new technology.[48] Recognizing that technology will not simply disappear, the International Trade Union Confederation (ITUC) recently stated that its position is to support innovation and automation.[49]

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45. *See, e.g.*, Ewenstein, Hancock, & Komm, *supra* note 8 (citing a company that uses an online application that allows employees to review each other in real time).

46. *Id.*

47. *See* BARBARA JANTA ET AL., RAND CORP. EMPLOYMENT AND THE CHANGING LABOUR MARKET GLOBAL SOCIETAL TRENDS TO 2030: THEMATIC REPORT 5, 36 (2015), https://www.rand.org/pubs/research_reports/RR920z5.html (discussing the increased interest in teleworking and maintaining "more autonomy and flexibility" among workers).

48. *See, e.g.,* Steve Greenhouse, *Unions Face The Fight Of Their Lives To Protect American Workers*, HUFFPOST (May 4, 2018, 5:46 AM), https://www.huffingtonpost.com/entry/american-workers-jobs-inequality-union-automation_us_5ae043f9e4b061c0bfa32e0c (illustrating one union's efforts to protect workers from displacement by seeking opportunities for robots to work alongside current employees).

49. *See G7 Labour Summit, supra* note 1 ("[D]igital divides persist in the G7 when it comes to women, disadvantaged groups and rural regions and worldwide: around fifty per cent of the world's population still has no access to the internet . . . . 'Technological innovation has always been supported by unions, and workers show a broad acceptance of new technologies. Eighty-five per cent of respondents in the ITUC Global Poll agree that new technologies will make jobs easier to do. People view technology as bringing

Still, whether labor unions can survive Industry 4.0 is being questioned:

> There is no "one best way" for unions to respond to these challenges, but there is consensus that unions will continue to remain relevant only by anticipating and adapting their organizing and collective bargaining strategies to the continuously changing economy, labor market, demography, work organization, and human resource management.
>
> [U]nlike digitization, automation of production is a long-lasting union challenge, that traces back to the second half of the twentieth century. The innovation of current transformations lies in the combination of automated devices with increasing connectivity . . . . [M]any unions' attempts to keep up with these changes can be reported from developed countries. In Italy, for instance, the Italian Federation of Metalworkers, FIM-CISL, . . . is promoting professional training as an individual right for workers, which should be included in the national collective agreement of the metalworking sector.[50]

While unions do show some support for innovation, they will likely resist employers' restructuring and the tendency toward more decentralized work processes and highly flexible workplace interventions. It has been proposed that

> the German model of co-determination demonstrates that workers' participation in decision-making can provide an effective solution to this issue, allowing automation and digitization to become programs for success for both employers and employees. That is why the workers voice may be expected to become one of the main union claims in face of current transformations.[51]

In the U.S., unions use education about the new technology and seek notification by the employer before the introduction of new technology so the union can prepare for changes.[52] Unions appear to have become

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opportunities but are aware that there is a chance for negative side effects on jobs that need to be addressed by rules and government action[.]'"); *see supra* note 43 and accompanying text.

50. Kavi Guppta, *Will Labor Unions Survive in the Era Of Automation?*, FORBES (Oct. 12, 2016), https://www.forbes.com/sites/kaviguppta/2016/10/12/will-labor-unions-survive-in-the-era-of-automation/#bef22c03b221.

51. *Id.*

52. Unions have been dealing with the core issue of new technology and its effects on the workforce for some years, as illustrated by union response to automation in the 1980s. Calvin Sims, *Unions Offer Labor Help on Automation*, N.Y. TIMES, Oct. 21, 1987, at D10 ("[M]any labor unions are treating expertise about new technology as one of the services they need to offer members. They hire economists and other specialists to keep members abreast of developments that may affect their jobs and seek contracts that allow them to become involved in almost every aspect of the integration of new technologies in the work place. . . . The U.A.W. has reached agreement with most major auto makers and suppliers that the local union and the national committee are to be notified before the companies introduce technologies that could displace workers or

somewhat sanguine about the entry of Industry 4.0, and often hire economists to keep them abreast of new developments in technology.

> 'Over all, local unions do not have the knowledge to really negotiate effectively with management on new computer-based systems, automated manufacturing technologies and robotics,' said Peter Unterweger, a 47-year-old economist for the United Automobile Workers who is responsible for monitoring new technology that might affect that union's 1.1 million active members. 'We are concerned that our people will not have the same expertise that the company brings to the table.'[53]

Other union responses to new technology included "participating in the design of new equipment for the office and factory, sponsorship of and participation in retraining programs, and independent checks on the health effects of the new technology on workers."[54]

Unions also negotiated with employers over contract language protecting employees' rights dealing with compensable time, worker health and safety, and non-discrimination under labor and employment laws, all involving the workplace environment and affecting performance evaluation.[55]

c. Privacy Interests

The automated collection and use of big data for applications usually requires permission, although, in the U.S., permission is frequently only needed for health data.[56] However, MNCs and other employers operating cross-border may have statutory considerations in other countries.[57] The electronic monitoring of workers' private communications on emails, social media, etc., and of individuals' locations and activities by technological

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change the scope of their jobs. Committees consisting of union members and company management have been established to decide how new technology will be applied.").

53. *Id.*

54. *Id.*

55. *See, e.g.,* Paul Ziobro, *Teamsters Tell UPS: No Drones or Driverless Trucks*, WALL ST. J. (Jan 24, 2018, 7:00 AM), https://www.wsj.com/articles/teamsters-tell-ups-no-drones-or-driverless-trucks-1516795200 (discussing the negotiations between United Parcel Service Inc. and Teamsters union that address worker issues such as unsafe conditions, having a sufficiently sized workforce, "an environment of mutual respect," and work hours).

56. *Contra* Daisuke Wakabayashi, *California Passes Sweeping Law to Protect Online Privacy*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/technology/california-online-privacy-law.html (detailing the new "GDPR-like" law passed in California, signaling a changing privacy law landscape in the U.S.).

57. *See, e.g.*, European Commission Press Release Memo/17/1441, Questions and Answers: Data Protection Reform Package (May 24, 2017), http://europa.eu/rapid/press-release_MEMO-17-1441_en.htm (highlighting that the data protection reform package which entered into force in May 2016 and will be applicable as of May 2018 includes the General Data Protection Regulation).

equipment or by chips implanted in the worker's body, often raise legal issues.[58]

B. Changing Employee Performance Evaluations

It is the employer's responsibility to evaluate its employees. Of course, with corporate restructuring and fissurization, issues arise as to who is the employer and who is the worker to be evaluated. While independent contractors may fall outside the protections of most labor and employment laws, still, those independent contractors working inside the company may need to be evaluated, at least for retention purposes, though the method and usual consequences of the evaluation may differ from that of the company's "employees."[59] Likewise, outside third-party subcontractors are typically evaluated on the results of their performance with a different type of evaluation.

The standards for work performance of employees typically will be those created by the controlling employer and used by the HRM departments or other company personnel.[60] Increasingly, technology is employed in this process to varying degrees; "[a]ccording to Deloitte's 2015 Global Shared Services Survey, leaders indicated 'increasing the level of automation' as the second most important strategic priority."[61] Emblematic of automation being a high priority for corporate management is the increase in automated

58. *See* Astor, *supra* note 40 (discussing the possibility of microchips being used to track location and timing of breaks).

59. *Independent Contractor: Audit Checklist for Maintaining Independent Contractor (IC) Status*, SOC'Y FOR HUM. RESOURCE MGMT. (Feb. 6, 2018), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/cms_020334.aspx ("Do not conduct performance evaluations similar to employee evaluations."); HR Specialist: Emp't Law, *Should We Give Reviews to Independent Contractors?*, BUS. MGMT. DAILY (June 8, 2007, 12:00 AM), https://www.businessmanagementdaily.com/2735/should-we-give-reviews-to-independent-contractors (finding part of the reason is that if treated similarly with employees, they may become legal employees).

60. *See Automated Performance Management Systems: Efficient and Effective*, OASISBLOG, https://www.oasisadvantage.com/blog/automated-performance-management-systems-efficient-and-effective (last visited Sept. 15, 2018) ("According to a recent survey reported in *Forbes*, almost all large companies use performance evaluations for the majority of employees. Likewise, research by performance management systems providers has found that nearly 85% of small- and mid-size companies also conduct performance evaluations."). *See generally* Michael Gretczko & Rajesh Attra, *Can Robots Replace HR?*, CAPITAL H BLOG (Nov. 17, 2016), https://capitalhblog.deloitte.com/2016/11/18/can-robots-replace-hr/ (explaining the impact automation may have on HRM departments).

61. Gretczko & Attra, *supra* note 60 (citing Susan Hogan & Noemie Tilghman, *2015 Global Shared Services Survey Results*, DELOITTE (2015), https://www2.deloitte.com/us/en/pages/operations/articles/2015-global-shared-services-survey-results.html/.html?id=us:2el:3bl:hrt:awa:cons:111716.

tools:

> [o]ne [human resource] processes area that has been shown to benefit from the use of automated tools is talent management, which encompasses recruiting, employee performance management, learning management, compensation and succession planning. Employee performance management includes performance reviews, goal setting and alignment, competency/job skills management and employee development planning.[62]

At the end of the evaluation process, the technologically collected data is usually reviewed by humans and HRM decisions made; but increasingly, robots and AI can be utilized for these evaluations based on the needs of the company.[63] While AI can assess performance levels and workers' attitudes and, in some circumstances, limit human bias, it also has limitations including being ill-equipped to assess its own bias (often written into the code through an engineer's human biases) or that of a reviewing supervisor and protect a worker's privacy.[64] Privacy interests can also be affected by a third party using bots to extract personal information from an employees' outside data; for example, data that is contained in LinkedIn storage and is sold to the employee's employer that may then be used in an evaluation of the employee.[65]

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62. JP Guay, *Benefits of Automating Employee Performance Management*, MOLDMAKING TECH. (Dec. 1, 2011), https://www.moldmakingtechnology.com/articles/benefits-of-automating-employee-performance-management; *see also* Gretczko & Attra, *supra* note 60 (posing the question: "[w]hat talent is more vulnerable to poaching, given local economic development and the announced growth plans of our competitors" which could be answered by "robotic and cognitive automation technologies.").

63. Chris Nerney, *Could Artificial Intelligence Replace the Annual Performance Review?* DXC.TECH. (Jan. 26, 2017), https://blogs.dxc.technology/2017/01/26/could-artificial-intelligence-replace-the-annual-performance-review/ (giving the example of timely, consistent performance reviews as an advantage of using AI for performance reviews).

64. *Compare* Rob Light, *How Artificial Intelligence Will Revolutionize Human Resources*, G2 CROWD (Nov. 17, 2016), https://www.g2crowd.com/blog/artificial-intelligence/artificial-intelligence-will-revolutionize-human-resources/ (explaining how AI can manage the employee hiring, training, and evaluating processes better than humans), *and* Sue Walsh, *Will AI Kill the Performance Review?*, RTINSIGHTS (Oct. 20, 2016), https://www.rtinsights.com/workcompass-ai-performance-review/, *and* Itsquiz, *How AI Helps To Improve Performance Management*, MEDIUM (Feb. 1, 2017), https://medium.com/@itsquiz15/how-ai-helps-to-improve-performance-management-2a7ef816d49b, *with The Workplace of the Future*, ECONOMIST (Mar. 28, 2018), https://www.economist.com/leaders/2018/03/28/the-workplace-of-the-future ("AI's benefits will come with many potential drawbacks. Algorithms may not be free of the biases of their programmers . . . . And surveillance may feel Orwellian.").

65. *See* hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099, 1113 (N.D. Cal. 2017), *appeal docketed*, No. 17-16783 (9th Cir. Sept. 6, 2017); *see also* Edward G. Black & Patrick J. Reinikainen, hiQ Labs, Inc. v. LinkedIn Corp.*: A Federal Court Weighs in*

III. LEGAL ENVIRONMENT AND IMPACTS OF 4.0 TECHNOLOGY

The very issues created by the changing work environment and the infusion of new technology into it, with performance evaluations of workers chasing the changes, also create the emerging legal issues in regulating the changing environment. Restructuring employers create issues of coverage and application of labor and employment laws to "employers" and "employees."[66] Mobile and dispersed workplaces and workers likewise complicate the legal issues. The added abilities of technology, robotics, AI, data-gathering, and monitoring, all increase the certainty that traditional laws must grow with the changing labor market developments to protect the rights of workers and locate the limits of the law. And, worker performance evaluations take place within this changing legal environment and must therefore keep pace.

Delineating the rights of "border-line employees" is the first legal inquiry in determining the applicability of labor law rights.[67] New job structures, outsourcing, independent contractors,[68] and platform workers[69] all raise the issue of the applicability of the labor and employment laws that were mostly designed for the traditional master-servant employment relationship. Under federal U.S. law, employees have labor protections, but non-employees have much fewer.[70] Some areas in the U.S. involving drivers in "conventional" employment relationships, like Fed-Ex, and those working from platforms, like Uber and Lyft, are still battling over legislative coverage issues.[71]

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on Web Scraping, Free Speech Rights, and the Computer Fraud and Abuse Act, ROPES & GRAY (Sept. 7, 2017), https://www.ropesgray.com/newsroom/alerts/2017/09/hiQ-Labs-Inc-v-LinkedIn-Corp-A-Federal-Court-Weighs-in-on-Web-Scraping-Free-Speech-Rights.aspx.

66. *Supra* Section II.

67. *See* Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 61 (2017) (explaining that, "after the passage of the Fair Labor Standards Act ("FLSA"), uncertainty about the boundary separating covered employees and independent contractors is as high as ever").

68. *See generally* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1688 (2016) (using Uber as an example of a company claiming to be structured around independent contractors).

69. *See also* Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html (examining varying levels of worker dependence on peer-to-peer platforms). *See generally* Lobel, *supra* note 67 (explaining the use of platform workers).

70. *See* Lobel, *supra* note 67.

71. *See* Yasaman Moazam, *UBER in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going Beyond the Dichotomous Workers' Classification?*, 24 U. MIAMI INT'L & COMP. L. REV. 609, 638-39, 641 (2017); *see also* Robert W. Wood, *FedEx Settles Independent Contractor*

A. Wage and Hour

Employers are subject to federal wage and hour laws (Fair Labor Standards Act ("FLSA") and Equal Pay Act ("EPA")) as well as state laws for the states in which they are operating. The minimum wage and equal pay requirements do not apply to independent contractors falling outside the liberal FLSA definition,[72] nor are subcontracted workers covered. Employer control remains the primary legal test for determining whether a worker is an independent contractor. Employee use of wearable robotic devices and other technological equipment could raise issues if putting it on and taking it off ("donning and doffing") is "compensable time" under the FLSA.[73] If a wearable device can be defined as "clothes" or falls under a collective bargaining exception, it will not be compensable.[74]

Most U.S. labor law statutes do not apply extra-territorially, with a few exceptions, such as the Civil Rights Act ("CRA") and American Disability Act ("ADA").[75] So, while the wage and benefit laws are applicable only to

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Mislabeling Case For $228 Million, FORBES, (June 16, 2015), https://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/#5cc31515c22e); *Judge Approves FedEx's $227 Million Settlement in IC Misclassification Cases*, Staffing Industry Analysts (May 10, 2017), https://www2.staffingindustry.com/Editorial/Daily-News/Judge-approves-FedEx-s-227-million-settlement-in-IC-misclassification-cases-42019 ("FedEx Corp. will pay more than $227 million to settle some of the long-running lawsuits in 19 states brought by drivers who claim they were undercompensated because the company classified them as independent contractors rather than full-time workers. The settlements bring the total FedEx has paid to resolve driver compensation claims to at least $454 million. Other big independent contractor misclassification cases include Uber, which saw a US federal judge in August reject a $100 million settlement in a lawsuit claiming Uber misclassified drivers as independent contractors. In another lawsuit, a $27.5 million class-action settlement in an independent contractor case against human cloud, ride-sharing firm Lyft received final approval in March.").

72. *See* Fair Labor Standards Act, 29 U.S.C. §§ 201, 206 (2018); *see also* Ira H. Weinstock, *"Independent Contractors" and Employee Misclassification*, IRA H. WEINSTOCK P.C. (Mar. 16, 2016), https://www.paworkerscompensation.law/independent-contractors-and-employee-misclassification/ ("The FLSA defines 'employ' as including to 'suffer or permit to work', [sic] representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves."); *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB., https://www.dol.gov/whd/regs/compliance/whdfs13.htm (last updated July 2008).

73. *See* Sandifer v. United States Steel Corp., 571 U.S. 220 (2014) (holding that putting on and taking off protective gear required for employment is not compensable under the Fair Labor Standards Act).

74. *Id.* at 232.

75. Civil Rights Act, 42 U.S.C. § 2000e-1(c)(1) (2018); Americans with Disabilities

the workers in the U.S., if a worker is located overseas, but is remotely operating robots or technological equipment in the U.S.; is located overseas, but is working by teleconferencing within the U.S.; or, is hired within the U.S. but is working intermittently overseas, or traveling to remote workplaces,[76] a legal issue arises — where is their workplace for purposes of FLSA?[77] The FLSA applies to employees engaged in commerce. Title 29, Section 203(b) of the United States Code states: "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."[78]

Another growing issue deals with whether an employee who is "connected," is working. [79] Workers who stay "connected' with their employer, even with their smartphone, may not only be "on call," but may perform work that can be classified as legally compensable time for overtime liability:[80] "[d]ue to the ever-increasing use of technology in the business environment, more and more employees are performing work outside of the normal business setting. Such work, if done beyond normal working hours,

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Act, § 12112(c)(1)-(2) (2018).

76. 29 U.S.C. § 623(h) (2018) (applying statute to U.S. citizens working abroad in foreign firms under the domain of a U.S. firm); Civil Rights Act § 2000e-1(c)(1) (applying statute to U.S. citizens working outside the United States for foreign firms if the non-U.S. employer is shown to be under the "control" of a U.S. employer); *see also* Stephen Bruce, *3 FLSA Challenges: Off-Clock, Travel Time, 'Independent' Contractors*, HR DAILY ADVISOR (Apr. 22, 2013), http://hrdailyadvisor.blr.com/2013/04/22/3-flsa-challenges-off-clock-travel-time-independent-contractors/ (highlighting the challenge of defining work time in professions that require commuting to different locations); ANGELO SPINOLA ET AL., LITTLER MENDELSON, P.C., HOT WAGE AND HOUR ISSUES FOR HOME HEALTHCARE EMPLOYERS 4 (2013), https://www.littler.com/files/press/pdf/Hot%20Wage%20and%20Hour%20Issues%20for%20Home%20Healthcare%20Employers.pdf (explaining the complexities of the home health industry in compensating travel time).

77. Wright v. Adventures Rolling Cross Country, Inc., No. C-12-0982 EMC, 2012 U.S. Dist. LEXIS 104378, at *19 (N.D. Cal. May 3, 2012) (holding travel guides of a California company hired to conduct multi-week trips outside the United States on a per trip basis were not entitled to minimum wage under the FLSA); *see also* Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate*, 27 DUKE J. COMP. & INT'L L. 381, 383, 385, 388 (2017); Sindhu Sundar, *Judge Limits Extraterritorial Reach of Calif. Wage Laws*, LAW360 (May 4, 2012), https://www.law360.com/articles/337378/judge-limits-extraterritorial-reach-of-calif-wage-laws.

78. 29 U.S.C. § 203(b).

79. *See* Jana M. Luttenegger, Note, *Smartphones: Increasing Productivity, Creating Overtime Liability*, 36 J CORP. L 259, 272-73 (2010) (discussing, generally, the legal compensation issues associated with employees staying "connected" through smartphone usage outside of work hours, and noting that there may be additional legal issues with the possible difference between checking emails because of the "societal pressure to stay connected" and an employee's real need to stay connected for their job).

80. *Id.*

can open up an employer to FLSA liability."[81] Already, lawyers are defending the wage issues arising from employee connectivity.

> The explosion of smartphone and tablet use has eased the way for employees to have continuous remote connectivity to the workplace, presenting yet another liability threat for employers already battling an increase in overtime pay claims. If an employee can show the employer had actual or constructive knowledge of work performed, an employer can owe overtime pay for work never requested from a worker.[82]

B. Health and Safety and Work-Related Injuries

1. Occupational Safety and Health Act

Restructuring work with new technology brings benefits and possible risks and liabilities.[83] The possibilities of software faults, and the risks associated with robot and drones use, or the malfunction of wearable technology, such as robotic exoskeletons,[84] create potential safety hazards that would need to

81. Robert S. Gilmore, *"Technology in Fair Labor Standards Act Litigation" Preventing a Suit from the Employer's Perspective*, A.B.A, http://apps.americanbar.org/labor/techcomm/mw/Papers/2009/pdf/GILMORE.pdf (last visited Sept. 30, 2018).

82. Peter Gillespie & Alfred Robinson, Jr., *Overtime Pay Claims for After-Hours Use of Electronic Devices: Avoiding and Defending Litigation*, STRAFFORD (Oct. 31, 2017), https://www.straffordpub.com/products/tldewdhdra?utm_campaign=tldewdhdra&utm_medium=email&utm_content=&utm_source=exacttarget&pid=413928&trk=EL3MG2-79ODZY&mid=133362 (explaining that employees that prevail in overtime pay claims may be entitled to back wages plus interest, liquidated damages, and attorneys' fees and costs from the employer).

83. Eric J. Conn et al., *Employment Law and OSHA Concerns with Temps, Contractors, and Joint- and Multi- Employer Sites*, OSHA DEF. REP. (Sept. 7, 2016), https://oshadefensereport.com/2016/09/07/dept-of-labor-concerns-related-to-temps-contractors-and-joint-and-multi-employer-relationships/ ("With more and more unique employment relationships and multi-employer worksites, it is crucial to understand the complexities of how the DOL and its various enforcement agencies define the employment relationship and/or assign liability in these contexts.").

84. *See, e.g.*, David Goldstein, *I am Iron Man: Top 5 Exoskeleton Robots*, SEEKER (Nov. 27, 2012), https://www.seeker.com/i-am-iron-man-top-5-exoskeleton-robots-1766089390.html; Alissa Zingman et al., *Exoskeletons in Construction: Will They Reduce or Create Hazards?* NIOSH SCI. BLOG (June 15, 2017), https://blogs.cdc.gov/niosh-science-blog/2017/06/15/exoskeletons-in-construction/.

be addressed by OSHA[85] and Workers Compensation laws.[86] Currently, there are few specific standards for the robot industry, but OSHA guidelines are outdated.[87]

While OSHA typically places obligations on the employer to maintain hazard-free workplaces, it has special rules for home offices and telecommuting.

> [A]cross the country, "safety professionals and human resources directors face a challenging task: ensuring safety for the increasing number of employees who are out of sight, working remotely from a home office. Privacy concerns dissuade some employers from conducting unsolicited home office inspections. In a 2000 directive, OSHA announced it would not conduct inspections of employees' home offices, nor would it hold employers liable for employees' home offices. But potential workers' compensation issues linger for organizations that have employees injured while working from home. What if an employee trips on an extension cord? What if an employee's home office has no smoke detector?"[88]

85. Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 (2018); *see also Summary of the Major Laws of the Department of Labor*, U.S. DEP'T LAB., https://www.dol.gov/general/aboutdol/majorlaws#safety (last visited Sept. 9, 2018) ("The Occupational Safety and Health (OSH) Act is administered by the Occupational Safety and Health Administration (OSHA). Safety and health conditions in most private industries are regulated by OSHA or OSHA-approved state programs, which also cover public sector employers. Employers covered by the OSH Act must comply with the regulations and the safety and health standards promulgated by OSHA. Employers also have a general duty under the OSH Act to provide their employees with work and a workplace free from recognized, serious hazards. OSHA enforces the Act through workplace inspections and investigations. Compliance assistance and other cooperative programs are also available.").

86. *See, e.g.*, HAW. REV. STAT. § 386 (2018) (providing an example of a state workers' compensation program); *see* Georgina Prodhan, *Europe's Robots to Become "Electronic Persons" Under Draft Plan*, REUTERS (June 21, 2016), http://www.reuters.com/article/us-europe-robotics-lawmaking/europes-robots-to-become-electronic-persons-under-draft-plan-idUSKCN0Z72AY (explaining how the EU Parliament considered having special funding for its "electronic persons" so as help compensate for losses caused by robots replacing humans and lessening available compensatory resources).

87. *See* MATHIASON ET AL., *supra* note 26 (providing a summary of existing regulations).

88. Tom Musick, *Working (Safely) From Home*, SAFETY+HEALTH (Jan. 25, 2015), http://www.safetyandhealthmagazine.com/articles/11704-working-safely-from-home; *see also* OSHA, *Instruction on Home-Based Worksites* (Feb. 25, 2000), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=directives&p_id=2254; AON, CHALLENGES WITH TELECOMMUTING 4 (2014), http://www.aon.com/attachments/risk-services/The-Challenges-of-Telecommuting-Q2-2014.pdf (mentioning that OSHA does not inspect home offices).

2. Workers Compensation

When work-related injuries do occur in the U.S., the state worker's compensation laws apply to compensate covered injuries.[89] For compensation, the injury must "arise out of and in the course of employment;"[90] therefore, additional liability risks may come from technology, and from the ambiguities of remote workplaces or telecommuting work from home where there is no visual supervision.[91]

There are numbers of recorded injuries and deaths caused by robots and robotic equipment. According to the OSHA, it is reported that robots have caused at least thirty-three workplace deaths and injuries in the United States in the last thirty years. [92]

Conversely, there are potential benefits of new technology, such as the cutting back on workers compensation for certain injuries, such as repetitive stress injuries[93] or back injuries, with use of the exoskeleton.[94]

C. Anti-Discrimination

The changing work environment and use of technology in performance evaluations raise issues not only with attempts to eliminate human biases in interpreting data,[95] but also in algorithmic application to personnel decisions,

89. *See generally Workers' Compensation Law - State by State Comparison*, NAT'L FED'N OF INDEP. BUS. (June 7, 2017), https://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/ (stating that workers' compensation "requirements vary by state" and outlining comparisons of said requirements state-by-state).

90. *See, e.g., About Us*, N.Y. ST. WORKERS' COMPENSATION BOARD, http://www.wcb.ny.gov/content/main/TheBoard/glossary.jsp (last visited Sept. 30, 2018) (defining "arising out of and in the course of employment").

91. *See* Lori D. Bauer, *Telecommuting Tradeoffs*, 11 BUS. L. TODAY, no. 4, Mar.—Apr. 2002, at 16, 18 (listing worker's compensation coverage as a concern to consider when developing a telecommuting program).

92. *See* John Markoff & Claire Cain Miller, *As Robotics Advances, Worries of Killer Robots Rise*, N.Y. TIMES (June 16, 2014), https://www.nytimes.com/2014/06/17/upshot/danger-robots-working.html*; see also* Brown*, supra* note 17, at 206.

93. *See* H. Kazrooni et al., *Trunk Support Exoskeleton*, SUITX, https://www.dropbox.com/s/xluhcpxdgr48bcv/TSE%20%26%20Back%20Injury%20Paper.pdf?dl=0 (last visited Sept. 30, 2018); INT'L FED'N OF ROBOTICS, http://www.ifr.org/robots-create-jobs/work-unsafe-vor-humans/ (last visited Oct. 1, 2018).

94. Kazrooni, *supra* note 93.

95. Bernard Marr, *The Future Of Performance Management: How AI and Big Data Combat Workplace Bias*, FORBES (Jan. 17, 2017), https://www.forbes.com/sites/bernardmarr/2017/01/17/the-future-of-performance-management-how-ai-and-big-data-combat-workplace-bias/#60f9b7b84a0d ("[Human] assessor[s] [are] inclined to compare an individual's performance to his peers, rather than to defined standards of achievement[,] . . . [and give more weight to] actions in the recent past . . . than actions which happened further back in time . . . . This is where AI can come in, as bias – along

under the anti-discrimination laws, especially involving age and disability discrimination.[96]

1. Age

The Age Discrimination in Employment Act ("ADEA") prohibits discrimination against applicants or employees aged 40 or over and many state laws do not have an age threshold.[97] Therefore, if an employer or digital program were to promote workers based on stereotyping older workers as less technologically adaptable, or statistically prefer younger people for more high-tech jobs, the law may be violated.[98] Thus, the integrity and lawfulness of the performance evaluation would be compromised and invalidated.

2. Disability

The ADA[99] prohibits employers from discriminating in employment against persons with physical and mental disabilities and, upon request, requires employers to make reasonable accommodation to the needs of otherwise qualified applicants and employees, if such accommodation does not result in undue hardship to the employer.[100] With changing work

with fatigue and logical fallibility – is a human failing that machine intelligence doesn't have to overcome.").

96. *See generally* SUSAN N. HOUSEMAN, U.S. DEP'T OF LABOR, FLEXIBLE STAFFING ARRANGEMENTS: A REPORT ON TEMPORARY HELP, ON-CALL, DIRECT-HIRE TEMPORARY, LEASE, CONTRACT COMPANY, AND INDEPENDENT CONTRACTOR EMPLOYMENT IN THE UNITED STATES 9.7 ANTI-DISCRIMINATION LAWS 46 (Aug. 1999), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.210.2977&rep=rep1&type=pdf ("Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, sex, or ethnic origin; the [ADEA] prohibits discrimination against employees 40 years and older; and the [ADA] prohibits discrimination in employment on the basis of disabilities and requires that employers reasonably accommodate individuals with disabilities who can otherwise perform a job. As with other labor standards, independent contractors generally would not be covered by anti-discrimination laws.").

97. Age Discrimination in Employment Act, 29 U.S.C. § 631 (2018); *see* HAW. REV. STAT. § 378-2 (2018).

98. *See* Wolf Richter, *Tech workers get better with age – but that's not stopping 'systemic' discrimination*, BUS. INSIDER (Oct 2, 2017, 6:44 PM), https://www.businessinsider.com/systemic-age-discrimination-even-as-tech-workers-get-better-with-age-2017-10 (discussing "age discrimination in the Tech industry, both in hiring and promotions").

99. Americans with Disabilities Act, 42 U.S.C. § 12112 (2018).

100. *Id.*; Smith v. City of Jackson, 544 U.S. 228, 228-68 (2005) (explaining the disparate-impact theory); *see also The ADA: Your Employment Rights as an Individual with a Disability*, EEOC (Mar. 21, 2005), https://www.eeoc.gov/facts/ada18.html ("Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include: providing or modifying equipment or

environments and performance evaluations, accommodation for disabled persons should begin including advanced robotic systems that may allow such accommodations to be reasonable, thus meeting legal standards. Robotic arms, exoskeleton suits, and other wearable technologies may open new work opportunities for the disabled and likely present economic or practical challenges for employers, as well as affect performance evaluations:

> These wearable technologies may one day be required as accommodations for disabled employees. Under the ADA and similar state laws, workers' mobility limitations can require reasonable accommodation by modification of both the duties and the workplace, which includes obtaining assistive equipment. Currently, much wearable and human enhancing technology may not be objectively reasonable or may pose undue hardships because of its novelty or cost. However, as this technology becomes more common and prices decline, it becomes more likely that employers may be required to provide it to aid disabled employees to perform their jobs.[101]

D. The National Labor Relations Act and Labor Unions

Labor unions have been involved in automation and technological changes for decades. Their interest is to protect the wages, working conditions, and jobs of their constituency in the face of change.[102] They will advocate against the use of independent contractors, subcontracting, and its variants, and the use of new technologies that displace members of their constituency, unless sometimes there are retraining, and monetary benefits negotiated.[103] They

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devices, job restructuring, part-time or modified work schedules, reassignment to a vacant position, adjusting or modifying examinations, training materials, or policies, providing readers and interpreters, and making the workplace readily accessible to and usable by people with disabilities. An employer is required to provide a reasonable accommodation to a qualified applicant or employee with a disability unless the employer can show that the accommodation would be an undue hardship -- that is, that it would require significant difficulty or expense."); *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, EEOC (Dec. 20, 2017), https://www.eeoc.gov/facts/performance-conduct.html.

101. *See* MATHIASON ET AL., *supra* note 26, at 12 (describing that advanced technologies could provide new opportunities for individuals with disabilities, such as self-driving vehicles and advanced sensory technology could make jobs previously denied to deaf or blind applicants a real opportunity); *id.* ("Honda's Asimo can assist a person confined to a bed or a wheelchair by performing manual operations like turning on a light switch, opening doors, and carrying objects. Such advanced technologies could make already existing technology affordable and more accessible.").

102. *See supra* notes 49-50 and accompanying text.

103. *See, e.g., Full and Fair Employment*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers/1099-economy (last visited Oct. 1, 2018) ("We should not allow or encourage businesses to treat their employees as independent contractors in the On

also negotiate for health and safety protections and related equipment, as well as favorable wage and benefit standards.[104] These are the standards used in the performance evaluations to calculate wages, benefits, and discipline or promotion flowing from the performance evaluations. An area ripe for negotiation may be contractually protecting the privacy interests of employees as constitutional limits are unavailable for private employees.[105]

If the workplace changes involve "mandatory' subjects, as defined under the NLRA, the employer is first required to collectively bargain with the union until impasse or agreement.[106] Thus far, the U.S. Supreme Court has not specifically ruled on whether the introduction of automation by the employer is a mandatory subject for bargaining, though there are lower decisions so holding.[107] Likewise, legal consideration of negotiated

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Demand economy or anywhere else because this weakens working people's ability to negotiate, lowers labor standards for all working people, and puts good employers at an unfair disadvantage.").

104. *See, e.g., Building Power for Working People*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers (last visited Oct. 1, 2018) (listing various issue areas that the American Federation of Labor and Congress of Industrial Organizations advocates for on behalf of its members).

105. *See, e.g.,* Richard M. Reice, *Wearables in the Workplace—A New Frontier*, BLOOMBERG L. (May 24, 2018, 6:40 AM), https://news.bloomberglaw.com/daily-labor-report/wearables-in-the-workplacea-new-frontier/ ("Surveillance of employees can violate the NLRA because it 'chills' employees from engaging in concerted activity . . . . In a unionized workplace, it may be appropriate, if not mandatory, to negotiate the who, what, where, and when of the use of wearables.").

106. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2018); *see also* National Labor Relations Act, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/resources/national-labor-relations-act-nlra (last visited Sept. 20, 2018) (noting that most employees in the private sector are covered by the NLRA; however, the Act does not apply to an independent contractor); *Employee Rights*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/rights-we-protect/employee-rights (last visited Sept. 20, 2018); *Frequently Asked Questions-NLRB*, NAT'L LAB. REL. BOARD, https://www.nlrb.gov/resources/faq/nlrb (last visited Sept. 20, 2018) (stating that most employees are protected under the NLRA, except for those who are supervisors, independent contractors, in government, or in agriculture).

107. First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 686 n.22 (1981) ("In this opinion we intimate no view as to . . . automation . . . which are to be considered on their particular facts."). *See generally* Gary E. Lippman, *Will Police Body Cameras be a Mandatory Subject of Bargaining in Florida?*, 90 FLA. B. J. 57, (2016) (discussing case law surrounding "body-worn cameras" on police officers); ROBERT H. LAVITT, A.B.A., MONITORING EMPLOYEE WHEREABOUTS: COLLECTIVE BARGAINING IMPLICATIONS OF RFID AND GPS TECHNOLOGIES IN THE WORKPLACE 4 n.10 (2011) (citing *King County*, Decision 9204-A, (PECB 2007) (WA PERC)), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/155.authcheckdam.pdf ("Where GPS data had been used as basis for employee discipline, but union had waived any right to bargain implementation or effects of installation of GPS in workers' trucks, employer nonetheless violated state labor law by failing to timely comply with union's request for information regarding implementation and use of GPS and its effects, including

contractual management rights clauses and the waiver of the statutory right to strike may need to be weighed in looking at employee performance, since if, at present, the possibly mandatory subject of automation need not be bargained. However, times are changing and the law could evolve regarding the availability of the NLRA for use by the unions, perhaps counterbalanced by the erosion of "employees" falling under the Act.[108]

> Concerns about the spread of automation and the use of [AI] in the workplace are growing. Companies like Uber are hard at work developing technology that would allow for pilotless trucks. Ultimately, a switch to self-driving solutions could displace nearly 300,000 truckers per year. Uber purchased the autonomous trucking company, Otto, with that goal in mind.[109]
>
> Because an employer's use of robotics necessarily affects existing employees' terms and conditions of employment, either by substantially changing the nature of their jobs or by eliminating bargaining unit jobs or work altogether, robotics could become a mandatory subject of bargaining. While there appear to be few NLRB decisions concerning the transition to a robotic workforce, the NLRB has long held [though not the U.S. Supreme Court] that technological changes that significantly affect an employer's unionized workforce are a mandatory subject of bargaining.[110]

These negotiated labor standards most often provide part of the basis upon which performance evaluations are made with consequential discipline or benefits.

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disciplinary uses of the technology."); *id.* at 6 ("[T]hat hidden surveillance cameras were mandatory subjects because they affected employee discipline and job security and thus were 'plainly germane to the working environment' and were not entrepreneurial in character or basic to managerial direction of the business.").

108. *See generally* Alexia Elejalde-Ruiz, *Supreme Court's Janus Ruling Could Undercut Private Sector Unions Too*, CHI. TRIB. (July 11, 2018, 10:00 AM), http://www.chicagotribune.com/business/ct-biz-janus-private-sector-ramifications-20180709-story.html# (discussing the changing landscape of attitudes towards and laws applying to both private- and public-sector unions).

109. Patrick T. Wilson, *Competing with a Robot: How Automation Affects Labor Unions*, WAKE FOREST J. BUS. & INTELL. PROP. (Aug. 22, 2017), http://ipjournal.law.wfu.edu/2017/08/competing-with-a-robot-how-automation-affects-labor-unions/.

110. *See* MATHIASON et. al, *supra* note 26, at 6 n.21 (citing Renton News Record, 136 N.L.R.B. 1294 (1962)) ("Although the NLRB refined its approach to determining whether an employer must bargain over a given decision, since *Renton New Record*, its approach to automation cases remains consistent."); *see also* Plymouth Locomotive Works, Inc., 261 N.L.R.B. 595, 602, 606-08 (1982) (applying *Renton News Record* paradigm and finding that an employer had committed an unfair labor practice by failing to bargain over a decision to automate).

E. Privacy

Protected individual privacy interests can arise in numerous ways in the changing workplace environment and inappropriately find their way into performance evaluations. Big data transfers are regulated in the European Union and many countries, but not in the U.S., where legal protections focus on individual rights and where one has a reasonable expectation of privacy.[111] For example, China regulates an increasing number of sectors.[112]

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111. *See* Wisskirchen, *supra* note 5 ("EU General Data Protection Regulation, applicable as of May 2018, provides that collecting personal data without a permissive rule is prohibited in all European countries. U.S. data privacy protection laws are not based on the general assumption that data are confidential."); *see also* Philip L. Gordon, *The Next HR Data Protection Challenge: What U.S. Multinational Employers Must Do to Prepare for the European Union's Impending General Data Protection Regulation*, LITTLER (Sept. 13, 2017), https://www.littler.com/publication-press/publication/next-hr-data-protection-challenge-what-us-multinational-employers-must (describing steps that U.S. MNCs will have to take to comply with GDPR). *Compare* European Commission Press Release MEMO/17/1441, Questions and Answers – Data Protection Reform Package (May 24, 2017), http://europa.eu/rapid/press-release_MEMO-17-1441_en.htm ("The data protection reform package which entered into force in May 2016 and will be applicable as of May 2018 includes the General Data Protection Regulation ("GDPR")."), *with* Ieuan Jolly, Loeb & Loeb, *Data Protection in the United States: Overview,* THOMSON REUTERS PRACTICAL L. (July 1, 2017), https://1.next.westlaw.com/Document/I02064fbd1cb611e38578f7ccc38dcbee/View/FullText.html (discussing the U.S. "patchwork" of laws).

112. China's Cybersecurity Law (Zhonghua Renmin Gongheguo Wangluo Anquan Fa (中华人民共和国网络安全法) [Cybersecurity Law of the People's Republic of China] (promulgated by Standing Committee of National People's Congress, Nov. 7, 2016, effective June 1, 2017); *see* Athena Jiangxiao Hou, Michael Dewey, Qing Lyu, Wei Huang, Steven Shengxing Yu, Ming Li, Ken Dai, Jingbing Li, Yanling Zheng, Hunter Wenxiong Qiu, Qiuming Chen and Rong Kohtz, (Dec. 1, 2017) China Committee's Submission to the 2017 Year in Review Subject to Revision Before Final Publication, CHINA (available with author) (It "is the first national law regulating personal information, data and cybersecurity protection. The CSL adopts a graded system for cybersecurity protection and puts forward the concept of Critical Information Infrastructure ("CII") for the first time. Among the requirements, the cross-border data transfer restriction may be one of the biggest challenges to multinational corporations . . . . CII operators, under the CSL, must comply with stricter cybersecurity protections and restrictions on data cross-border transfer. The determination of CII status is of great significance for businesses. The CSL lists certain sectors related to CII, including public communications, information service, energy, transport, water conservancy, finance, public service and electronic government administration. (art. 31). Furthermore, the Draft CII Regulation ((Guanjian Xinxi Jichu Sheshi Anquan Baohu Tiaoli (Zhengqiu Yijiangao) (关键信息基础设施安全保护条例（征求意见稿） [Draft Regulations on the Security Protection of Critical Information Infrastructure] (promulgated by Cyberspace Administration of China, July 11, 2017), http://www.cac.gov.cn/2017-07/11/c_1121294220.htm (details and extends the CII scope by including additional sectors, which will likely increase the challenges and potential exposure . . . . Under the CSL, if a company is determined to be a CII operator, personal information and important data collected and generated by it within China must be stored in China. Such restrictions, however, may also apply to general network

The risk areas of liability that could adversely affect performance evaluations might include employers collecting excess data, such as protected health information, or telepresence technology that views protected areas of a home or remote office, or unwarranted monitoring of private conversations on technology that is used.[113] Another situation can arise where employer monitoring is excessive; for example, the U.S. Supreme Court has held that continuously tracking an employee's vehicle for over a month is illegal.[114]

GPS tracking raises interesting questions of privacy, depending on the scope of the surveillance, though waivers and consent seem to at least lessen the possibilities of violations of privacy rights. The earlier illustration of the employer planting a chip in the employee's body was accomplished by employee consent.[115] With today's technology, an employer can track or measure nearly everything employees do in or outside the workplace.[116]

> Some [employers] are measuring keystrokes or using programs that can tell supervisors when a keyboard has been idle for 15 minutes. Others use keywords to flag which websites employees visit — and block ones that aren't related to work — or are checking employees' e-mails and instant messages to make sure they don't contain inappropriate or proprietary material. Indeed, nearly every aspect of work is now measurable in some way: Hours are tracked via security badges and fingerprint scanners, locations are monitored using GPS, and certain employee activities are captured by digital camera and video.[117]

In 2015, a plaintiff in California sued her former employer after she was fired for refusing to use an app on her smart phone called "Xora," which would allow her boss to track her whereabouts 24 hours a day, 7 days a week.[118] An employee's discipline or discharge for violation of being found

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operators under the data exporting rules of the CSL, which are under review. Furthermore, under certain conditions, statutory security assessments must be conducted before transferring personal information and important data outside China.").

113. *See, e.g.*, Purple Communications, Inc., 361 N.L.R.B. No. 126, 1122 (2014) (imposing limits on the employer's ability to limit employees' email use during non-working times).

114. *See* United States v. Jones, 565 U.S. 400, 404 (2012).

115. See Astor, *supra* note 40.

116. *See* V. JOHN ELLA, A.B.A., EMPLOYEE MONITORING AND WORKPLACE PRIVACY LAW, 4-5 (2016), https://www.americanbar.org/content/dam/aba/events/labor_law/2016/04/tech/papers/monitoring_ella.authcheckdam.pdf (noting a comprehensive description of the many techniques an employer can use to monitor employees and some of the legal limitations).

117. *See* Lee Michael Katz, *Monitoring Employee Productivity: Proceed with Caution*, SOC'Y FOR HUM. RESOURCE MGMT. (June 1, 2015), https://www.shrm.org/hr-today/news/hr-magazine/pages/0615-employee-monitoring.aspx.

118. *See* Complaint, Arias v. Intermex Wire Transfer, LLC, No. S-1500-CV-284763

to be in the wrong location would certainly find its way into an employee performance evaluation in this changing work environment.[119]

A case currently before the Ninth Circuit, *hiQ Labs Inc. v., LinkedIn Corp.*, involves a company, hiQ, that used bots to "scrape out" information from LinkedIn to track public profile changes of LinkedIn clients who also use LinkedIn's *Recruiter* to indicate interest in relocating.[120] hiQ Labs Inc., has two products — Keeper and Skill Mapper — which track and analyze "employee skills" and whether an employee is "at risk of being recruited away," respectively.[121] LinkedIn attempted to block hiQ's access to its data, but a court issued a temporary restraining order which held that the block would violate antitrust laws.[122] Though this is a commercial issue, it is

SPC (Cal. Super. Ct. Bakersfield, Co., May 5, 2015); Jose Pagliery, *Woman Fired After Disabling GPS on Work Phone*, CNN (May 13, 2015), http://money.cnn.com/2015/05/13/technology/fired-gps-app/; *see also* Jennifer M. Holly, *There's An App For That: Considerations in Employee GPS Monitoring*, SEYFARTH SHAW (Jan. 26, 2017), http://www.calpeculiarities.com/tag/arias-v-intermex-wire-transfer/ (reporting that the employee "sued for wrongful termination, invasion of privacy, unfair business practices, retaliation, and other claims, seeking over $500,000 in damages. This suit, privately settled, is likely not the last of its kind. An additional source of legal restriction on remote employee monitoring is California Penal Code section 637.7, which prohibits the use of 'an electronic tracking device to determine the location or movement of a person' via a 'vehicle or other moveable thing' *unless* 'the registered owner, lessor, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle.'").

119. *See* Katz, *supra* note 117.

120. *See* hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099, 1113 (N.D. Cal. 2017), *appeal docketed*, No. 17-16783 (9th Cir. Sept. 6, 2017); *see also* Black & Reinikainen, *supra* note 65 ("In granting a preliminary injunction guaranteeing a company the right to scrape data, the court found that the public nature of the information sought potentially vitiates the application of the federal Computer Fraud and Abuse Act's ("CFAA") civil and criminal provisions and other legal restrictions on scraping and similar forms of data harvesting. In reaching its decision, the court even suggested, albeit without specifically holding, that serious questions exist as to whether there is a free speech right under the California State Constitution to access and obtain information that has already been made publicly available on the internet. Plaintiff, hiQ Labs, Inc. ("hiQ"), brought a federal action against Defendant, LinkedIn Corp. ("LinkedIn"), the popular business and professional social network, asserting claims under California common law, California's Unfair Competition Law, and the California State Constitution.").

121. Patrick Thibodeau, *LinkedIn Case Highlights Employee Privacy Issues*, TECHTARGET, http://searchhrsoftware.techtarget.com/feature/LinkedIn-case-raises-employee-privacy-concerns (last visited Sept. 30, 2018).

122. *Id.* ("LinkedIn said the scraping of members' personal data is being done 'without their consent' and is in violation of the Computer Fraud and Abuse Act (CFAA), the 1986 anti-hacking law, according to court records filed in the U.S. District Court in the Northern District of California, where the employee monitoring case is being heard. But hiQ argues it only uses profile data that is 'wholly public information' and accessible to anyone. It 'pulls data for a limited subset of users — usually its client's employees —

obvious that technology in the workplace reaches directly into the possible privacy interests of employees and certainly affects employee performance (and retention) evaluations.

IV. ANALYSIS: PERFORMANCE EVALUATIONS WITHIN LEGAL LIMITS IN A CHANGING WORK ENVIRONMENT

What are the legal impacts and limits of employers' restructuring and increasing use of technology for evaluating employee performance in this changing work environment? Objective and subjective data collected by humans and machines on work performance, including appraisal of productivity, conduct, and attitudes, while never an exact science, raise legal issues. Certain issue areas, below, are identifiable though their resolutions may still be evolving.

1. Restructured employers and fissurization shrink the number of "employees" and thus, labor rights.

2. New technology, more inclusive, expansive, and intrusive in the workplace, pervasively enables and encapsulates workers and raises new legal issues involving wage and hours, occupational safety and health, workers compensation, collective bargaining, anti-discrimination, and privacy.

3. Assessing worker performance must navigate these workplace changes.

Many of the changes taking place in the workplace environment with the use of new structural approaches and technology present old problems in new packages. For example, the issues arising from fissurization and restructuring companies raise the continuing, but accelerating, dichotomy between employees and independent contractors, the latter most often excluded from many or most of the labor and employment law protections.[123] Future labor protections will come from labor reforms replacing the traditional master-servant employment relationship with an expanding definition of protected workers.[124] This more liberal approach could

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and uses scientific methodology to analyze the information,' it wrote in a court filing. The two sides have sharply different views on how the LinkedIn data may be used. The information developed by hiQ in its Keeper tool, the company explained, may prompt an employer to give an employee at risk of leaving a 'stay bonus' or career development or internal mobility opportunity.' LinkedIn describes a less positive outcome to employee monitoring: 'If an employer thinks an employee is about to leave, the employer could terminate her or refuse to give her access to sensitive information, even if she actually has no intention of departing.'").

123. *See* Brown & Rymkevich *supra* note 23, at 10-11; Lobel *supra* note 67, at 55-56.

124. *See generally* Lobel, *supra* note 67 (suggesting four proposals for reform that go

embrace currently ambiguous platform workers, contingent workers, etc., under a more inclusive legal test of distinguishing "dependent contractors," such as that used by the FLSA or the Canadian approach, or as is developing in Europe.[125]

> The boundaries between dependent employment and self-employment have increasingly become blurred in some areas in recent years, in a context of changing labour markets and the spread of practices such as outsourcing and contracting-out. This process has led to growing interest in 'economically dependent workers'- workers who are formally self-employed but depend on a single employer for their income - and calls from trade unions and other sources for such work to be regulated and social security coverage and employment law protection to be provided.[126]

Expansion of labor and employment law protections can also arise from expanding definitions of the "employer" to include concepts such as "joint-employers" in cases of independent contractors, contingent, franchise, and subcontracted workers.[127]

New technology changes the work environment, the worker's performance, and the evaluation of worker performance. The continuing introduction of automation and infusion of technology into the workplace brings changing skill requirements and the need to confront digitalization, electronic monitoring, telecommunications, wearing electronic equipment, and working with robots, or maybe being replaced by one.[128] All require continual training and upgrading of skills; and, resulting performances will be measured for purposes of retention, benefits, and discipline. Performance may be further complicated by having to fairly measure comparative performances of those inside and outside the traditional office and working cross-border and remotely, including home workplaces which could raise

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"beyond [the] master-servant" relationship).

125. *See generally* Heather Hettiarachchi, *Understanding Dependent Contractors, and How to Avoid Legal Action*, SMALL BUS. BC (last updated Oct. 27, 2016), http://smallbusinessbc.ca/blog/understanding-dependent-contractors-and-how-to-avoid-legal-action/; Roberto Pedersini, *'Economically Dependent Workers', Employment Law and Industrial Relations*, EUROFOUND (June 13, 2002), https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/economically-dependent-workers-employment-law-and-industrial-relations; *see also* Cherry & Aloisi, *supra* note 30, at 685-87 (discussing the gig economy in the United States).

126. Pedersini, *supra* note 125.

127. *See* Lobel, *supra* note 67, at 63 (stating that the Department of Labor, "in response to the wave of worker misclassification issues arising from the explosion of the Gig Economy . . . referenced the definition contained within the FLSA for what constitutes employment — 'to suffer or permit work' — which is for all intents and purposes, a very broad standard").

128. *See* Sandifer v. United States Steel Corp., 571 U.S. 220 (2014); Astor, *supra* note 40; Holly, *supra* note 118; Pooler, *supra* note 16.

claims of unlawful discrimination.

Measuring workers' production performance often utilizes the latest technological methodology for efficiency and cost-savings.[129] How that is affected by a given workforce varies, but as described above, the methods are designed to obtain a bottom-line as to the amount of productive contribution by the worker, as measured by an employer's own criteria. The data collected and the way it is collected and by whom allows for ultimate evaluation by either a bot or a human or both in tandem. The amount and relevancy of the evaluations collected may or may not raise legal issues of privacy, as discussed above.[130]

The overlay of law on the changing work environment and performance evaluations should be tailored to the operations of specific employers, including MNCs, but generalizations can be made. As stated above, until there are changes and reforms in the labor and employment laws, the trajectories of legal application are predictable and can be anticipated as a company's changing work environment occurs, though sometimes novel applications and policy interpretations will be needed.[131]

As required skills change, training programs can be used to identify and prepare individuals who will perform best.[132] Performance evaluation schemes must avoid data shortcuts based on stereotypes of age, race, gender, disabilities, etc. And, companies need to keep apprised of robotic assistance available to meet the demands of "reasonable accommodation" requests under the ADA.[133] Proper and ongoing training of new technology also cuts back on injuries causing delays in productivity and the costs of worker injuries, covered by workers compensation.[134]

For alternative workplaces, an employer needs to keep aware of its responsibilities and/or liabilities for protecting employees' health and safety; and, for off-site workplaces, the employer must be mindful of sufficiently monitoring the workplaces but at the same time considering whether it is exercising such dominion and control over "independent contractors" to convert them into "employees" or itself into a "joint employer." Too much connectivity with employees can create overtime liabilities under the FLSA; likewise, excessive monitoring may violate privacy protections.[135]

One legal obligation always continues in a unionized workplace, and that

129. *See generally* Ewenstein, Hancock & Komm, *supra* note 8.
130. *See* Astor, *supra* note 40; ELLA *supra* note 116.
131. *See* Lobel, *supra* note 67.
132. *See* Larison, *supra* note 16; Richter *supra* note 98.
133. *See* MATHIASON ET AL., *supra* note 26, at 12.
134. *See id.*; Zingman, *supra* note 84.
135. *See* Conn et al., *supra* note 83; ELLA, *supra* note 116.

is the continuing obligation to negotiate with the union about new technology or its effects or before significant workplace changes are instituted.[136] Contract provisions such as waivers, management rights clauses, etc. are available, but must first be negotiated. Some unions have negotiated information and training requirements to accompany the innovations. An area ripe for negotiation may be contractually protecting the privacy interests of employees as constitutional limits are unavailable for private employees.

Lastly, privacy concerns are also ever-present and should be re-emphasized. Employment performance evaluations must always be scrutinized for perceived intrusions of employees' privacy interests; and, if present, to eliminate them or consider informing the employees and obtaining consents.[137] While close monitoring of employees and their use of vehicles may improve the bottom-line, consideration of job satisfaction and motivation must be factored into the performance evaluation, as well as legal privacy concerns.[138]

V. CONCLUSION — NEW APPROACH OR TWEAK?

The ever-evolving legal applications arising from changing technology and work environments will evolve by usual legal processes, but the law will always be a step behind. The politics of reform are formidable, but many of the necessary and significant technical legal changes of reform could occur by definitional or interpretive tweaks in the laws, enlarging coverages and protecting worker rights while balancing the employers' needs to immerse into Industry 4.0.

136. *See G7 Labour Summit*, *supra* note 1.

137. *See* Astor, *supra* note 40; ELLA, *supra* note 116; Holly, *supra* note 118.

138. *See* Holly, *supra* note 118.

TO ACTUALLY GIVE A FAIR CHANCE: "BAN THE BOX" LAWS AND THE "RATIONAL RELATIONSHIP" STANDARD

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I. INTRODUCTION

In 2012, Zindora Crawford was arrested and charged with multiple counts

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of theft.[1] Instead of convicting her, the court allowed her to participate in an Accelerated Rehabilitative Disposition ("ARD") program, which prevented the disposition of her crime from being considered a conviction under the law.[2] Four years later, she was denied a job at a T-Mobile retail store because of this very arrest.[3]

It is becoming more frequent that employers encounter job applicants with some form of criminal record.[4] These employers ask these applicants about that criminal record and use it as a way to eliminate a "bad hire" from the hiring pool.[5] This has created a group of job applicants who find obtaining employment after an arrest, charge, or conviction increasingly difficult.[6] This phenomenon provided the inspiration for the "ban the box" movement, its goal being to make reintegration into communities easier for ex-offenders by making gainful employment easier for ex-offenders to obtain.[7]

The "box" in the movement's name refers to a question or set of questions on employment applications that businesses create that asks an applicant about his or her criminal background.[8] This question applies to an increasingly larger portion of the US population as incarceration rates increase through focuses on "law and order" and "tough on crime" policies, and the "war on drugs."[9] This eliminates greater numbers of people from the

1. Complaint ¶ 13, Zindora Crawford v. T-Mobile US, Inc., (E.D. Pa. Oct. 26, 2017) (No. 2:17-cv-04826) [hereinafter Crawford Complaint].

2. *Id.* ¶¶ 14-17.

3. *Id.* ¶¶ 39-41.

4. *See* Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas (stating that nearly one-third of American adults have a criminal record).

5. *See* Michael Gaul, *Considering Employee Criminal Background Checks? Ask Yourself This Question*, PROFORMA SCREENING SOLUTIONS (May 4, 2010), http://www.proformascreening.com/blog/2010/05/04/employee-criminal-background-checks/ (describing reasons companies use criminal background checks including to see past criminal behavior and use that information to predict employee behavior).

6. *See* Eric Dexheimer, *After 30 Years in Business, Locksmith Loses his License – For 1980 Crime*, MY STATESMAN (Dec. 29, 2017, 10:58 AM), https://www.mystatesman.com/news/after-years-business-locksmith-loses-his-license-for-1980-crime/DuJ6O3WxF7CkjTMMySTaxK/ (driving a get-away car at 19); Jesse Kelley, Opinion, *Welcome Ex-Offenders into Legal Marijuana Jobs*, SUNSENTINEL (Feb. 8, 2018, 11:30 AM), http://www.sun-sentinel.com/opinion/fl-op-offenders-legal-marijuana-jobs-20180207-story.html (smoking marijuana while it was illegal).

7. *See About: The Ban the Box Campaign*, BAN THE BOX CAMPAIGN, http://banthe boxcampaign.org/about/#.WvcsMyOZOt8 (last visited May 12, 2018).

8. *See* Taylor McAvoy, *'Ban the Box' Bill Advances*, THE GOLDENDALE SENTINEL (Feb. 21, 2018), http://www.goldendalesentinel.com/story/2018/02/21/news/ban-the-box-bill-advances/10017.html.

9. Christine Neylon O'Brien & Jonathan J. Darrow, *Adverse Employment*

hiring pool, and increases the necessity of laws protecting employment opportunities and other methods of providing aid to ex-offenders upon their release.[10] "Ban the box" laws are among the methods being implemented in states across the country to remedy this problem.[11]

"Ban the box" laws are a series of laws that in some way limit employers' access to an individual's criminal background during the hiring process.[12] At times they are also called "Fair Chance" laws because they are meant to provide a fair chance to ex-offenders upon reintegration into society by affording them a chance at obtaining gainful employment without employers automatically eliminating them from the pool of applicants.[13]

States across the nation continue to adopt "ban the box" legislation to counter the ever-growing use of criminal background checks in the hiring process.[14] In November 2017, Arizona's governor issued an executive order to eliminate questions about criminal records on the state government's initial job applications or prior to an initial interview, and in March 2018, Washington state's governor signed a "ban the box" statute into law.[15] These

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Consequences Triggered By Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination, 42 WAKE FOREST L. REV. 991, 994-95 (2007) (stating that "as many as one in five Americans [has] a criminal record"); *see also* ROY WALMSLEY, WORLD PRISON POPULATION LIST 5 (11th ed. 2016), http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf (showing the increase in incarceration in the United States since 2000).

10. O'Brien & Darrow, *supra* note 9, at 994-95; *see, e.g.*, Elizabeth Redden, *Criminals and Colleges in the Capital*, INSIDE HIGHER ED (Feb. 14, 2007), https://www.insidehighered.com/news/2007/02/14/dc (showing an increase in the use of criminal background checks in higher education). *But see* Ben Casselman, *As Labor Pool Shrinks, Prison Time is Less of a Hiring Hurdle*, N.Y. TIMES (Jan. 13, 2018), https://www.nytimes.com/2018/01/13/business/economy/labor-market-inmates.html (explaining that hiring prospects are improving for ex-offenders).

11. Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*, 85 TEMP L. REV. 921, 921, 924 (2013).

12. *See* HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); *see also* Garcia, *supra* note 11, at 921, 924 (defining "ban the box" laws and their purpose).

13. Garcia, *supra* note 11, at 921 (explaining that the laws do this by limiting what an employer may ask about an individual's criminal record, when an employer may ask about the criminal record, and how far into the past an employer may ask about); *see also* McAvoy, *supra* note 7.

14. Howard Fischer, *State Government Joins Flagstaff, Other Cities in Giving Convicted Job Applicants a Break*, ARIZ. DAILY SUN (Nov. 6, 2017), http://azdailysun.com/news/local/state-government-joins-flagstaff-other-cities-in-giving-convicted-job/article_9af003bb-c245-5881-b42b-3b51ad65ba7a.html.

15. *See* Ariz. Exec. Order No. 2017-07 (Nov. 6, 2017), https://azgovernor.gov/sites/default/files/related-docs/boxeo.pdf; Fischer, *supra* note 14; Staff, *Gov. Inslee Signs Legislation to 'Ban the Box*,*'* KREM (Mar. 13, 2018), https://www.krem.com/article/news/local/northwest/gov-inslee-signs-legislation-to-ban-the-box/293-

two states joined twenty-nine other states that have similar guidelines from executive orders or legislation.[16] Following Arizona's executive order, Virginia legislators are considering "ban the box" legislation for their own states.[17] Additionally, in November 2017, Spokane, Washington joined the ranks of the more than 150 cities that have banned the box on employment applications for both public and private employers.[18]

This Comment delves into the history, structure, and application of "ban the box" laws in the United States. Part II will provide the historical and legal context for the emergence of "ban the box" legislation, discuss the anemic protections for ex-offenders at the federal level, and review arguments for and against these laws. It will also examine various "ban the box" laws and the case law attendant to the laws. In this Comment, "criminal record" will refer to any arrest, charge, or conviction an individual has received. Part III will compare and contrast these laws and assess how they interact with case law and a case that embodies the motivations for the "ban the box" movement. Finally, Part IV will recommend that courts across the country mimic the Hawaii Supreme Court's application of the rational relationship standard to achieve the actual purpose of the "ban the box" laws, in addition to recommending that states that do not have a "rational relationship" standard in the text of the laws add that standard to their current or emerging "ban the box" laws.

II. THE LEGAL CONTEXT FOR "BAN THE BOX" LAWS

Both the state and the federal government have attempted to address the use of background checks to eliminate ex-offenders from the hiring pool.[19]

528367808.

16. *See* Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Practices*, NAT'L EMP. L. PROJECT (Apr. 20, 2018), http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ (listing states with ban the box laws as Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin).

17. McAvoy, *supra* note 8; *see* Max Smith, *Va. Senate Passes 'Ban the Box' Bill for State Government*, WTOP (Jan. 19, 2018, 7:09 PM), https://wtop.com/virginia/2018/01/va-senate-passes-ban-box-bill-state-government/ (stating that the bill will go to the house of delegates next to be considered).

18. Kip Hill, *Spokane City Council Votes to 'Ban the Box' for Private Employers, Fines Delayed One Year*, THE SPOKESMAN REV. (Nov. 27, 2017, 11:02 PM), http://www.spokesman.com/stories/2017/nov/27/spokane-city-council-votes-to-ban-the-box-for-priv/.

19. *See generally* Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. CAL. INTERDISC. L.J. 395 (2016) (outlining

At the federal level, advocates have attempted to use Title VII and the Equal Employment Opportunity Commission ("EEOC") to address discrimination based on ex-offender status.[20] However, these approaches have not adequately addressed the issue, and have left a gap in protection for "ban the box" laws to fill.[21]

A. Federal Treatment of Ex-Offender Protection Status

Title VII of the Civil Rights Act of 1964[22] protects people based on their "race, color, religion, sex, or national origin" from discrimination in the hiring process and from discriminatory termination from their place of employment.[23] When applying Title VII in *Griggs v. Duke Power Co.*,[24] the United States Supreme Court established the disparate impact doctrine, providing that practices "fair in form, but discriminatory in operation" are subject to the Civil Rights Act.[25] Congress later codified the disparate impact doctrine, stating that a business practice that has a disparate impact on applicants from a protected class cannot be used unless the employer can show that the decision, policy, or practice relates to the job in question and is "consistent with business necessity."[26]

The EEOC also addresses this issue.[27] The EEOC is a federal agency that enforces federal laws such as Title VII that ban employment discrimination based on race, color, religion, sex, disability, or genetic information, and provides guidelines for employers to follow to abide by employment laws.[28]

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attempts to regulate the use of criminal records to protect job applicants).

20. *See* Garcia, *supra* note 11, at 926-27.

21. *See id.* at 924.

22. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

23. *Id.*; *see* Paul-Emile, *supra* note 19, at 403-04 (explaining that individuals suing under Title VII must demonstrate that the employment practice disproportionately burdens a protected group, excluding many ex-offenders).

24. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

25. *Id.* at 431.

26. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see* United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 308 (1972) ("[The] doctrine of business necessity . . . connotes an irresistible demand . . . must not only foster safety and efficiency, but must be essential to that goal.").

27. Ingrid Cepero, *Banning the Box: Restricting the Use of Criminal Background Checks in Employment Decisions in Spite of Employers' Prerogatives*, 10 FLA. INT'L U. L. REV. 729, 735-36 (2015).

28. *See About EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/index.cfm (last visited Apr. 25, 2018); *see also What You Should Know About the EEOC and Arrest and Conviction Records*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm (last visited Apr. 25, 2018) (stating that the EEOC issued this updated guideline after at least four years of research, meetings, and feedback from organizations

In 2012, the EEOC issued its updated policy guidance on the "Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" to set forth its procedure for determining whether and when criminal records should be considered when hiring employees.[29] These guidelines do not prohibit employers from using the information, but rather lay out ways for employers to limit using criminal background checks in a discriminatory way.[30]

B. The Introduction of "Ban the Box" Laws

State law has filled the gaps in the shortfalls of federal regulations and efforts to alleviate employment discrimination of ex-offenders.[31] Hawaii passed the first "ban the box" law in 1998.[32] At the time, Hawaii had a law that prohibited employers from considering criminal records in the hiring process.[33] The legislature created the new statute — section 378-2.5 of the Hawaii Revised Statutes — in an effort to eliminate this prohibition.[34] Instead of eliminating the prohibition, Hawaii tailored the new law to provide ex-offenders with protections while giving employers the legal means to conduct background checks.[35]

Six years later, a group of ex-offenders and their advocates called All of Us or None ("AOUON") adopted the "ban the box" movement as an initiative in Oakland, California.[36] AOUON lobbied in the Oakland, San

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interested in the subject of criminal background checks in the hiring process).

29. Cepero, *supra* note 27; *see* U.S. EQUAL EMP. OPPORTUNITY COMM'N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 8-9 (2012) https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [hereinafter CONSIDERATION OF ARREST AND CONVICTION RECORDS].

30. *See generally* CONSIDERATION OF ARREST AND CONVICTION RECORDS, *supra* note 29, at 15-16 (showing that companies can limit and narrow criminal background check use through considering "[t]he nature and gravity of the offense or conduct; [t]he time that has passed since the offense, conduct and/or completion of the sentence; and [t]he nature of the job held or sought.").

31. *See* Garcia, *supra* note 11, at 927.

32. *Hawaii's Fair Chance Law*, VERIFYPROTECT, https://www.verifyprotect.com/ban-the-box/hawaii/ (last visited Apr. 25, 2018).

33. HAW. REV. STAT. ANN. § 378-2 (LexisNexis 2017); Wright v. Home Depot U.S.A., 111 Haw. 401, 407-08 (2006).

34. *See* Sheri-Ann S. L. Lau, *RECENT DEVELOPMENT: Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 HAW. L. REV. 709, 715 (2000).

35. *Id.* at 715-16.

36. All of Us or None, *Ban the Box Timeline*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, 1 [hereinafter *Ban the Box Timeline*] http://www.prisonerswithchildren.org/wp-content/uploads/2015/08/BTB-timeline-final.pdf (last visited Apr. 25, 2018); *see*

Francisco, and East Palo Alto area for legislation addressing the question about criminal backgrounds on public employment applications and an end to discrimination against ex-offenders.[37] After effective lobbying, San Francisco passed a "ban the box" resolution in January 2006.[38] Since then, the "ban the box" movement has slowly picked up pace, with Massachusetts passing its own law in 2010.[39] Many states followed suit, and as of January 2018, thirty-one states and over 150 cities have some form of "ban the box" regulation.[40] As these states and cities have passed regulations, there has been plenty of opportunity for people to debate the merits of the "ban the box" statutes.[41]

C. The Pros and Cons of "Ban the Box" Laws

As "ban the box" laws gained visibility, advocates and opponents developed arguments for the laws' passage or rejection. One argument in favor of the laws is that they protect individuals with criminal records who do not fall under Title VII protected classes.[42] Because ex-offenders are not a Title VII protected class, state laws provide an alternative forum from federal law for employment protections.[43]

Additionally, many argue that "ban the box" laws will reduce the recidivism of ex-offenders.[44] Studies have shown that gainful employment decreases the likelihood of recidivism for ex-offenders.[45] Limiting the use

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also, *All of Us or None*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, http://www.prisonerswithchildren.org/our-projects/allofus-or-none/ (last visited Apr. 25, 2018) (describing AOUON, a civil and human rights organization fighting for current- and ex-offenders' rights).

37. *Ban the Box Timeline*, *supra* note 36, at 1.

38. *Id.* (stating that this ordinance banned the box on public employment applications).

39. *See* Dan Ring, *Massachusetts Gov. Deval Patrick Signs Law Changing CORI System*, MASSLIVE (last updated Aug. 6, 2010, 10:22 PM), http://www.masslive.com/news/index.ssf/2010/08/massachusetts_gov_deval_patric_24.html (stating that the law prohibits applications from including questions about criminal records but allows questioning in interviews).

40. *See* Avery & Hernandez, *supra* note 16.

41. *See, e.g.,* McAvoy, *supra* note 8 (discussing the Washington legislature's debates on the merits of "ban the box" laws).

42. *See* O'Brien, *supra* note 9, at 1020, 1023 (explaining how not all individuals fall under the Title VII protected classes of race, color, religion, sex, or national origin).

43. *See id.* at 1020.

44. Cepero, *supra* note 27, at 741-42 (explaining that gainful employment is one contributing factor to reducing recidivism).

45. *See* Christy A. Visher et al., *Ex-offender Employment Programs and Recidivism: A Meta-analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 295, 295-96 (2005) (explaining that "a good job . . . provides . . . means for . . . survival, . . . self-esteem, . . . a conventional

of background checks will likely lead to consideration of ex-offenders' qualifications rather than their criminal records and, thus, to hiring ex-offenders.[46]

One challenge to implementing "ban the box" laws is their conflict with state negligent hiring standards.[47] The tort of negligent hiring occurs when an employee commits a crime while at work that the employer "knew or should have known would [be] a foreseeable risk" of employing that employee.[48] This standard encourages employers to conduct background checks and eliminate potentially risky applicants as early as possible, while "ban the box" laws limit this practice.[49] The result is a so-called "minefield of liability concerns," where too little or too much investigation into an applicant's background results in legal liability.[50] This difficult legal quagmire is murkier for employers operating in multiple states because of the existence of different versions of "ban the box" laws.[51]

D. Different "Ban the Box" Laws

Each "ban the box" law takes a unique approach to addressing employers' use of criminal background checks.[52] Delaware's "ban the box" law regulates only public employers inquiring into criminal records, while Hawaii's law covers both public and private employers.[53]

As of June 2018, eleven states and the District of Columbia cover both private employers and public organizations in their "ban the box" laws.[54]

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lifestyle, and a sense of belonging"); *see also* John M. Nally et al., *Post-Release Recidivism and Employment Among Different Types of Released Offenders: A 5 Year Follow-up Study in the United States*, 9 INT'L J. CRIM. JUST. SCI. 16, 16 (2014).

46. *See* Garcia, *supra* note 11, at 942 (explaining that many of these offenses do not relate to the position applied for and are less relevant than the applicant's qualifications).

47. Garcia, *supra* note 11, at 940-41.

48. *Id.* at 924.

49. *Id.* at 939-40 (explaining that negligent hiring suits are costly for businesses, with employers losing approximately 72% of cases and the average settlement being $1.6 million).

50. Garcia, *supra* note 11, at 940-41; *see also* Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 913 (Minn. 1983) ("[T]o hold that an employer can never hire a person with a criminal record . . . would offend our civilized concept that society must make a reasonable effort to rehabilitate those who have erred so they can assimilate into the community.").

51. *See, e.g.*, OR. REV. STAT. § 659A.360 (2018); *see also* MD. CODE ANN. STATE PERS. & PENS. § 2-203 (LexisNexis 2018).

52. *See, e.g.,* DEL. CODE ANN. tit. 19, § 711(g)(1) (2017); OR. REV. STAT. § 659A.360.

53. DEL. CODE ANN. tit. 19, § 711(g)(1); HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017).

54. CAL. LAB. CODE § 432.7 (Deering 2018); CONN. GEN. STAT. § 31-51i (2017);

Nineteen states with "ban the box" laws or regulations only cover public employers.[55] For example, Delaware's "ban the box" statute explicitly states that "[i]t shall be an unlawful employment practice for any *public employer* to inquire" into an employee's criminal background.[56] In some states, the governors passed the regulations via executive order, and therefore had no ability to implement regulations on private employers.[57] In others, the legislature decided to write the law in this manner for a variety of reasons.[58]

Under Hawaii's law, employers may inquire into criminal conviction records as long as the conviction "bears a rational relationship to the duties and responsibilities of the position."[59] Additionally, section (b) of this statute states that these checks may be conducted only after the applicant receives a conditional offer from the employer.[60] The statute defines conviction as "an adjudication by a court of competent jurisdiction that the defendant committed a crime . . . ."[61] Only those convictions that fall within ten years of the date of the check can be considered.[62]

The most discussed aspect of Hawaii's law is its "rational relationship" standard.[63] In December 2002, the Hawaii Criminal Justice Data Center of the Department of the Attorney General issued a report arguing that a rational relationship was a relatively easy standard to meet.[64] However, subsequent

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D.C. CODE § 24-1351 (2018); HAW. REV. STAT. ANN. § 378-2.5; 820 ILL. COMP. STAT. ANN. 75/15 (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018); MINN. STAT. §§ 364.021, 364.03 (2018); N.J. REV. STAT. §§ 34:6B-14 (2018); OR. REV. STAT. § 659A.360; 28 R.I. GEN. LAWS § 28-5-7 (2018); VT. STAT. ANN. tit. 21, §495j (2018); News Release, Nat'l Emp't Law Project, Washington Gov. Inslee Signs Fair Chance Act, Extending 'Ban the Box' to Private Emp'rs (Mar. 13, 2018), https://www.nelp.org/news-releases/washington-gov-inslee-signs-fair-chance-act-extending-ban-box-private-employers/.

55. *See, e.g.*, DEL. CODE ANN. tit. 19, § 711(g)(1).

56. *Id.* (emphasis added).

57. *See, e.g.*, Ariz. Exec. Order No. 2017-07 (Nov. 6, 2017), https://azgovernor.gov/sites/default/files/related-docs/boxeo.pdf.

58. *See, e.g.*, Daily Report Staff, *'Ban the Box' Bill Advances to Full Louisiana House of Representatives*, GREATER BATON ROUGE BUS. REP. (Apr. 20, 2016), https://www.businessreport.com/article/ban-box-bill-advances-full-louisiana-house-representatives.

59. HAW. REV. STAT. ANN. § 378-2.5(a) (stating that employers may do this for "hiring, termination, or the terms, conditions, or privileges of employment").

60. *Id.* § 378-2.5(b) (reiterating the rational relationship standard stated section (a)).

61. *Id.* § 378-2.5(c) ("[N]ot including final judgments required to be confidential pursuant to section 571-84.").

62. *Id.* § 378-2.5(a) (excluding from that ten year period of time considered any periods of incarceration served).

63. *Id.*

64. HAW. CRIMINAL JUSTICE DATA CTR., CRIMINAL HISTORY RECORDS CHECKS REPORT TO THE 2003 LEGISLATURE 9 (2002), http://ag.hawaii.gov/wp-content/uploads/

court application of the law determined that a "rational relationship" is not "coextensive with the ultra-deferential rational basis test," but still not incredibly difficult to attain.[65]

Oregon's "ban the box" law prevents employers from excluding an applicant from an initial interview solely because of a past criminal conviction.[66] Oregon defines "excludes an applicant from an initial interview" in section (2)(a)-(c) as requiring an applicant to disclose a criminal conviction on an application, before the initial interview, or before a conditional offer of employment if no interview is conducted.[67]

Massachusetts's law expressly prohibits employers from conducting any criminal background checks on an initial application for employment.[68] Additionally, employers are not allowed to conduct background checks to discover anything that did not result in a conviction or "a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace" for many portions of the hiring process.[69]

Massachusetts's "ban the box" statute also restricts what employers can search.[70] The law prevents employers from searching for misdemeanors committed five years before the search or, alternatively, for which the ex-offender was released five years or more before the search; however, it provides an exception and allows employers to conduct a search when the applicant has committed another offense within five years of the application date.[71] This provision limits criminal background checks for those ex-

2013/01/2003_rept_to_legis_act_263.pdf ("[T]he rational relationship standard is not a difficult one to satisfy, requiring only a showing of an understandable or rational connection between the offense and how it may affect an individual's ability to perform the job duties and functions. Almost any conceivable relationship between the offense and the job will likely satisfy the rational relationship standard.").

65. *See* Romer v. Evans, 517 U.S. 620, 631-33 (1964) (finding that a rational basis may be found if a law advances a legitimate government interest); Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479, 484 (2015).

66. OR. REV. STAT. § 659A.360(1) (2018).

67. OR. REV. STAT. § 659A.360(2) ("(a) Requires an applicant to disclose on an employment application a criminal conviction; (b) Requires an applicant to disclose, prior to an initial interview, a criminal conviction; or (c) If no interview is conducted, requires an applicant to disclose, prior to making a conditional offer of employment, a criminal conviction.").

68. MASS. ANN. LAWS ch. 151B, § 4(9 1/2) (LexisNexis 2018).

69. *Id.* § 4(9) ("[A]n application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person . . . .").

70. *See id.*

71. *Id.* § 4(9)(iii) ("[A]ny conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom,

offenders who may have one or two old, minor convictions on their record, while still allowing employers to conduct a thorough search of any applicant who has more recent convictions.[72]

None of these three laws completely bans background checks.[73] All three contain provisions stating that positions for which state or federal law requires an employer to conduct background checks are exempt from the states' "ban the box" provisions.[74]

E. The Hawaiian Case Law

Since the passage of Hawaii's law in 1998, the legal field has been open to legal challenges of employer's use of criminal background checks in the hiring process.[75] Two major cases exist in Hawaiian jurisprudence for its "ban the box" law: *Wright v. Home Depot U.S.A.*[76] and *Shimose v. Hawaii Health Systems Corp.*[77]

Wright was one of the first cases appealed to the Hawaii Supreme Court regarding the "ban the box" law.[78] The plaintiff's application for a promotion within the company triggered the employer to uncover a 1996 conviction for using a controlled substance in a background check.[79] Although the plaintiff passed all other requirements for the position, the employer fired the plaintiff for his conviction record.[80]

The Hawaii Supreme Court remanded the case to provide the plaintiff an opportunity to prove that the conviction had no rational relationship to the

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whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.").

72. *See id.* (providing an exception to the ban on searches for applicants with more recent convictions).

73. *See* HAW. REV. STAT. § 378-2.5 (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4(9); OR. REV. STAT. §659A.360 (2017).

74. HAW. REV. STAT. ANN. § 378-2; MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360.

75. *See, e.g.,* Wright v. Home Depot U.S.A., 111 Haw. 401 (2006) (interpreting the "rational relationship" clause of Hawaii's "ban the box" statute).

76. *Id.*

77. Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479 (2015).

78. *See* Kahumoku v. United Air Lines, Inc., No. 11-00661 ACK-BMK, 2013 U.S. Dist. LEXIS 184752, *16 (D. Haw. Feb. 26, 2013) (stating that the only appellate decision regarding the Hawaii "ban the box" law was Wright v. Home Depot U.S.A.); *Wright*, 111 Haw. at 401.

79. *Wright*, 111 Haw. at 403-04 (stating that this conviction occurred before the "ban the box" law's passage).

80. *Id.*

duties and responsibilities of a department supervisor.[81] The court held that, despite having no explicit statutory definition, the plain and obvious meaning of the phrase "rational relationship" existed in the words in the statute.[82] Thus, the relationship between the conviction and the duties and responsibilities of the position must be rational.[83]

In *Shimose,* the plaintiff had a conviction on his record for possession with intent to distribute crystal methamphetamine.[84] While in prison, the plaintiff obtained an associate's degree at Kapiolani Community College and a degree in the college's radiological technician ("radtech") program.[85] After his release, the plaintiff applied for a radtech position at a hospital.[86] The hospital turned the plaintiff down because of the criminal background.[87]

The Hawaii Supreme Court held that the hospital did not establish a rational relationship between the plaintiff's conviction and the duties and responsibilities of a radtech sufficient to warrant summary judgment.[88] Factual issues still existed that bore on whether the conviction had a rational relationship to the radtech position.[89]

F. Crawford v. T-Mobile

In *Crawford v. T-Mobile US, Inc.*,[90] applicant Zindora Crawford alleged that her employer, T-Mobile U.S., Inc. ("T-Mobile"), violated Philadelphia's "ban the box" ordinance by rejecting her application.[91] In August 2012, Crawford was arrested and charged with multiple counts of theft.[92]

81. *Id.* at 406, 412 (reversing the trial court's decision to grant a motion to dismiss).

82. *Id.* at 411-12; *see* HAW. REV. STAT. ANN. § 378-2.5(b) (LexisNexis 2017) (stating that background checks take place "only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.").

83. *Wright,* 111 Haw. at 411-12 ("[T]he plain and obvious meaning of the phrase is found in the words themselves.").

84. Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479, 481 (2015).

85. *Id.* (stating that plaintiff graduated from the program upon release from prison).

86. *Id.* (stating that the plaintiff was qualified for this position except for the criminal record).

87. *Id.* at 481-82 (finding that, upon his first rejection from the hospital for the clinical rotation, Shimose completed his rotation in a separate hospital).

88. *Id*. at 484 (reversing the trial court's decision).

89. *Id.* at 486.

90. Complaint, Zindora Crawford v. T-Mobile US, Inc., (No. 2:17-cv-04826) (E.D. Pa. Oct. 26, 2017).

91. *See id.* ¶¶ 1, 7-9, 145-57.

92. *Id.* ¶ 13 (mentioning that these charges included multiple counts of theft of services, theft by unlawful taking, receiving stolen property, unlawful use of a computer, computer theft, computer trespass, criminal use of communication facility, and

Crawford's charges were resolved two years later without a conviction through the state's Accelerated Rehabilitative Disposition ("ARD") program.[93] This program is meant to rehabilitate those charged with minor offenses, and is not intended to be counted as a conviction for most purposes.[94]

In 2016, Crawford applied for a Retail Associate Manager position with T-Mobile.[95] After a successful first round interview, Crawford received a second interview for the position.[96] In between interviews, Crawford received a background check request from T-Mobile and completed it.[97] Crawford attended the second interview with no issue.[98]

Days later, Crawford called the store to follow up on the background check process.[99] Her calls were not returned, and a week later Crawford received a letter containing a copy of her background check and stating that T-Mobile rejected her application, at least in part, because of the background check.[100] Crawford then filed suit under Philadelphia's "ban the box" law.[101]

III. "BAN THE BOX" AND THE "RATIONAL RELATIONSHIP" STANDARD IN *CRAWFORD V. T-MOBILE*

"Ban the box" laws are young, with all but one law having been passed since 2009, and vary from state to state in their construction and application.[102] These differing standards result in a complicated legal

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conspiracy).

93. *Id.* ¶¶ 13-17.

94. *Id.* ¶¶ 15-16; *see* PA. R. CRIM. P. 312 cmt. (2017) ("[I]t may be statutorily construed as a conviction for purposes of computing sentences on subsequent convictions.").

95. Crawford Complaint, *supra* note 1, ¶¶ 24-29, 29 (explaining that was Crawford's second attempt at employment with T-Mobile, and she was denied employment for the same reasons on both attempts).

96. *Id.* ¶¶ 34, 37.

97. *Id.* ¶ 36 (informing Crawford that the background check should be in by April 1, 2016).

98. *Id.* ¶¶ 38-39 (advising Crawford that there would be a third interview after the background check was received and reviewed if she met T-Mobile's background check requirements).

99. *Id.* ¶ 40.

100. *Id.* ¶¶ 41-42 (stating that Crawford never received a conditional offer of employment from T-Mobile).

101. Crawford Complaint, *supra* note 1, ¶ 1.

102. *See, e.g.*, MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018) (passed in 2010); VT. STAT. ANN. tit. 21, § 495j (2018) (passed in 2015); *see also* Dom Apollon, *Got a Record? You Can Still Get A Job In Massachusetts*, COLORLINES (Sept. 3, 2010, 12:04 PM), https://www.colorlines.com/articles/got-record-you-can-still-get-job-massachusetts (stating that Massachusetts, the second state to pass a "ban the box" law, passed it in

landscape, with more than one "ban the box" statute applying to employers that serve multiple states.[103] Additionally, few courts outside of Hawaii have addressed the standards for the application of "ban the box" laws.[104]

A. The Diversity of the "Ban the Box" Laws

"Ban the box" laws across the country come in a variety of forms and use various methods and language to achieve the same goal.[105] However, the main differences between these laws are (1) whether the statute applies only to public employers or to both public and private employers; (2) what aspects of a criminal record employers can consider; (3) when during the hiring process the employers can consider criminal records; and (4) whether the statute incorporates a standard for considering the applicable criminal record.[106]

"Ban the box" statutes range from incredibly broad to narrowly tailored when covering what aspects of an employee or applicant's criminal records employers may consider during the hiring process.[107] Hawaii's statute falls on the broader end of this spectrum, with Oregon's law being broader than Hawaii's, and Massachusetts's more narrowly tailored.[108] Hawaii's law allows the state to consider convictions, defined as "an adjudication by a court of competent jurisdiction that the defendant committed a crime,"[109] within ten years of the date of the search or convictions where the release came within ten years of the search.[110] On the extreme end of broadness, Oregon's law expressly states that employers may consider ex-offenders'

2010). *See generally* Rachel Santitoro, *Banning the Box in New Jersey: A Small Step Toward Ending Discrimination Against Ex Offenders*, 13 RUTGERS J.L. & PUB. POL'Y 215 (2015) (providing a survey of New Jersey's "ban the box" law).

103. Garcia, *supra* note 11, at 940-41.

104. *See* Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479 (2015); Wright v. Home Depot U.S.A., 111 Haw. 401 (2006).

105. *See, e.g.*, CAL. LAB. CODE § 432.7 (Deering 2018); LA. STAT. ANN. § 42:1701 (2018); *see also* Garcia, *supra* note 11, at 927-28 (stating that while the goals of the "ban the box" laws are generally the same, they approach the task differently).

106. *See, e.g.*, HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2018); OR. REV. STAT. § 659A.360 (2018); Garcia, *supra* note 11, at 927-28.

107. *See, e.g.*, 820 ILL. COMP. STAT. ANN. 75/15 (LexisNexis 2017) (incredibly broad and vague); MASS. ANN. LAWS ch. 151B, § 4(9) (incredibly specific about what an employer cannot consider).

108. HAW. REV. STAT. ANN. § 378-2.5(a), (c) (LexisNexis 2017); MASS. ANN. LAWS ch. 151B, § 4(9); OR. REV. STAT. § 659A.360(1), (3) (2018).

109. HAW. REV. STAT. ANN. § 378-2.5(c).

110. *Id.* § 378-2.5(a), (c).

conviction histories when hiring employees.[111] Additionally, Oregon's law does not define "conviction," nor does it expressly state what is includable in the background checks as both Hawaii and Massachusetts do.[112] Nothing in the section of the Oregon statute addresses whether arrest records or pending case records may be included in the background check.[113]

Comparatively, Massachusetts's "ban the box" statute is much more specific than Hawaii's in covering the specific crimes that can be considered.[114] While Massachusetts's law is similar to Hawaii's in restricting employers to considering only convictions,[115] it expands this restriction to cover employers' consideration of first convictions for the misdemeanors "drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace."[116]

Additionally, Massachusetts limits its timeframe for searches to a much narrower window than Hawaii's ten-year timeframe.[117] Specifically, the Massachusetts statute prevents employers from searching for misdemeanors that occurred within five years of the search or convictions for misdemeanors where the applicant was released within five years.[118] Unlike Hawaii's law, however, Massachusetts's limit is not an absolute bar on searches before a certain time period.[119] Massachusetts allows these misdemeanors to be exempt from the ban if the applicant has committed another misdemeanor in the five years since the initial misdemeanor was committed.[120] Oregon's law differs even further by not containing a timeframe at all.[121] While the Massachusetts law appears to have an immediate negative effect on ex-offender employment in the two years following its passage, not enough data exists to determine which state's approach is the best.[122]

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111. OR. REV. STAT. § 659A.360(3) (2018).

112. *See* HAW. REV. STAT. ANN. § 378-2.5; MASS. ANN. LAWS ch. 151B, § 4(9); OR. REV. STAT. §§ 659A.001, 659A.360.

113. OR. REV. STAT. § 659A.360.

114. *See* HAW. REV. STAT. ANN. § 378-2.5(a), (c) (lacking discussion of any specific crimes in the text of the law); MASS. ANN. LAWS ch. 151B, § 4(9).

115. *See* HAW. REV. STAT. ANN. § 378-2.5(c); MASS. ANN. LAWS ch. 151B, § 4(9).

116. MASS. ANN. LAWS ch. 151B, § 4(9).

117. *See* HAW. REV. STAT. ANN. § 378-2.5(c); MASS. ANN. LAWS ch. 151B, § 4(9).

118. MASS. ANN. LAWS ch. 151B, § 4(9) (applying this limitation on searches only applies to misdemeanors and allowing employers to search for felonies committed by the applicant).

119. *See* HAW. REV. STAT. ANN. § 378-2.5; MASS. ANN. LAWS ch. 151B, § 4(9).

120. MASS. ANN. LAWS ch. 151B, § 4(9).

121. OR. REV. STAT. §§ 659A.001, 659A.360 (2018).

122. *See generally* Osborne Jackson & Bo Zhao, *The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010–2012 Massachusetts CORI Reform* (Fed. Reserve Bank of Bos., Working Paper

The "ban the box" laws vary as to when in the hiring process the employers can conduct criminal background checks.[123] Hawaii's "ban the box" law is considered to be more strict because it expressly limits the window of time that employers may conduct a search.[124] This limitation prevents employers from conducting a criminal background check prior to extending a conditional offer of employment to the applicant.[125]

In the same vein, Massachusetts is highly explicit about when the employer can conduct a background check on certain segments of the statute.[126] Massachusetts law directly states that employers may not request permission to conduct a background check on the applicant in the initial written application.[127] However, the statute does not explicitly state that an employer can never conduct a background check.[128]

Similar to Hawaii, Massachusetts also mandates that an employer cannot request a background check regarding specific misdemeanors at any point in the process.[129] However, unlike other state statutes, the Massachusetts "ban the box" law says nothing about allowing employers to conduct background checks for other crimes after the initial written application.[130] This creates confusion as to whether an employer could conduct a background check once an applicant has been selected for an interview, or if the employer must wait until after the interview has been conducted.[131]

Unlike Hawaii's law, Oregon's "ban the box" law does not prevent employers from conducting background checks prior to a conditional job

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No. 16-30, 2017) (discussing the effects of Massachusetts's new law, the factors considered in analyzing the negative results, and possible alternative explanations for the results).

123. *See, e.g.*, CONN. GEN. STAT. § 31-51i (2018) (not prior to an initial employment application); MINN. STAT. § 364.021(a) (2018) (not prior to selection for an interview or, if there is no interview process, not prior to extending a conditional offer).

124. HAW. REV. STAT. ANN. § 378-2.5(b).

125. *Id.*

126. *See* HAW. REV. STAT. ANN. § 378-2.5(b); MASS. ANN. LAWS ch. 151B, §§ 4(9) (LexisNexis 2018).

127. *See* MASS. ANN. LAWS ch. 151B, § 4(9 1/2).

128. *See id.* §§ 4(9), (9 1/2).

129. *See* MASS. ANN. LAWS ch. 151B, § 4(9) ("[I]n connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person."); *see also* HAW. REV. STAT. ANN. § 378-2.5(c).

130. *See* MASS. ANN. LAWS ch. 151B, §§ 4(9), (9 1/2). *Contra* HAW. REV. STAT. ANN. § 378-2.5(b).

131. *See* MASS. ANN. LAWS ch. 151B, §§ 4(9), (9 1/2) (indicating that it is unlawful only "[f]or an employer to request on its initial written application form criminal offender record information.").

offer.[132] Additionally, Oregon's law likely is just as vague as Massachusetts's in specifying when in the hiring process an employer may conduct a background check because, like Massachusetts's law, it does not specify a time during which employers may conduct checks.[133] However, the context implies that employers cannot conduct background checks before they conduct the initial interview.[134]

Additionally, some "ban the box" statutes contain standards that employers must apply to a criminal record to determine whether the employer may use it to exclude a person from the hiring pool.[135] In Hawaii, an employer may not consider a conviction when hiring an individual, even if it appears on the background check, unless it bears a "rational relationship" to the position for which the applicant is applying.[136] Additionally, the Hawaii Supreme Court has applied the "rational relationship" portion of the statute to several cases.[137]

Neither Massachusetts's law nor Oregon's law includes a "rational relationship" provision or any other applicable standard.[138] In fact, neither law has a standard for which a court could determine how employers may use the criminal record in the hiring process written into it.[139] While employers in Hawaii may only use convictions if they bear a rational relationship to the position's duties and responsibilities, employers in Massachusetts and Oregon may be able to use any accessible conviction to make their determination.[140] In fact, Massachusetts and Oregon likely meant to allow access to all information on applicants not expressly restricted by

132. *See* HAW. REV. STAT. ANN. § 378-2.5(b); OR. REV. STAT. § 659A.360 (2018); *see also* Ian K. Kullgren, *Oregon Senate Approves Amended 'Ban the Box' Bill, Aimed at Helping Ex-Convicts Get Jobs*, THE OREGONIAN (June 11, 2015), http://www.oregonlive.com/politics/index.ssf/2015/06/oregon_senate_approves_amended.html (stating that the Oregon Senate removed a clause from the original bill that required a conditional offer before an employer conducts a criminal background check).

133. *See* MASS. ANN. LAWS ch. 151B, § 4(9 1/2); OR. REV. STAT. § 659A.360.

134. *See* OR. REV. STAT. § 659A.360.

135. *See* HAW. REV. STAT. ANN. § 378-2.5(b) ("rational relationship"); *see also* PHILA., PA., CODE tit. 9, § 9-3504(2) (providing an example of a city ordinance that contains a rational relationship standard).

136. HAW. REV. STAT. ANN. § 378-2.5(b).

137. *See* Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479 (2015); Wright v. Home Depot U.S.A., 111 Haw. 401 (2006).

138. *See* HAW. REV. STAT. ANN. § 378-2.5(b); MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360.

139. *See* MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360. *Contra* PHILA., PA., CODE tit. 9, § 9-3504(2) (2018).

140. *See* HAW. REV. STAT. ANN. § 378-2.5(b); MASS. ANN. LAWS ch. 151B, § 4; OR. REV. STAT. § 659A.360.

the statute.[141] For example, the Oregon legislature removed the section from the proposed bill that would have required a conviction be "job-related."[142] Subsequently, Hawaii's statute is the only statute with case law that applies its standards.[143]

B. The Lessons of Wright *and* Shimose *for* Crawford v. T-Mobile US, Inc.

Outside of Hawaii's Supreme Court decisions in *Wright* and *Shimose*, little case law exists that applies "ban the box" laws.[144]

Crawford is similar to *Wright* and *Shimose* as each scrutinized the standards under which employers consider applicants' criminal background checks.[145] Under the Hawaii rational relationship standard, if the conviction and the position have no similarities, then there is no "rational relationship" and the background check cannot be used to discriminate against a potential employee.[146] In *Wright*, the position of department supervisor at a Home Depot had no similarities with possession of an illegal drug.[147] However, as established in *Shimose*, the conviction and the position can have similarities and even then a rational relationship may not be established.[148]

Philadelphia's rational relationship standard aligns with Hawaii's, while also being much more explicitly defined.[149] As with Hawaii's law, the conviction must bear some relationship to the position.[150] However,

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141. *See* MASS. ANN. LAWS ch. 151B, § 4 (lacking a standard with which to determine whether information may or may not be considered); OR. REV. STAT. § 659A.360 (lacking a standard with which to determine whether information may or may not be considered).

142. *See* H.B. 3025, 78th Leg. Assemb., Reg. Sess. (Or. 2015) ("[U]nless the conviction is job-related or is a conviction that legally bars the employment of the individual.").

143. *See* Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479 (2015); Wright v. Home Depot U.S.A., 111 Haw. 401 (2006).

144. *See Shimose*, 134 Haw. at 479; *Wright*, 111 Haw. at 401; s*ee also* Williamson v. Lowe's, No. 14-00025 SOM/RLP, 2015 U.S. Dist. LEXIS 13170 (D. Haw. Feb. 4, 2015) (providing an example of a district court applying the Hawaiian case law).

145. *See Shimose*, 134 Haw. at 479; *Wright*, 111 Haw. at 401; *see also* Crawford Complaint, *supra* note 1.

146. *See Wright*, 111 Haw. at 412.

147. *See id.* (finding no nexus and that no "rational relationship" existed).

148. *See Shimose*, 134 Haw. at 481-83 (finding a lack of a nexus for a "rational relationship" as plaintiff would be supervised in the hospital at all times); *id.* (stating that the plaintiff had a prior drug conviction and the employment he sought involved interacting with drugs); *see also* Williamson v. Lowe's, No. 14-00025 SOM/RLP, 2015 U.S. Dist. LEXIS 13170 (D. Haw. Feb. 4, 2015) (providing an additional example of a court applying the rational relationship standard).

149. PHILA., PA., CODE tit. 9, § 9-3504(2) (2018).

150. *See* HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); PHILA., PA., CODE tit.

Philadelphia's standard provides employers with much more guidance than Hawaii's when considering an applicant's convictions.[151] Philadelphia requires an individualized assessment of the record to determine whether the applicant must be excluded by business necessity because he or she represents and unacceptable risk to the employer.[152]

Crawford's criminal record, when including the arrests for theft, had some relation to the position, but likely not enough for T-Mobile to consider it under either Hawaii's or Philadelphia's rational relationship standards (assuming *arguendo* that the conviction can be considered under both standards).[153] Under the Hawaii standard, the charges of theft likely can be considered against the managerial position, be related to the position, and still not have a rational relationship with the position.[154] As in *Shimose*, where the drug conviction did not have a rational relationship with the position, Crawford's solitary charges of theft likely can be related to the managerial position and its responsibility for inventory.[155]

Under Philadelphia's standard, Crawford's charges may not represent enough of a risk to the business to be excluded under business necessity.[156] The nature of the offense is related to the job, and the particular duties associated with the job would make theft easier.[157] However, three years passed between the charges and the application for employment.[158] Crawford also gained no additional charges or convictions in that time

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9, § 9-3504(2).

151. HAW. REV. STAT. ANN. § 378-2, 2.5; PHILA., PA., CODE tit. 9, § 9-3504(2); *Shimose*, 134 Haw. at 484; *Wright*, 111 Haw. at 411-12.

152. PHILA., PA., CODE tit. 9, § 9-3504(2), (2)(a)-(f) ("Such assessment shall include: (a) The nature of the offense; (b) The time that has passed since the offense; (c) The applicant's employment history before and after the offense and any period of incarceration; (d) The particular duties of the job being sought; (e) Any character or employment references provided by the applicant; and (f) Any evidence of the applicant's rehabilitation since the conviction.").

153. *See* Crawford Complaint *supra* note 1, ¶¶ 13-15; *see also* PHILA., PA., CODE tit. 9, § 9-3504(2); HAW. REV. STAT. ANN. § 378-2, 2.5.

154. *See Shimose*, 134 Haw. at 481-83; *Wright*, 111 Haw. at 404, 412; Crawford Complaint, *supra* note 1, ¶¶ 13-15.

155. *See Shimose*, 134 Haw. at 481-83; Crawford Complaint, *supra* note 1, ¶¶ 13-15.

156. *See* PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint, *supra* note 1, ¶¶ 13-17 (stating that Crawford was charged, never convicted, accepted into a rehabilitation program meant to correct criminal behavior, and that the charge was "relatively minor").

157. *See* Crawford Complaint, *supra* note 1, ¶ 29 (stating that Crawford applied to be a Retail Associate Manager for the company).

158. *See* PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint, *supra* note 1, ¶¶ 13-17, 29 (stating that Crawford was charged in 2012 and applied for the position in question in 2016).

period.[159] Finally, the decision to admit Crawford into an ARD program is evidence of Crawford's rehabilitation since the charge.[160]

Moreover, under their respective statutes, employers in both Hawaii and Philadelphia were not allowed to consider arrests and charges that did not result in convictions when considering an applicant for employment.[161] While the Hawaii Supreme Court did not find this dispositive in the Hawaii cases, it likely will be in Crawford's case because the state did not convict her of the charges levied against her and she allegedly had no other convictions on her record.[162] Furthermore, all of the employers were required to present the applicants with conditional offers before conducting a criminal background check in the employment process.[163] This was not a deciding factor in *Shimose* and *Wright*, but it likely will be in Crawford's case because T-Mobile did not extend her a conditional offer when she applied for the position.[164] Each of these factors should play a role in deciding cases under the Philadelphia "ban the box" ordinance.[165]

C. The "Rational Relationship" Standard and the Crawford *Court's Application of Philadelphia's "Ban the Box" Law*

Philadelphia's "ban the box" ordinance likely supports an outcome favorable to the plaintiff.[166] Crawford had no convictions on her record,[167] and under Philadelphia's "ban the box" ordinance, T-Mobile could not consider arrests that did not result in convictions.[168] Additionally, the

159. *See* PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint ¶¶ 13-17, 24, 141 (stating that Crawford had no convictions on her record and only the arrest record relating to the theft).

160. *See* PHILA., PA., CODE tit. 9, § 9-3504(2); Crawford Complaint, *supra* note 1, ¶¶ 13-17, 29, 141 (claiming that Crawford lacked any convictions on her record along with the approximately three year period between the entry into the program and the application).

161. HAW. REV. STAT. ANN. § 378-2, 2.5 (LexisNexis 2017); PHILA., PA., CODE tit. 9, § 9-3503(1).

162. *See* Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479 (2015); Wright v. Home Depot U.S.A., 111 Haw. 401 (2006); Crawford Complaint, *supra* note 1, ¶¶ 13-17 (stating that the ARD program is not a formal conviction).

163. HAW. REV. STAT. ANN. § 378-2.5; PHILA., PA., CODE tit. 9, § 9-3504(1)(b).

164. *See Shimose*, 134 Haw. at 481-83; *Wright*, 111 Haw. at 401; Crawford Complaint, *supra* note 1, ¶¶ 13-17.

165. *See* PHILA., PA., CODE tit. 9, § 9-3504.

166. *See also* Crawford Complaint ¶¶ 145-57 (laying out the "ban the box" count against T-Mobile). *See generally* PHILA., PA., CODE tit. 9, § 9-3500 (laying out Philadelphia's laws as to the discrimination of individuals with criminal records);

167. Crawford Complaint, *supra* note 1, ¶¶ 13-17 (stating that Crawford only had arrests and charges appear on her background check).

168. PHILA., PA., CODE tit. 9, § 9-3503(1); Crawford Complaint, *supra* note 1, ¶¶ ¶¶

ordinance requires employers to present the applicant with a conditional offer of employment before requesting and conducting a criminal background check.[169] T-Mobile conducted a background check before the second interview that they offered to Crawford, and did not extend a conditional offer.[170]

Assuming *arguendo* that the Philadelphia ordinance did not restrict consideration of arrests and charges, T-Mobile would still be required to prove that a rational relationship exists between the position of Retail Associate Manager and the charges to be able to reject Crawford.[171] T-Mobile likely could determine that Crawford's presence would present an unacceptable risk because her previous arrests included theft.[172] However, business necessity likely cannot compel exclusion.[173] The nature of theft is a factor an employer would want to consider with an applicant, as the particular duties of the job would give the applicant easy access to inventory.[174] However, about four years passed between Crawford's conviction and her application, and she participated in an ARD program.[175] While the other factors in the business necessity test are not answered by the complaint, the balance of the test likely does not prove business necessity on the part of T-Mobile.[176]

However, in applying the Hawaii Supreme Court's rational relationship standard, a single instance of arrest for theft would likely not be enough to exclude Crawford.[177] Rather, that single arrest may be an overbroad reading of the Philadelphia ordinance, and "[a]n overly broad reading . . . would eviscerate the protections afforded to persons with conviction

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13-17.

169. PHILA., PA., CODE tit. 9, §§ 9-3504(1), (1)(b).

170. Crawford Complaint, *supra* note 1, ¶¶ 22-23, 35-37, 42.

171. PHILA., PA., CODE tit. 9, §§ 9-3504(1), (1)(b); *see also* Crawford Complaint, *supra* note 1, ¶¶ 13-17 (the plaintiff was charged with multiple counts of theft of services and of property); *id.* ¶¶ 29-32.

172. Crawford Complaint, *supra* note 1, ¶ 13 (showing that, depending on the access to inventory that T-Mobile gives a Retail Associate Manager, T-Mobile likely could determine that Crawford's presence would be risky); *see also* PHILA., PA., CODE tit. 9, § 9-3504(2).

173. PHILA., PA., CODE tit. 9, §§ 9-3504(2) ("[T]he employer may reasonably conclude . . . that exclusion of the applicant is compelled by business necessity" after considering the inexhaustible list of factors).

174. *Id.* §§ 9-3504(2)(a), (d).

175. *Id.* §§ 9-3504(2)(b), (f); *see* Crawford Complaint, *supra* note 1, ¶¶ 13, 14, 29.

176. PHILA., PA., CODE tit. 9, §§ 9-3504(2)(a)-(f). *See generally* Crawford Complaint, *supra* note 1 (claiming that there was no reason other than the arrest record to not hire Crawford).

177. *See* Shimose v. Hawai'i Health Sys. Corp, 134 Haw. 479, 486-87 (2015).

records . . . ."[178] In both scenarios, the ordinance likely leans in Crawford's favor, and T-Mobile likely violated the Philadelphia "ban the box" ordinance.[179]

IV. A "RATIONAL RELATIONSHIP" STANDARD SHOULD BE INCORPORATED BY COURTS AND STATES INTO "BAN THE BOX" JURISPRUDENCE

As more cities and states adopt "ban the box" laws, more litigation will inevitably arise under these laws.[180] Courts should adopt a standard that gives courts plenty of leeway to interpret how broadly or narrowly they will interpret the phrasing of the laws. In deciding those standards, it will be courts that will decide whether the spirit and purposes of the laws will be followed.[181] To prevent this, states should take the reigns and give their courts the tools they need to more easily and appropriately apply "ban the box" legislation.[182]

Without the guidance of state law, courts should mimic the Hawaiian Supreme Court's application of the rational relationship standard when applying their city and state "ban the box" laws, whether or not "rational relationship" language is incorporated in the statute.[183] This does not suggest that courts outside of Hawaii implement Hawaii's "ban the box" law. Rather, they should take guidance from the way that the Hawaiian courts have applied Hawaii's law and interpret their states' statutes much more narrowly than they are written. Hawaii's standard provides ex-offenders with a better opportunity for gainful employment while also allowing employers the ability to exclude those with convictions that could be harmful to the employer if the ex-offender were to recidivate.[184] Providing employers a similar standard to apply across state lines, instead of a variety or a lack of standards, will likely help employers servicing multiple states know what convictions should or should not be considered on a standard job application. This consistency, and the resulting clarity of what convictions an employer can consider, would likely aid employers in balancing "ban the box" laws and negligent hiring standards in their jurisdictions.[185]

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178. *Id.* at 486.

179. *See* PHILA., PA., CODE tit. 9, § 9-3500; Crawford Complaint, *supra* note 1.

180. *See* Crawford Complaint, *supra* note 1; *see also* Complaint, Zindora Crawford v. Verizon Pennsylvania, Inc. (E.D. Pa. Jun. 2, 2014) (No. 2:14-cv-03091).

181. *See, e.g.,* Shimose v. Hawai'i Health Sys. Corp., 134 Haw. 479, 485-86 (2015).

182. *See, e.g.,* McAvoy*, supra* note 8; Smith, *supra* note 17.

183. *See Shimose*, 134 Haw. 479 (2015); Wright v. Home Depot U.S.A., 111 Haw. 401 (2006).

184. *See Shimose*, 134 Haw. at 484 ("Negative attitudes toward politically unpopular ex-offenders do not, standing alone, justify adverse employment decisions.").

185. *See generally* Garcia, *supra* note 11 (detailing "ban the box" laws and employer

Applying this standard to a statute or ordinance that does not have this or similar language will likely be much more difficult than to one that has similar language to Hawaii's statute.[186] If states do not incorporate a standard into their statutes, courts will likely have to develop a common law standard of review for the application of "ban the box" laws.[187] While this is possible, it would be much more difficult to incorporate than a standard incorporated into a statue.[188]

Alternatively, states looking to adopt a new "ban the box" statute, or to improve an existing statute, should add language incorporating a rational relationship standard.[189] However, states should define their rational relationship standard more explicitly than Hawaii did.[190] Philadelphia's statute contains a model for a defined rational relationship standard that would likely be easier for employers to implement.[191] Moreover, it would likely better help courts determine what convictions are rationally related to respective employment opportunities.[192] This language, that employers must "reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers, and that exclusion of the applicant is compelled by business necessity," would be an apt addition to existing and yet conceived "ban the box" laws.[193] Between these two recommendations, "ban the box" laws will likely become more effective and serve their actual purpose: providing ex-offenders with a second chance at obtaining gainful employment and leading a better life.

V. CONCLUSION

Courts will increasingly require standards to apply the "ban the box" laws as litigation arises across the country.[194] While the federal government has

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liability for negligent hiring).

186. *See, e.g.,* MASS. ANN. LAWS ch. 6, § 171A (LexisNexis 2018); OR. REV. STAT. § 659A.360 (2018).

187. *See, e.g.,* Romer v. Evans, 517 U.S. 620, 631-33 (1964) (providing an example of a standard of review created by the Supreme Court for applying specific types of laws).

188. *See, e.g.,* PHILA., PA., CODE tit. 9, § 9-3504 (2018) (contains a rational relationship standard).

189. *See, e.g.*, HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); PHILA., PA., CODE tit. 9, § 9-3504; *see also* Stacy A. Hickox, *A Call to Reform State Restrictions on Hiring of Ex-Offenders*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 121, 173-76 (2016) (recommending that states consider a standard outside of "ban the box" laws that requires considering the relationship between the crime committed and the position sought).

190. *See* HAW. REV. STAT. ANN. § 378-2.5.

191. PHILA., PA., CODE tit. 9, § 9-3504.

192. *Id.*

193. *Id.*

194. *See* Shimose v. Hawai'i Sys. Corp., 134 Haw. 479, 484 (2015); Wright v. Home

attempted to address ex-offender employment, more and more states and cities have adopted "ban the box" laws to address the problem separately.[195] These laws are varied in their approach to the problem.[196] They differ primarily in what employers they cover, what parts of a criminal record can be considered, when in the hiring process an employer can consider criminal records, and what, if any, standard to apply to the usable criminal record.[197] Only Hawaii's rational relationship standard has been adequately developed.[198] Ex-offenders likely would be given a better chance to obtain employment and reintegrate back into society if courts were to adopt Hawaii's standard.[199]

Depot U.S.A., 111 Haw. 401, 411-12 (2006).

195. *See, e.g.*, CONSIDERATION OF ARREST AND CONVICTION RECORDS, *supra* note 29, at 8-9; *see also* OR. REV. STAT. § 659A.360 (2018).

196. *See* HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2017); MASS. ANN. LAWS ch. 6, § 171A (LexisNexis 2018); OR. REV. STAT. § 659A.360.

197. Garcia, *supra* note 11, at 927-28.

198. *See Shimose*, 134 Haw. at 479; *Wright*, 111 Haw. at 411-12.

199. *See Shimose*, 134 Haw. at 479; *Wright*, 111 Haw. at 411-12.

THE SUPREME COURT AND THE FEDERAL CIRCUIT TURN PATENT INFRINGEMENT VENUE JURISPRUDENCE UPSIDE DOWN

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I. INTRODUCTION

Justice Thomas' textual interpretation of the patent venue statute in *TC Heartland LLC v. Kraft Foods Group Brands LLC,*[1] set the stage for a stark reversal in patent venue jurisprudence, which was then solidified by the federal circuit decision *In re Cray*, *Inc*.[2] The Supreme Court ruled that 28 U.S.C. section 1391(c),[3] the general venue statute, does not modify the meaning of 28 U.S.C. section 1400(b), the patent venue statute.[4]

The Supreme Court's decision in *TC Heartland* reversed twenty-seven years of patent venue jurisprudence and revived an interpretation that patent infringement venue is governed solely by a separate venue provision in 28 U.S.C. section 1400(b).[5] Moreover, the *TC Heartland* and *In re Cray* decisions significantly restricted where a patent holder can file an infringement action against a defendant who is allegedly infringing upon a patent holder's intellectual property.[6] The *TC Heartland* decision ultimately left one question unanswered that the Federal Circuit addressed in *In re Cray*: what is the meaning of a "regular and established place of business" under section 1400(b)?[7] In September 2017, the Federal Circuit enacted a three-part test that has solidified the Supreme Court's efforts to restrict where

1. TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 (2017).

2. *In re* Cray Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017).

3. 28 U.S.C. § 1391(c) (2012) ("Residency. For all venue purposes . . . an entity . . . whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question . . . .").

4. *TC Heartland*, 137 S. Ct. at 1517.

5. 28 U.S.C. § 1400(b) ("Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.").

6. *See* Robert G. Bone, Comment, *Forum Shopping and Patent Law - A Comment on* TC Heartland, 96 TEX. L. REV. 141, 141 (2017) (stating that the *TC Heartland* decision has restricted where patent holders can file infringement actions).

7. 28 U.S.C. § 1400(b).

patent infringement actions can be filed.[8]

This Comment will first examine the patent infringement venue jurisprudence leading up to the Supreme Court and Federal Circuit's 2017 decisions and the consequences of these decisions. Next, this Comment will argue that the courts have created an over-restrictive system governing where patent infringement actions may be filed which will negatively affect wide swaths of businesses. The Supreme Court and Federal Circuit have created a test that cannot be easily applied to businesses in the twenty-first century who operate primarily on the Internet or through complex partnership agreements.

This Comment recommends that the United States ("U.S.") Congress enact new legislation that balances the interests of both patent holders and alleged infringers to easily assert their rights in court while also helping to curtail the pervasiveness of patent trolling. Finally, this Comment concludes that without changes to the current law governing patent infringement venue, forum shopping will continue and small business owners who depend on patent protection will be negatively impacted and may ultimately be unable to access the court system.

II. A HISTORICAL GUIDE TO PATENT INFRINGEMENT VENUE JURISPRUDENCE

A patent is an exclusive right granted by the U.S. government to an inventor to exclude others from making, using, offering to sell, selling any patented invention, or importing into the U.S. any patented invention throughout the term of the patent.[9] A patent holder may sue anyone that violates the patent holder's rights by infringing upon the patent holder's exclusive right to exclude others from using the patented invention.[10] Since the late 19th century, patent infringement venue has been treated separately from general venue that governs other civil actions.[11]

In 1887, the venue for patent infringement actions was only appropriate

8. *In re* Cray Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017) (introducing a test to determine residency in infringement actions under 28 U.S.C. § 1400(b)).

9. 35 U.S.C. § 271(a) (2012) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.").

10. *Id.*; *see also Frequently Asked Questions: Patents Basics*, WORLD INTELL. PROP. ASS'N, (last visited Apr. 22, 2018), http://www.wipo.int/patents/en/faq_patents.html ("[P]atent protection means that the invention cannot be commercially made, used, distributed, imported, or sold by others without the patent owner's consent.").

11. *See* Act of Mar. 3, 1897, ch. 395, 29 Stat. 687, 695.

where the defendant was an inhabitant.[12] Congress enacted this change in law to curtail patent infringement actions filed in inconvenient locations merely because service was provided in the district.[13]

In 1897, Congress passed the antecedent to the modern-day patent venue statute which provided that patent infringement actions could only be brought "in the district where the defendant is an inhabitant, or in any district where the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business."[14] The Supreme Court in *Stonite Products Co. v. Melvin Lloyd Co.*,[15] ruled that no other statute governed patent infringement actions.[16] This case created the foundation for the U.S. courts to treat patent infringement venue differently than all other civil action venue in the future.

A. Defining Corporate Residency

Congressional recodifications of the venue statutes have created confusion in patent infringement venue jurisprudence. In 1948, the patent venue statute was re-codified to its present-day language as 28 U.S.C. section 1400(b): "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."[17] This re-codification created controversy between the historical precedent of restrictive patent venue and the more liberal approach by the newly codified conventional venue statute.[18]

In 1957, the Supreme Court examined the patent venue and general venue statutes to analyze the meaning of the word "resides."[19] The Court in *Fourco Glass Co. v. Transmirra Products Corp.*[20] ruled that "resides" only applied

12. *See* Richard C. Wydick, *Venue in Actions for Patent Infringement*, 25 STAN. L. REV. 551, 553 (1973).

13. *Id.*

14. Ch. 395, 29 Stat. at 695; *see also* Benjamin J. Christoff, TC Heartland*, the VENUE Act, and the Direction of Patent Law*, ABA: INTELL. PROP. LITIG. (Feb. 7, 2017), https://www.americanbar.org/groups/litigation/committees/intellectual-property/articles/2017/tc-heartland-venue-act-direction-patent-law.html (stating that the Judiciary Act of 1911 reenacted the 1897 Act).

15. Stonite Prods.' Co. v. Melvin Lloyd Co., 315 U.S. 561, 563 (1942) (holding that the patent venue statute was not supplemented by the general venue provisions).

16. *Id.*

17. 28 U.S.C. § 1400(b) (Supp. || 1949).

18. *Id.* § 1391(c); *see also* Wydick, *supra* note 12, at 558 (stating that the 1948 recodification greatly expanded the forums available to the plaintiff in patent infringement actions).

19. *See* Christoff, *supra* note 14.

20. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957).

to the state in which the defendant was incorporated.[21] This ruling significantly limited where patent infringement actions may be brought under 28 U.S.C. section 1391(c), which allows civil actions to be filed "in any judicial district which such defendant is subject to the court's personal jurisdiction with respect to the action in question . . . ."[22] The Court rejected the argument that section 1391(c) and section 1400(b) should be read together to determine appropriateness of patent infringement venue and reiterated that section 1400(b) is the sole provision controlling patent infringement venue.[23] The Court ultimately determined that the meaning of "resides" under section 1400(b) had a more restrictive definition than it did under section 1391(c).[24]

B. Federal Circuit Interpretation Expands Patent Infringement Venue

Congress again amended the statutory language of the venue statutes in 1988.[25] The language in 28 U.S.C. section 1391 was amended to include "[f]or the purposes of venue under this chapter."[26] The location of 28 U.S.C. section 1400(b) is in the same chapter as § 1391(c).[27] In *VE Holding Corp. v. Johnson Gas Appliance Co.,*[28] the patent holder challenged whether this phrase was meant to modify the meaning of corporate residency under section 1400(b).[29] The Federal Circuit held that the addition of this provision altered the meaning of the statute and, from now on, venue for patent infringement actions would be supplemented by the language in section 1391(c).[30] This ruling expanded appropriate patent infringement venue to

21. *Id.* at 226 (1957) (restricting the venues appropriate for patent infringement actions to the state of incorporation under the residence clause of 28 U.S.C. 1400(b)).

22. 28 U.S.C. § 1391(c) (2012).

23. *See Fourco*, 353 U.S. at 229 (holding that 28 U.S.C. § 1391(c) cannot be read to expand patent infringement venue under 28 U.S.C. §1400(b)).

24. *See* Wydick, *supra* note 12, at 559 (stating that "resides" under 28 U.S.C. § 1400(b) only included the state of incorporation of the business).

25. *See* Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1013, 102 Stat. 4642, 4669 (1988).

26. *Id.*

27. *See* 28 U.S.C. § 1400(b) (2012); *see also* 28 U.S.C. § 1391(c) (1988).

28. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1575 (Fed. Cir. 1990).

29. *Id.* at 1576, 1578 (examining whether the language "under this chapter" in section 1391(c) modified the residency definition in section 1400(b) which is located in the same chapter but has historically been treated separately when determining appropriate patent infringement venue).

30. *Id.* at 1578 (holding that the addition of "For the purposes of venue under this chapter" language in section 1391(c) expanded the scope of patent infringement jurisdiction because section 1400(b) is in the same chapter of the United States Code).

anywhere the defendant is subject to personal jurisdiction."[31]

C. 2011 Amendment to 28 U.S.C. Section 1391(c) Sets the Stage for TC Heartland

In 2011, the phrase "for purposes of venue under this chapter" in 28 U.S.C. section 1391(c) was changed to "for all venue purposes."[32] The Court again had to determine whether this phrase modified the meaning and application for patent infringement venue.[33] This amendment to the statute would ultimately form the basis of the Court's decision to narrow the scope of patent infringement jurisdiction in *TC Heartland LLC*.[34]

Kraft Foods Inc. filed a patent infringement action against TC Heartland, an Indiana-based corporation that does not have any places of business in Delaware.[35] However, TC Heartland's products were shipped into the state.[36] TC Heartland filed a motion to transfer venue to the Southern District of Indiana, but the Delaware District Court denied the motion citing *VE Holding Corp*.[37] TC Heartland unsuccessfully argued to the district court that venue was improper and that the *Fourco Glass Co.* case should be the exclusive venue provision governing patent infringement actions.[38] Shortly thereafter, the Federal Circuit denied TC Heartland's petition for a writ of mandamus to re-examine the district court's ruling that the definition of residency in 28 U.S.C. section 1391(c) applied to defendant corporations in a patent infringement action.[39] TC Heartland appealed to the Supreme Court

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31. § 1013, 102 Stat. at 4669 (1988).

32. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, sec. 202, § 1391, 125 Stat. 758, 763 (2011) (eliminating the language "under this chapter" in section 1391(c), which was the foundation of the court's opinion in *VE Holding Corp.* where the court held that section 1391(c) expanded the scope of patent infringement venue).

33. *See* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 (2017).

34. *Id.* (considering that the amendments were made to section 1391 and not 1400(b), which was the subject of the ruling in *Fourco Glass Co. v. Transmirra Products Co.*).

35. *Id.* (stating that TC Heartland does not operate any stores in Delaware).

36. *Id.*

37. *Id.*; *see also* Kraft Foods Grp. Brands LLC v. TC Heartland LLC, No. 14-28-LPS, 2015 U.S. Dist. LEXIS 127972, at *4-5 (Sept. 24, 2015) (arguing that venue was proper under 28 U.S.C. § 1391(c) because *VE Holding Corp.* held that section 1391(c) augmented the narrow scope of patent infringement jurisdiction under section 1400(b)).

38. Christoff, *supra* note 14.

39. *See In re* TC Heartland LLC, 821 F.3d 1338, 1344-45 (Fed. Cir.) (holding that TC Heartland met sufficient minimum contacts for jurisdiction and that the court's exercise of jurisdiction was reasonable), *cert. granted*, 137 S. Ct. 614 (2016).

who ultimately accepted the case.[40]

The Court unanimously overturned the ruling in *VE Holding Corp.*, which determined appropriate patent infringement action venue since 1990.[41] The Court held that *Fourco Glass Co.* still applied because the 2011 change to the patent statute showed that Congress intended to change the meaning of 28 U.S.C. section 1391(c).[42] The Court noted that Congress removed "under this chapter" from section 1391(c) which formed the basis of the Federal Circuit's decision in *VE Holding Corp*.[43] Second, the Court pointed out that the 2011 version of section 1391 contains the phrase "as otherwise provided by law."[44] When the Federal Circuit decided *VE Holding Corp.*, this provision was not in the statute.[45] Finally, the 2011 amendment removed the phrase "under this chapter" from section 1391(c) which formed the basis for the *VE Holding Corp.* opinion.[46] *TC Heartland* marks the return to the previous theory prior to the holding in *VE Holding Corp.*, that 28 U.S.C. section 1400(b) is the sole provision directing patent infringement venue for domestic entities.[47]

D. In re Cray Inc. *Solidifies* TC Heartland

In the wake of *TC Heartland*, the question of what a "regular and established place of business" was under section 1400(b) remained unclear.[48] In 2017, Raytheon, a defense contractor, filed a patent infringement action

40. *See id.*

41. *TC Heartland LLC*, 137 S. Ct. at 1520 (2017).

42. *See Patent Venue Statute is Not Modified by General Venue Statute*, AM. INTELL. PROP. L. ASS'N (May 22, 2017), https://www.aipla.org/resources2/reports/2017AIPLADirect/Pages/170522Direct.aspx.

43. *Id.* (noting that both section 1391(c) and section 1400(b) are in the same chapter, so that by removing "under this chapter" Congress intended to effect a change of law by eliminating the provision that the Federal Circuit relied upon to expand patent infringement venue through application of the personal jurisdiction standard in section 1391(c)).

44. *Id.* (noting that the phrase "unless otherwise provided by law" in 28 U.S.C. § 1391(c) (2012) "explicitly acknowledges that there are other venue statutes with other definitions of 'resides,' a point implicitly recognized in *Fourco*.").

45. *TC Heartland LLC*, 137 S. Ct. at 1521.

46. *See id.* ("*VE Holding* relied heavily—indeed, almost exclusively—on Congress' decision in 1988 to replace 'for venue purposes' with '[f]or purposes of venue *under this chapter*' (emphasis added) in § 1391(c)." (citing VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d. 1574, 1578-80 (Fed. Cir. 1990))).

47. *See id.* at 1517.

48. 28 U.S.C. § 1400(b) (2012); *see* Bone, *supra* note 6, at 159 (stating that "[a]t the time that *TC Heartland* was decided, there was considerable uncertainty about what qualifies as a 'regular and established place of business.'").

against Cray Inc. in the Eastern District of Texas.[49] Cray Inc. is incorporated in Washington state and does not have any property interests in the Eastern District of Texas.[50] However, two Cray Inc. employees were allowed to work remotely from their homes in the Eastern District of Texas.[51] Reimbursement for travel expenses and cell phone usage from the properties was provided to these employees, and internal company documents included phone numbers for the employees with Eastern District of Texas area codes that were not owned by the corporation.[52]

The Federal Circuit ruled that a "regular and established place of business" must satisfy three factors: "(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant."[53] Applying this test to the aforementioned facts, the Federal Circuit determined that while the employees were conducting business in the Eastern District of Texas, the home offices were not the places of the defendant.[54] Cray Inc. did not own or lease the properties, which the court determined did not permit venue within the district.[55]

E. Forum Shopping Runs Rampant in the Eastern District of Texas

Following the *VE Holding* decision,[56] plaintiffs filing patent infringement actions were incentivized to bring their actions in courts that would yield favorable results.[57] The rules established exclusively in the Eastern District of Texas weigh heavily in the plaintiff's favor.[58] The district has many "pro-

49. *In re* Cray Inc., 871 F.3d 1355, 1357 (Fed. Cir. 2017).

50. *Id.* at 1357 (noting that the employees owned and controlled their homes and not Raytheon).

51. *See id.* at 1357-58; *see also id.* 1358-61 (citing *In re* Cordis Corp., 769 F.2d 733, 736-37 (Fed. Cir. 1985)) (exemplifying that, under *In re Cordis Corp.,* contacts would have been sufficient to satisfy venue under 28 U.S.C. § 1391(c) prior to the *TC Heartland* decision).

52. *Id.* at 1357-58.

53. *Id.* at 1360.

54. *Id.* at 1365-66.

55. *Id.*

56. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1583-84 (Fed. Cir. 1990) (stating that section 1391(c) expanded upon section 1400(b) which enabled infringement actions to be filed in any jurisdiction in which the defendant was subject to personal jurisdiction).

57. Bone, *supra* note 6, at 145 ("With this many venue options available, patentee-plaintiffs had strong incentives to shop for a court that offered the most favorable procedures.").

58. *See id.* at 146-147; *see also* Loren Steffy, *Patently Unfair*, TEX. MONTHLY, https://www.texasmonthly.com/politics/patently-unfair/ (last visited Apr. 25, 2018) (stating that the Eastern District is popular with plaintiff's lawyers because the small federal criminal docket allows cases to get to trial rapidly).

patentee procedures, including a restrictive approach to granting summary judgment (making it harder for defendants to exit lawsuits) and a preference for broad and expedited discovery (increasing defendant's costs relative to plaintiff's)."[59] These provisions make settlements more likely which lead to "patent trolling" or non-practicing entities who file patent infringement lawsuits exclusively to obtain settlements from wealthy potential patent infringers.[60] The patent community has viewed the Supreme Court's *TC Heartland* decision as a judicial activism attempt to mitigate the issue of patent trolling.[61]

F. District Courts' First Attempts at Patent Infringement Venue Post TC Heartland *and* In re Cray, Inc.

Prior to the *TC Heartland* case, Symbology initiated a patent infringement action against Lego Systems in Virginia.[62] Lego Systems is a Danish company incorporated in Delaware and headquartered in Connecticut.[63] One week after the *In re Cray* decision, the District Court for the Eastern District of Virginia ruled that Lego Systems did not have a "regular and established place of business" within the district pursuant to the three-part *In re Cray* test.[64]

Lego Systems has no stores and operates no facilities within Virginia.[65] However, Lego Brand Retail, Inc., a separately incorporated subsidiary of Lego Systems, Inc., operates three stores in Virginia that sell products designed and manufactured by Lego Systems, Inc.[66] Even though Lego Brand Retail, Inc. is a subsidiary company that maintains "separate finances, assets, officers, and records,"[67] the court noted that:

> [s]o long as a formal separation of the entities is preserved, the courts ordinarily will not treat the place of business of one corporation as the place of business of the other. On the other hand, if the corporations disregard their separateness and act as a single enterprise, they may be

59. Bone, *supra* note 6, at 146.

60. *Id.* at 147.

61. *Id.* at 148 ("[I]t is not much of an exaggeration to say that the patent community viewed *TC Heartland* as a patent reform case aimed at the patent troll problem.").

62. Symbology Innovations, LLC v. Lego Sys., Inc., 282 F. Supp. 3d 916, 927, 935 (E.D. Va. 2017) (stating that venue was appropriate under *VE Holding Corp.* prior to the *TC Heartland* decision).

63. *Id.* at 922.

64. *Id.* at 929-36.

65. *Id.* at 923.

66. *Id.*

67. *Id.* at 932.

treated as one for purposes of venue.[68]

The court held that venue in the Eastern District of Virginia was not appropriate because Lego Systems, Inc. did not have a "regular and established place of business in the district because the court could not attribute the subsidiary corporation properties to Lego Systems, Inc."[69] The court noted that the second prong of the test was not established: the retail locations of Lego Brand Retail, Inc. were not legally recognizable as places of Lego Systems, Inc. for purposes of the litigation.[70] The court did not dispute that the retail locations were regular and established places of business, nor did the court refute that the locations were in the judicial district.[71]

In the Eastern District of Texas, cases with similar facts have not been ruled favor of the plaintiff.[72] Plaintiff Intellectual Ventures filed a patent infringement action in the Eastern District of Texas against FedEx Corporation.[73] For example, FedEx Corp., incorporated in Delaware, is headquartered in Tennessee and provides "general financial, legal, and business guidance . . . in the logistics, freight, and package transportation, and print and copying fields" to its subsidiary companies: FedEx Office, Express, Ground, Supply Chain, Freight, and Custom Critical.[74] FedEx Office is incorporated and headquartered in Texas.[75] No other subsidiary of FedEx Corp. is headquartered or incorporated within the state of Texas.[76] Because all other FedEx corporations aside from FedEx Office are incorporated outside of the state of Texas, venue is only proper in the Eastern District of Texas if each corporation has a "regular and established place of business" within the state.[77]

Intellectual Ventures argued that venue is proper in the Eastern District of Texas because the subsidiary corporations of FedEx Corp. do business from fixed physical locations within the district.[78] The defendant corporations

68. *Id.* (citing CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3823 (4th ed. 2017)).

69. *Id.* at 933.

70. *Id.*

71. *See id.* at 931-33.

72. *See* Intellectual Ventures II LLC v. FedEx Corp., No. 2:16-CV-00980-JRG, 2017 WL 5630023, at *6 (E.D. Tex. Nov. 22, 2017) (finding that venue was proper in the filed district).

73. *Id.* at *1.

74. *Id.* at *1-2.

75. *Id.* at *1.

76. *Id.* at *1-2.

77. *Id.* at *6.

78. *Id.* at *6 ("Plaintiff's Complaint alleges that FedEx Express, FedEx Custom

made no showing that the FedEx companies did not operate out of physical locations within the district.[79]

Because FedEx Corp. subsidiary corporations operated in cooperation with other branches of the FedEx company at locations within Texas, the district court ruled that venue was proper in the district due to FedEx's "regular and established place of business" within the state.[80]

III. 28 U.S.C. SECTION 1400(b) IS NOT EASILY APPLIED AND HARMS BUSINESSES

Since the Federal Circuit's *In re Cray* decision, district courts have struggled to uniformly apply the three-part test to determine whether a person or entity has a "regular and established place of business."[81] One major point of discrepancy is whether a corporation with no property or agents in a state may have a "regular and established place of business" in the district if a partner corporation operates a place of business within the district.[82]

A. District Courts Send Conflicting Signals About Regular and Established Places of Business

District courts' disparate interpretation of similar fact patterns injects uncertainty into patent infringement venue jurisprudence.[83] The *In re Cray, Inc.* three-part test does not resolve the discrepancies between the *Intellectual Ventures II, LLC*[84] and *Symbology Innovations, LLC*[85] district court decisions.[86] These seemingly similar fact patterns have yielded

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Critical, FedEx Ground, FedEx Freight, and FedEx Supply Chain carry out business from 'a physical, geographical location' in this district." (quoting *In re* Cray, Inc., 871 F.3d 1355, 1362-63 (Fed. Cir. 2017))).

79. *Id.* at *7.

80. *Id.*

81. *See In re* Cray, Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017).

82. *See Intellectual Ventures II LLC*, 2017 WL 5630023, at *1-2 (operating a subsidiary that sells parent company's goods); *see also* Symbology Innovations, LLC v. Lego Sys., Inc., 282 F. Supp. 3d 916, 927 (E.D. Va. 2017) (operating a subsidiary that offers services performed by another subsidiary of the parent company).

83. *See* Gene Quinn, *Industry Reaction to SCOTUS Patent Venue Decision in* TC Heartland v. Kraft Food Group, IP WATCHDOG (May 22, 2017), http://www.ipwatchdog.com/2017/05/22/industry-reaction-scotus-patent-venue-decision-tc-heartland-v-kraft-food-group/id=83518/ (giving Paul Morinville's reaction to *TC Heartland v. Kraft*).

84. *Intellectual Ventures II LLC*, 2017 WL 5630023, at *1-2.

85. *Symbology Innovations, LLC*, 282 F. Supp. 3d at 916.

86. *See In re Cray*, 871 F.3d at 1360 ("(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant."); *see also Symbology Innovations, LLC*, 282 F. Supp. 3d at 916;

conflicting results in different district courts.[87] Both companies were incorporated in a state outside of the judicial district where the infringement action was filed, but separately incorporated subsidiaries operated businesses within the state.[88] In both cases, the subsidiaries satisfy the first prong of the test requiring a physical location within the district.[89] Each company operates a subsidiary, like Lego Brand Retail, Inc. and FedEx Office, which have a physical location in the states of Virginia and Texas, respectively.[90]

Next, the place must be regular and established.[91] Lego Brand Retail, Inc. operates permanent stores that sell Lego-designed and manufactured goods.[92] Similarly, FedEx Office is headquartered in Texas and other branches of the company operate locations within the state.[93] In both cases, the subsidiary corporations of each defendant were operating at a permanent fixed location within the state, satisfying part three of the *In re Cray* test.[94] However, the district court in *Symbology Innovations, LLC* noted that revenue derived within a given jurisdiction holds no weight in a section 1400(b) venue analysis.[95] The *FedEx* court did not consider this in their analysis.[96]

Finally, in both instances, part three of the *In re Cray* test was the determinative factor.[97] The *Symbology Innovations* court determined that Lego Systems, Inc. did not operate the stores in Virginia even though their subsidiary owned and operated the stores to sell goods produced by the parent company.[98] The court noted that the detached financial organization

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Intellectual Ventures II LLC, 2017 WL 5630023, at *1-2.

87. *See Symbology Innovations, LLC*, 282 F. Supp. 3d at 916; *Intellectual Ventures II LLC*, 2017 WL 5630023, at *1-2.

88. *See Symbology Innovations, LLC*, 282 F. Supp. 3d at 922 ("Lego Systems is a Danish company incorporated in Delaware and headquartered in Enfield, Connecticut."); *Intellectual Ventures II LLC*, 2017 WL 5630023, at *1-2.

89. *See In re Cray*, 871 F.3d at 1360.

90. *See Symbology Innovations, LLC*, 282 F. Supp. 3d at 922-23; *Intellectual Ventures II LLC*, 2017 WL 5630023, at *1-2.

91. *See In re Cray,* 871 F.3d at 1360.

92. *Symbology Innovations, LLC*, 282 F. Supp. 3d at 922-23.

93. *See Intellectual Ventures II LLC*, 2017 WL 5630023, at *1, *7.

94. *See In re Cray,* 871 F.3d at 1360 (explaining that the physical place of business must be the place of the defendant).

95. *Symbology Innovations, LLC*, 282 F. Supp. 3d at 931 ("Revenue derived from the forum has no bearing on whether § 1400(b)'s requirements are met." (citing *In re* Cray, Inc., 871 F.3d 1357, 1360-61)).

96. *See Intellectual Ventures II LLC*, 2017 WL 5630023, at *2.

97. *See In re Cray,* 871 F.3d at 1360 (the defendant's place); *Symbology Innovations, LLC*, 282 F. Supp. 3d at 923; *Intellectual Ventures II LLC*, 2017 WL 5630023, at *2.

98. *See Symbology Innovations, LLC*, 282 F. Supp. 3d at 923.

of the subsidiary prevented the court from attributing the properties to Lego Systems, Inc.[99] However, in *Intellectual Ventures*, FedEx Corp. and its subsidiary corporations were also financially separate.[100] Services provided by FedEx were available at subsidiary locations within the state, similar to the goods manufactured by Lego Systems, which were also available at subsidiary locations within the state.[101] These outwardly similar factual situations yielded different results in district court due to the test created by the Federal Circuit in *In re Cray*.[102]

Corporations such as FedEx Corp. and Lego Systems, that have subsidiary corporations, are each separate entities from their subsidiary corporations, but they may operate interrelated businesses.[103] The Supreme Court and Federal Circuit have not presented a straightforward method for distinguishing between a separate corporate subsidiary from a corporate subsidiary that operates as "the place of the defendant" even though the two entities file separate financial documents and have separate legal structures.[104] This ambiguity will continue to lead to differing results for similar factual situations across different circuits.[105] This issue can be quickly rectified with a new piece of legislation from Congress addressing patent infringement venue under section 1400(b).[106]

B. The In re Cray *Test is Not Easily Applied to a Large Number of Businesses*

The *In re Cray* test fails to consider how a large portion of domestic corporations operate in the U.S. In deciding *In re Cray,* the Federal Circuit

99. *Id.* at 932-33.

100. *See Intellectual Ventures II*, 2017 WL 5630023, at *7.

101. *Id.* at *7; *Symbology Innovations, LLC*, 282 F. Supp. 3d at 925.

102. *In re Cray*, 871 F.3d at 1360.

103. *See Symbology Innovations, LLC*, 282 F. Supp. 3d at 930 (noting the financial and legal separation between the corporate entities but that the business interests between them are tied together); *Intellectual Ventures II*, 2017 WL 5630023, at *1.

104. *In re Cray*, 871 F.3d at 1360, 1363 (establishing that the defendant corporation must own, lease, or otherwise control the property to satisfy the regular and established place of business requirement under section 1400(b)).

105. *Id.*; *see also* Erin Coe, *Delaware Keeps Pace With Crush Of Patent Suits, For Now*, LAW 360 (Oct. 20, 2017, 5:37 PM), https://www.law360.com/articles/976463/delaware-keeps-pace-with-crush-of-patent-suits-for-now (stating that the District Court interpretation of *TC Heartland* is not uniform and that a consensus view will not become apparent for some time).

106. Kevin E. Noonan, *Does the Federal Circuit's* In re Cray *Decision Suggest a New Business Model for Savvy Infringers?*, PATENT DOCS (Oct. 1, 2017, 11:43 PM), http://www.patentdocs.org/2017/10/does-the-federal-circuits-in-re-cray-decision-suggest-a-new-business-model-for-savvy-infringers.html.

did not consider how the application of the three-part test would disproportionately affect patent holders filing infringement actions against corporations with non-traditional physical locations.[107] Companies that operate entirely online, such as Amazon.com, do not operate out of traditional brick and mortar locations, as was the case in the late 1800s when the patent venue statute was first enacted.[108] For these companies, it is entirely plausible that patent infringement actions against them may only be able to be filed in the jurisdiction of incorporation.[109] This development will have serious consequences for small businesses without the funds to litigate expensive patent infringement actions in foreign jurisdictions.[110]

Companies who are forced to litigate patent infringement actions against companies who do not operate traditional brick and mortar locations where the acts of infringement are occurring will be forced to file their lawsuits in distant jurisdictions.[111] Many more cases will need to be filed in states where corporations are incorporated, such as Delaware, which is not historically viewed as a plaintiff friendly venue.[112] The *TC Heartland* and *In re Cray* decisions increase the cost on small businesses that seek to enforce their intellectual property rights in federal court.[113] These decisions inject uncertainty into the patent sphere, and will lead to more complex litigation, raising the cost for small businesses to enforce their patent rights in court.[114] Moreover, these rulings will disincentivize innovation by small businesses because they will not be able to easily enforce their patent rights.[115] If companies are no longer able to affordably litigate against infringing parties, the patent portfolios of these entities will lose their value because the cost to

107. *See id.* (explaining many businesses' online nature).

108. *Id.* (stating that companies can operate entirely online without ever establishing a fixed physical location within the United States).

109. *Id.* (stating that the court disregarded how businesses operate in the twenty-first century and will restrict plaintiff's filing location to the state of incorporation of the infringing corporation).

110. *See* Quinn, *supra* note 83 (giving Paul Morinville's reaction to *TC Heartland*).

111. *See id.* (giving William A. Munck's reaction to *TC Heartland*).

112. *See id.* (stating that the District of Delaware, while competent at patent infringement litigation, does not require upfront investment in the case like the Eastern District of Texas).

113. *See id.* (giving Paul Morinville's reaction to *TC Heartland*, that costs will increase due to the inconvenience of small businesses being forced to litigate only in the judicial district where the alleged infringer is incorporated).

114. *See id.* (stating that venue disputes will complicate litigation and bring a level of unpredictability to a previously reliable aspect of a dispute).

115. *See id.* (stating Paul Morinville's reaction to *TC Heartland*, arguing that small businesses will not be able to enforce their patent rights due to the increased cost and inability to obtain a favorable outcome such as an injunctive relief or damages).

enforce the patent in court would outweigh the benefit received through litigation.[116] In order to rectify these issues created by the Federal Circuit and Supreme Court, Congress should rework patent infringement venue to allow a more uniform application of the law to corporations to create more stability and certainty in the law.[117]

C. Patent Infringement Filing Has Been Significantly Impacted by TC Heartland *Decision*

Since the Supreme Court and Federal Circuit decided *TC Heartland* and *In re Cray,* patent infringement filings have profoundly shifted from years prior.[118] In 2017, the Eastern District of Texas saw more patent infringement cases filed in the district than any other judicial district, but after the *TC Heartland* decision on May 22, 2017, there was a dramatic shift in filing activity.[119] The District of Delaware overtook the Eastern District of Texas in the second half of 2017 as the most popular district for patent infringement filings.[120] Additionally, other judicial districts, such as the Western District of Texas, the Western District of Washington, the Southern District of Texas, and the District of Massachusetts, saw 115.8, 108, 76.5, and 60.3 percent increases respectively in patent infringement cases in 2017 after the Supreme Court decided *TC Heartland*.[121]

The large number of cases still filed in the Eastern District of Texas can be attributed to the fact that the *TC Heartland* decision only applies to domestic businesses.[122] Foreign corporations operating within the U.S. are still subject to civil action for patent infringement in any jurisdiction

116. *See id.* (arguing that small business' patent portfolios will become unenforceable due to the cost-prohibitive status of patent infringement actions).

117. *See* Noonan, *supra* note 106 (arguing for Congress to liberalize patent infringement venue standards).

118. *See* Brian Howard, *Lex Machina Q4 2017 End of the Year Litigation Update*, LEX MACHINA (Jan. 16, 2018), https://lexmachina.com/lex-machina-q4-litigation-update/ (analyzing the shift in patent infringement filings in prominent patent districts such as Delaware, Northern and Southern Districts of California, and Washington, where they experienced increased litigation while the Eastern District of Texas experienced a decline in filings).

119. *See id.* (analyzing how patent infringement action filings in districts outside of the Eastern District of Texas have increased).

120. *See id.* at fig.3 (explaining that the District of Delaware overtook the Eastern District of Texas for the number of patent infringement actions filed).

121. Benjamin Anger & Boris Zelkind, *Where Plaintiffs Are Filing Suit Post-TC Heartland*, LAW 360 (July 7, 2017, 12:20 PM), https://www.law360.com/articles/942115/where-plaintiffs-are-filing-suit-post-tc-heartland (noting the shift in filing activity due to the *TC Heartland* decision).

122. *See id.* (noting that the Supreme Court limited the *TC Heartland* decision to domestic corporations).

pursuant to section 1391(c).[123] In *TC Heartland*, the Court stated that the decision only applied to domestic corporations.[124] If this were not the case, the number of filings in the Eastern District of Texas may have declined even further.[125]

The uptick in the California and Delaware judicial districts logically follows the holding in *TC Heartland*.[126] More than half of publicly traded American companies and sixty-six percent of Fortune 500 companies are incorporated within the state of Delaware.[127] The proportionally large number of businesses incorporated in the minute state of Delaware will predictably yield an outsized number of patent infringement cases filed within the district due to the new restrictions on appropriate patent infringement venue.[128] After the *In re Cray* decision, it has become increasingly difficult to satisfy venue requirements based on the "regular and established place of business" clause of 28 U.S.C. section 1400(b).[129] The three-part test established by the Federal Circuit requires a physical place owned by the defendant within the district.[130] Online businesses and companies with complex corporate structures comprising subsidiary corporations do not cleanly fit into the Federal Circuit's *In re* Cray three-part

123. 28 U.S.C. § 1391(c) (2012) (establishing a personal jurisdiction standard to determine appropriate venue in civil actions).

124. TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1520 n.2 (2017) (declining to analyze the implications on foreign corporations by leaving the previous standard unchanged and allowing foreign corporations to be sued in any judicial district).

125. *See* Anger & Zelkind, *supra* note 121 (noting that cases may have been improperly filed in the Eastern District of Texas and may be subject to dismissal or transfer out of the jurisdiction to the appropriate district).

126. *See* Howard, *supra* note 118 (stating that because a large percentage of American corporations choose to incorporate in Delaware that more patent infringement action filings will occur in Delaware because venue is always appropriate in the jurisdiction of incorporation).

127. *See* Suzanne Barlyn, *How Delaware Became a Hub of Corporate Secrecy*, BUS. INSIDER (Aug. 24, 2016, 1:51 PM), http://www.businessinsider.com/heres-why-corporations-are-flocking-to-delaware-to-conduct-business-2016-8 (examining Delaware incorporation statistics and the motivations behind companies' decisions to incorporate in Delaware).

128. *See* Coe, *supra* note 105 (stating that the large number of patent cases that could be filed in Delaware could lead to a congested docket which would increase the time it takes to reach a judgment).

129. *See id.* (quoting Susan Morrison) ("It's going to be easier to establish venue in Delaware because of the 'resides' language in the [patent] statute. . . . If plaintiffs sue a Delaware corporation in Delaware, it provides them with certainty that they won't face a venue challenge.").

130. *In re* Cray Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017).

test to determine patent infringement venue.[131]

It is much easier to satisfy venue requirements by suing in the jurisdiction of incorporation, which has prompted the increase in infringement filings in jurisdictions where there are more incorporated entities due to clarity of the law under section 1400(b).[132] The uptick in California filings can be attributed to the fact that many companies have headquarters in the state, making venue appropriate under the "regular and established place of business" clause.[133] Moreover, because the companies have offices in California, venue would also be appropriate because they have committed acts of infringement within the district.[134]

These developments are a first glance at the initial consequences of the change in venue jurisprudence as a result of *TC Heartland* and *In re Cray*. Companies looking for certainty and seeking to reduce unnecessary litigation will continue to choose to file their patent infringement actions in jurisdictions where venue is certain to be appropriate namely in the state of incorporation.[135]

D. Supreme Court Jurisprudence Negates the Original Intent of the Patent Venue Statute

The Supreme Court's holding in *TC Heartland* paved the way for the Federal Circuit to decide the *In re Cray* decision.[136] This narrow patent infringement venue provision is analogous to the original 1887 Act, that only permitted infringement actions to be filed in the jurisdiction in which the defendant is an inhabitant.[137] When the *In re Cray* test is examined in the

131. *See generally* Symbology Innovations, LLC v. Lego Sys., Inc., 282 F. Supp. 3d 916 (E.D. Va. 2017); Intellectual Ventures II LLC v. FedEx Corp., No. 2:16-CV-00980-JRG, 2017 WL 5630023 (E.D. Tex. Nov. 22, 2017).

132. *See* Coe, *supra* note 105 (stating that there is no ambiguity that venue is appropriate when choosing to sue in the jurisdiction where the alleged infringer is incorporated).

133. Anger & Zelkind, *supra* note 121 ("[T]he reason . . . may be that the plaintiffs in these cases have relied on Section 1400(b)'s second venue option to sue Silicon Valley's technology companies where they are headquartered — that is, where they have 'a regular and established place of business' . . . .").

134. *See id.* (establishing appropriate venue under section 1400(b)'s second prong).

135. *See* Quinn, *supra* note 83 (giving Jonathan Waldrop's reaction to *TC Heartland*, that companies will choose venues based on place of incorporation rather than clustering cases in the Eastern District of Texas and the District of Delaware).

136. *See* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 (2017); *In re* Cray, Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017) (establishing that patent infringement venue is only appropriate in the jurisdiction when the defendant has a physical place in the district, that place is a regular and established place of business, and that it is the place of the defendant).

137. *See* Noonan, *supra* note 106; Wydick, *supra* note 12, at 553.

context of the 1897 Act,[138] the test contradicts Congress' original intention of liberalizing patent infringement venue in 1897.[139] The 1897 Act sought to expand appropriate patent infringement venue to prevent plaintiffs from litigating in inconvenient judicial districts.[140] The law at the time sought to diversify the venues in which a patent infringement action could be filed.[141] The law, as it currently stands, restricts where plaintiffs can file patent infringement actions.[142] The Supreme Court and Federal Circuit have brought the status of patent infringement venue back to the late 1800s by restricting appropriate patent infringement venue.[143] Prior to the 1897 Act, venue was only proper where the defendant could be served.[144]

Similarly, today, venue is only proper where the defendant is incorporated or operates a physical location.[145] These were also the only places a business could be served in the late 1800s.[146] The legislature in the late 1800s intended to expand patent infringement venue, not restrict where actions could be filed.[147] Today's legal standard for determining venue overly restricts where a defendant can be sued for patent infringement which contradicts the initial patent infringement venue standard established in the 1897 Act.[148] *TC Heartland* and *In re Cray* have contradicted the exact purpose of the original venue statute which sought to expand patent holders' access to the court system.[149]

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138. Act of Mar. 3, 1897, ch. 395, 29 Stat. 687, 695.

139. *Id.* (expanding the venues where infringement actions could be filed prior to implementation of the act).

140. *See* Wydick, *supra* note 12, at 554.

141. Noonan, *supra* note 106.

142. *See In re* Cray, Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017).

143. *See* Christopher Gaspar & Sean Hyberg, *Supreme Court Turns Back the Clock on Venue in Patent Infringement Litigation*, L. J. NEWSLS., http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/06/01/supreme-court-turns-back-the-clock-on-venue-in-patent-infringement-litigation/ (last visited Apr. 29, 2018) (stating that the initial intent of the 1897 Act was to place patent infringement actions in "a class by themselves, outside the scope of general venue legislation").

144. *See TC Heartland, LLC*, 137 S. Ct. at 1514 (explaining that the prior to the 1897, plaintiffs could "bring suit . . . anywhere a defendant could be found for service of process").

145. *See id.* at 1517; *In re Cray*, 871 F.3d at 1360.

146. *See In re Cray*, 871 F.3d at 1360 (creating a restrictive three-part test to determine whether venue is proper in a district); Wydick, *supra* note 12, at 553.

147. *See* Wydick, *supra* note 12, at 554, 556-57 (arguing that general venue was stricter than patent infringement venue after the 1897 act was passed which liberalized patent infringement venue separately from all other venue provisions).

148. Act of Mar. 3, 1897, ch. 395, 29 Stat. 687, 695.

149. *See* Bone, *supra* note 6, at 149 (stating that the 1897 Act "recognized two grounds for patent venue: (1) the district where the defendant is an "inhabitant" . . . and

With its decision in *TC Heartland*, the Court reversed a longstanding trend of expanding the scope of patent infringement venue, reviving the legal standard used prior to 1990 in determining patent infringement venue.[150] The Court revived the *Fourco Glass Co.* holding which stated that section 1400(b) was the sole provision governing patent infringement venue.[151] The 1897 Act provided an exception to civil venue provision to grant patent holders increased flexibility in venue.[152] However, the Court is ironically using that same exception in the law to create a special provision for patent infringement venue that restricts appropriate venues for patent holders when filing patent infringement actions.[153] To rectify the negative consequences for patent holders of the *In re Cray* and *TC Heartland* decisions, the U.S. Congress will have to rethink how patent infringement venue is determined for domestic corporations.[154]

IV. CONGRESS MUST AMEND THE 28 U.S.C. SECTION 1391(c) AND 28 U.S.C. SECTION 1400(b) TO CREATE UNIFORMITY IN PATENT INFRINGEMENT VENUE JURISPRUDENCE

Congress must pass a patent infringement venue reform act or the negative impact of *TC Heartland* and *In re Cray* will cripple the U.S. patent system and ultimately stifle innovation within the U.S.[155] Congress, through legislative action, should create a system of patent-specific district courts that have exclusive jurisdiction over patent infringement actions scattered throughout the country in every jurisdiction.

A. Establish Patent Specific District Courts

Coupled with this new legislation, Congress should abolish section 1400(b), which created a separate venue statute for patent infringement

(2) any district where the defendant committed acts of infringement and has a regular and established place of business.").

150. *See* Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 226 (1957) (restricting the venues appropriate for patent infringement actions to the state of incorporation under the residence clause of 28 U.S.C. 1400(b)).

151. *Id.* (establishing that patent infringement venue is only determined under section 1400(b)).

152. *See* Ch. 395, 29 Stat. at 695.

153. TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 (2017) (limiting where plaintiffs can file patent infringement actions by removing ruling that 28 U.S.C. section 1391(c) does not augment 28 U.S.C. section 1400(b)).

154. *See* Noonan, *supra* note 106 (calling on the United States Congress to liberalize patent infringement venue to expand where corporations can be sued for patent infringement).

155. *See* Quinn, *supra* note 83 (giving Brian Pomper's reaction to *TC Heartland*).

actions.[156] This system of patent-specific district courts, analogous to the Federal Circuit at the appellate level, will create uniformity among the courts so that forum shopping is limited and access to the court system is maximized through a uniform set of policies and procedures.[157]

The branches of the patent-specific district court system would be spaced sporadically throughout the country. Plaintiffs would not be required to litigate in courts across the country because there would be a patent-specific courthouse in every federal judicial circuit across the country. Each of the eleven numbered federal circuits would have at least one patent-specific district court house in their district. The law would mandate that infringement actions be filed in a patent district court where the defendant is subject to personal jurisdiction under section 1391(c).

The outlined system is similar to that of the U.S. bankruptcy court system.[158] Bankruptcy courts are separate divisions within Federal District Courts.[159] These courts have exclusive jurisdiction over bankruptcy cases arising within the U.S.[160] Having separate patent-specific branches of district courts would greatly improve the consistency of judicial outcomes and reduce the steep learning curve for judges unfamiliar with patent-specific laws.[161] Allowing judges to specialize in an area of law will yield more uniform outcomes based on the facts of the cases.[162]

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156. *See* 28 U.S.C. § 1400(b) (2012) (stating that patent infringement venue is governed by this separate statutory provision).

157. *See generally* Noonan, *supra* note 106 ("It seems likely that, as in so many areas of patent law, the only remedy for this state of affairs will be if Congress steps in and changes the statute to again liberalize where proper venue in patent cases can be found.").

158. *See Tax Research: Understanding Sources of Tax Law*, WOLTERS KLUWER, https://webcache.googleusercontent.com/search?q=cache:XGTHOFzAQ4kJ:https://www.cchgroup.com/media/wk/taa/pdfs/accounting-firms/tax/understanding-sources-tax-law-fact-sheet.pdf+&cd=2&hl=en&ct=clnk&gl=us (last visited Apr. 29, 2018) (stating that bankruptcy courts are separate units with exclusive jurisdiction vested in the federal courts, including over tax issues that arise during bankruptcy cases).

159. *See U.S. Bankruptcy Courts*, FED. JUD. CTR., https://www.fjc.gov/history/courts/u.s.-bankruptcy-courts (last visited Apr. 29, 2018) (stating that bankruptcy courts are divisions within the federal district court system, and that all bankruptcy cases are referred to the bankruptcy judges by the district court).

160. *Id.* (stating that only bankruptcy courts have the authority to litigate bankruptcy matters; no other court has jurisdiction over these proceedings).

161. Jason Rantanen & Joshua Haugo, *District Court and Patent Cases, Part I,* PATENTLYO (Apr. 28, 2014), https://patentlyo.com/patent/2014/04/district-courts-patent.html ("[A]t least a substantial number of District Court judges do not hear more than an occasional patent case, and thus may find it difficult to determine which cases are 'exceptional' based on their past experience with other patent cases.").

162. Chris Burke, *Advantages & Disadvantages of Specialized Courts*, LEGAL BEAGLE, https://legalbeagle.com/8398649-advantages-disadvantages-specialized-courts.html (last updated June 20, 2017) ("Specialized judges have a greater understanding of

B. Drawbacks of Patent-Specific District Courts

While this proposal would greatly increase the efficiency and uniform application of patent jurisprudence throughout the country, this proposal would cost a lot of money. However, costs could be mitigated through court costs on litigants.[163] The typical entities involved in patent infringement litigation are corporations that can easily afford a small filing fee in addition to the 2.8 million dollars it costs on average to litigate a patent infringement action through the final disposition in federal court.[164] Businesses who choose to take on this immense cost to pursue a patent litigation action can afford to pay a small nominal fee to the court, which will ultimately benefit the corporation because patent law will be uniformly applied across the entire county.[165] These corporations will no longer be at a legal disadvantage based on the forum chosen by the plaintiff because the law will be uniformly applied across all districts, which is analogous to the Federal Circuit at the appellate level.

C. Personal Jurisdiction Standard for Venue Establishes Certainty and Uniformity

Applying the personal jurisdiction standard for venue to patent law will ensure that companies who incorporate in a given jurisdiction, and do not have other brick and mortar locations, are not protected from litigating in other jurisdictions merely because they do not have an office there even though they routinely sell their product or service in the jurisdiction.[166]

A return to the personal jurisdiction standard for venue will also bring certainty back to the venue debate in patent infringement cases.[167] The new test produced in *In re Cray* by the Federal Circuit created confusion, not

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issues and are better able to offer fair rulings based on the facts.").

163. Rebekah Diller, *Court Fees As Revenue?*, BRENNAN CTR. FOR JUST. N.Y.U. (July 30, 2008), https://www.brennancenter.org/analysis/court-fees-revenue (stating that states such as Colorado use court fees to fund new court houses).

164. Chris Neumeyer, *Managing Costs of Patent Litigation*, IP WATCHDOG (Feb. 5, 2013), http://www.ipwatchdog.com/2013/02/05/managing-costs-of-patent-litigation/id=34808/ (citing The American Intellectual Property Law Association) ("[T]he cost of an average patent lawsuit, where $1 million to $25 million is at risk, is $1.6 million through the end of discovery and $2.8 million through final disposition. Adding insult to injury, more than 60% of all patent suits are filed by non-practicing entities (NPEs) that manufacture no products and rely on litigation as a key part of their business model.").

165. *Id.* (stating that patent litigation will always be costly especially when one party aggressively pursues an aggressive discovery strategy).

166. *See* 28 U.S.C. § 1391(c) (2012) (establishing a personal jurisdiction standard for venue in civil actions).

167. *See id.*

certainty.[168] The personal jurisdiction standard is more easily applied because all other cases adhere to the personal jurisdiction standard for venue.[169] This will reduce the amount of money and time spent litigating a pre-trial issue that will not help end the dispute between the parties.[170]

V. CONCLUSION

The *TC Heartland* and *In re Cray* cases have significantly limited a plaintiff's access to the court system when filing patent infringement actions. Plaintiffs are restricted to filing in the state of defendant's incorporation or where the defendant has a permanent place of business that satisfies the three-part *Cray* test. These two decisions will harm plaintiffs when the defendant does not have any physical places of business, such as online companies. Online retailers, software companies, and other types of businesses that do not operate out of fixed physical locations will be able to avoid litigation in all jurisdictions except for the jurisdiction in which they are incorporated.

District courts will struggle to implement the *In re Cray* test without amendments to the venue statute or additional guidance provided by the Federal Circuit or the Supreme Court due to the evolving business model of modern companies. As the law currently stands after *In re Cray*, there is significant uncertainty that will persist until a more concrete standard for patent infringement venue is implemented.

168. See *In re* Cray Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017); *see also* Noonan, *supra* note 106 (discussing the issues with *In re Cray* and how the decision may have left plaintiffs with no place to sue for patent infringement).

169. *See* 28 U.S.C. § 1391(c) (stating the venue standard for civil actions).

170. *See* Letter from Professors, to the House and Senate Judiciary Committee, on Supporting Venue Reform, (July 12, 2016), https://drive.google.com/file/d/0B4BdaKgM6bo7cUt1YXdfSFBSOFQyaXJvRnVBS3pBQXZMLURR/view (appealing to Senators to change the venue rules in patent litigation to end forum shopping and reduce costs of litigation).

FAILING TO PREPARE: THE IMPORTANCE OF REGULATING TAX RETURN PREPARERS FOLLOWING THE PASSAGE OF THE TAX CUTS AND JOBS ACT

JACOB PEEPLES*

I. INTRODUCTION

Albert Einstein's name has become synonymous with genius, and even he once posited, "[t]he hardest thing in the world to understand is the income tax."[1] The complexity and confusion caused by the Internal Revenue Code ("IRC") are contributing factors to why more than half of taxpayers use a paid tax preparer to file each year.[2] Most Americans simply want to ensure

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1. *Tax Quotes*, IRS, https://www.irs.gov/newsroom/tax-quotes (last updated Aug. 21, 2018).

2. *See Written Testimony of John A. Koskinen Commissioner Internal Revenue Service Before the S. Fin. Comm. on Regulation of Tax Return Preparers*, 113th Cong. 1 (2014) [hereinafter *Koskinen Testimony*] (testifying to the Senate Finance Committee, former IRS Commissioner, John A. Koskinen explained that fifty-six percent of

that everything on their tax return is correct.[3] For this reason, it is highly concerning that taxpayers may not be able to trust the tax preparer they are paying to do their taxes.

Over the past two decades, the Internal Revenue Service ("IRS") has tried to increase oversight of tax return preparers; however, various lawsuits have prevented the agency from doing so.[4] Numerous investigations have demonstrated that non-credentialed return preparers ("NCRPs") consistently prepare returns incorrectly, thereby resulting in widespread underreporting of income.[5] This Note will examine the impact of tax preparer misconduct through the lens of certain refundable and non-refundable credits.[6] This Note focuses on that particular population because taxpayers claiming those credits are more likely to use paid tax preparers, specifically NCRPs, than their counterparts, who are not claiming those credits,[7] and because incorrectly claiming these credits can significantly impact the financial wellbeing and future eligibility of these taxpayers who trust someone to make sure they are in compliance.[8] This Note should not be seen as a

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taxpayers used paid preparers, and ninety percent of Americans seek some form of assistance on their taxes).

3. *See 2014 Taxpayer Attitude Survey*, IRS OVERSIGHT BOARD 1, 8 (Dec. 2014), https://www.treasury.gov/IRSOB/reports/Documents/IRSOB%20Taxpayer%20Attitude%20Survey%202014.pdf (explaining that, contrary to conventional wisdom, taxpayers are more motivated to pay their taxes because of personal integrity than because of fear or third-party pressure).

4. *See* Loving v. IRS, 742 F.3d 1013, 1014-15 (D.C. Cir. 2014) (ruling that the IRS does not have the authority to regulate an estimated 600,000 to 700,000 return preparers, allowing them to continue working without training or credentials); *see also* Steele v. United States, 260 F. Supp. 3d 52, 67-68 (D.D.C. 2017) (ruling that the IRS does have the authority to require PTINs, but the IRS cannot charge a fee for acquiring or maintaining a PTIN and must refund the previously paid fees).

5. *See* PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION, NAT'L TAXPAYER ADVOC. 14-15 (Dec. 31 2017) [hereinafter PURPLE BOOK], https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_PurpleBook.pdf (citing studies performed by the Government Accountability Office ("GAO"), Treasurer Inspector General for Tax Administration ("TIGTA"), New York State Department of Taxation and Finance, and the IRS which found extremely high instances of negligence and fraud amongst paid tax preparers).

6. *See infra* Part II (looking specifically at the Earned Income Tax Credit ("EITC"), refundable and nonrefundable child tax credit, and the refundable and nonrefundable education credits).

7. *See* Rosemary Marcuss et al., *Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns*, IRS 24 (Aug. 2014), https://www.irs.gov/pub/irs-soi/EITCComplianceStudyTY2006-2008.pdf (contrasting the types of preparers used by claimants and non-claimants and highlighting that forty-four percent of non-claimants use a CPA, while only ten percent of claimants do).

8. *See* 26 U.S.C. § 32(k) (2018) (stating that taxpayers making "fraudulent or reckless claims" can be disallowed from claiming the credit for two or ten years

criticism of the aforementioned credits, but, rather, as an invitation to discuss the lack of training and oversight of NCRPs and the impact of untrained and unregulated NCRPs on taxpayers and the federal government's bottom line.[9]

With the passage of the Tax Cuts and Jobs Act ("Act"), it is important that preparers get the training and oversight needed to help these taxpayers understand the changes in the law.[10] While the expansion of the refundable and non-refundable portions of the Child Tax Credit ("CTC") included in the Act is intended to help families reduce their tax burden, expanding those portions could incentivize preparer misconduct, thereby distorting the purpose of the changes by hurting taxpayers who are misled by NCRPs.[11]

Part II of this Note will examine the impact of underreporting on revenue collection as well as the subsequent consequences for taxpayers, and, further, Part II will analyze how some unqualified preparers exacerbate that problem. Part III will discuss the strategies employed by the IRS to reduce non-compliance through stricter regulation on tax preparers. Part IV will assess a variety of proposed legislative fixes and suggest ways to improve these fixes.

II. MONEY LEFT ON THE TABLE AND HOW IT HURTS THE AMERICAN TAXPAYER

A. Non-Credentialed Paid Preparers Are Adding to the Tax Gap

The United States ("U.S.") government is dependent on the voluntary compliance of taxpayers for over ninety percent of the revenue it collects.[12]

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depending on the circumstances).

9. *See Policy Basics: The Child Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITY, https://www.cbpp.org/research/federal-tax/policy-basics-the-child-tax-credit (last updated Apr. 18, 2018) (explaining the positive impact that the CTC and ACTC have had on reducing poverty and providing opportunities for children); *see also Policy Basics: The Earned Income Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITY, https://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit (last updated Apr. 19, 2018) (showing how the EITC encourages and rewards work and reduces poverty).

10. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (starting in tax year 2018, this law will make significant changes for all types of filers and will require preparer awareness).

11. *See* 26 U.S.C. § 24(h) (increasing the upper income threshold to $400,000 for joint returns and $200,000 for others, doubling the maximum credit to $2000 per child, and increasing the refundable portion of the credit to $1,400 per child).

12. *See* FISCAL YEAR 2016 HISTORICAL TABLES BUDGET OF THE U.S. GOVERNMENT, OFF. MGMT. & BUDGET 38 (Feb. 2, 2015), https://www.gpo.gov/fdsys/pkg/BUDGET-2016-TAB/pdf/BUDGET-2016-TAB.pdf (estimating that for Fiscal Year 2017, approximately 91.6 percent of revenue will come from individual income taxes (47.1 percent), payroll taxes (31.2 percent), and corporate income taxes (13.3 percent)).

While most taxpayers are able to accurately file their taxes, there is a significant difference between the amount of money owed and the amount that is collected.[13] The measure of this noncompliance is called the "gross tax gap," and between 2008 and 2010, it amounted to an average of $458 billion per year.[14] The "gross tax gap" not only represents money left on the table, so-to-speak, it suggests that taxpayers who are not properly filing are shifting their responsibility onto those who are.

The "gross tax gap" results from taxpayers underreporting, failing to file, and underpaying, with underreporting comprising approximately 71.7% of the gap.[15] The largest share of underreporting from income tax return filers comes from taxpayers filing business income reported on Schedules C, E, and F,[16] but this Note focuses on the second largest cause of underreporting: credits.[17]

By increasing the refundable portion of the CTC, Congress created a space in which preparers could make errors affecting the gap and taxpayers.[18] Said increase in the potential refund raises the following question: are the same underreporting problems facing the Earned Income Tax Credit ("EITC") shared by the CTC?[19]

Errors in claiming the EITC accounts for approximately two-thirds of the individual income tax underreporting gap attributable to credits, and between 2003 and 2013, EITC errors added $151 billion to the gap.[20] In 2014, the

13. *See* TAX GAP ESTIMATES FOR TAX YEARS 2008–2010, IRS 1 (Apr. 2016) [hereinafter *Tax Gap Estimates*], https://www.irs.gov/pub/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf (explaining that over eighty-three percent of taxpayers are compliant and overviewing the extent of the "tax gap" through the lens of a study looking at tax years 2008-2010).

14. *See id.* (noting that the IRS estimates it will ultimately be able to collect $52 billion through administrative and enforcement activities making the "net tax gap" $406 billion).

15. *See id.* at 2 (estimating that underreporting represents $387 billion of the tax gap, with non-filing and underpayment representing $32 billion and $39 billion respectively).

16. *See id.* at 19 (estimating that these taxpayers account for forty-seven percent of the $319 billion-dollar gross tax gap for individual income tax).

17. *See id.* (approximating that fifteen percent of the individual income tax underreporting tax gap comes from credits including the EITC (ten percent), refundable and nonrefundable child tax credit (three percent), and the refundable and nonrefundable education credits (two percent)).

18. *See* 26 U.S.C. § 24(h) (2018) (increasing the refundable portion of the CTC could cause greater underreporting if it trends parallel to the way the EITC is treated).

19. *See Koskinen Testimony*, *supra* note 2, at 5 (testifying that underreporting for claimants of the EITC can be partially attributed to the fact that approximately sixty percent of EITC returns are prepared by paid preparers).

20. *See* Kyle Pomerleau, *The Earned Income Tax Credit Still Faces High Error Rate*, TAX FOUND. (Jan. 12, 2015), https://taxfoundation.org/earned-income-tax-credit-still-faces-high-error-rate/ (showing that the error rate of EITC returns hovered between

IRS published a study on the filing habits of EITC claimants, identifying that the claimants are far more likely to use paid preparers than non-claimants and are also more likely to use unenrolled preparers or a preparer from a national tax return preparation firm than non-claimants.[21] While some of the underreporting for EITC claimants can be attributed to self-prepared returns, as well as the complexity of the EITC requirements, it is undeniable that the failures of certain paid preparers contribute significantly to the problem.[22]

If the expansion of eligibility and the refundable nature of the CTC operate like the EITC, increasing the refundable portion of the CTC will increase the percentage of the tax gap attributable to underreporting credits irrespective of errors potentially due to fraud or misunderstanding of the rules.

B. Impact on Taxpayers

The high rate of paid preparer error surrounding credits does not simply affect the tax gap, it can lead to immediate and long-term issues for the most vulnerable taxpayers. When a taxpayer incorrectly claims all or part of the EITC, CTC, or American Opportunity Tax Credit ("AOTC"), the taxpayer must pay back any amount in error *with interest* and may be subject to a twenty percent accuracy-related penalty or a seventy-five percent fraud penalty.[23] In addition, if the IRS determines that error occurred from "reckless or intentional disregard of rules and regulations" or fraud, the taxpayer may be banned from claiming certain credits for two or ten years, respectively.[24] If the IRS determines that the error was not the result of either, the taxpayer may yet carry the burden of filing an additional form to claim the credit in subsequent years.[25] Because the Act broadens the

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twenty-three and twenty-eight percent); *see also Tax Gap Estimates*, *supra* note 13 (approximating that the EITC is two thirds of the individual income tax underreporting gap). *But see* Robert Greenstein et al., *Reducing Overpayments in the Earned Income Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITY, https://www.cbpp.org/research/federal-tax/reducing-overpayments-in-the-earned-income-tax-credit#_ftnref5 (last updated Feb. 20, 2018) (asserting that methodological problems may be inflating the rate of error for EITC claimants).

21. *See* Marcuss et al., *supra* note 7, at 24.

22. *See id.* (showing that twenty-nine percent of EITC claimants self-prepare); *see also* Greenstein et al., *supra* note 20 (highlighting the complexity of the EITC as a main proponent of misfiling).

23. *See Consequences of Not Meeting Your Due Diligence Requirements*, IRS, https://www.eitc.irs.gov/tax-preparer-toolkit/preparer-due-diligence/consequences-of-failing-to-meet-your-due-diligence (last updated Sept. 28, 2017) (outlining the consequences of incorrectly claiming certain credits).

24. 26 U.S.C. § 32(k) (2018).

25. *See* FORM 8862, INFORMATION TO CLAIM EARNED INCOME CREDIT, IRS, https://www.irs.gov/pub/irs-pdf/f8862.pdf (last revised Oct. 2017) (requiring that the taxpayer prove that they are in fact eligible for the credit they are claiming).

eligibility and increases the credit amount for the CTC, a larger number of people could be affected if their preparers are not accurately assisting in preparing their tax returns.

III. THE IRS'S EFFORTS TO FIX THE PREPARER PROBLEM

Just before the turn of the millennium, the IRS began issuing Preparer Tax Identification Numbers ("PTINs") so that tax preparers would not have to use their Social Security Numbers when preparing a return.[26] A decade later, recognizing the growing importance of oversight for third-party preparers, IRS Commissioner Douglas Shulman created the Return Preparer Review, with mandatory PTINs as the cornerstone.[27] The resulting regulation required that all paid preparers obtain a PTIN and renew it each year, pay associated fees, pass a competency exam, and take fifteen continuing education credits each year to stay abreast of changes; however, a group of preparers sued the IRS, claiming that it did not have the statutory authority to do so.[28]

The IRS claimed to have the authority to regulate preparers through 31 U.S.C. section 330, which allows the Secretary of the Treasury to "regulate the practice of representatives of persons before the Department of the Treasury," but the U.S. Court of Appeals for the District of Columbia, in *Loving v. IRS*,[29] disagreed.[30] The court determined that the IRS lacked statutory authority to regulate tax preparers because preparers are not "representatives" and do not "practice" before the department.[31] Ultimately, the court disallowed all of the mandated testing and continuing education requirements, leaving only the PTIN requirement and the associated fees.[32]

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26. *See* Press Release, IRS, IRS to Issue Alternative Identification Numbers for Tax Preparers (Aug. 24, 1999), https://www.irs.gov/pub/irs-news/ir-99-72.pdf (providing return preparers with an option to protect their Social Security Numbers from potential abuse by their clients).

27. *Return Preparer Review*, IRS, 1-3 (Dec. 2009), https://www.irs.gov/pub/irs-pdf/p4832.pdf (outlining the commissioners plans to try to hold all preparers to the same professional standards).

28. *See* Loving v. IRS, 742 F.3d 1013, 1014-15 (D.C. Cir. 2014) (finding that the IRS only had the authority to require mandatory PTINs and charge for them but could not impose any other requirements); *see also* Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32,286, 32,287 (June 3, 2011) (to be codified at 31 C.F.R. pt. 10).

29. 742 F.3d at 1015.

30. *See* 31 U.S.C. § 330 (2018); *see also Loving*, 742 F.3d at 1015.

31. *See Loving*, 742 F.3d at 1021-22 (stating that the IRS failed both *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council* steps because Congress had not spoken explicitly on the issue and the actions of the IRS were arbitrary and capricious).

32. *See generally id.*

In its conclusion, the court recognized that this regulation may be "wise as a policy matter," but it is one that would need a legislative solution.[33] Additionally, preparers have since won a class action suit claiming that the IRS has no authority to charge preparers for PTINs because preparers receive no special benefit from the agency.[34]

Given the aforementioned decisions, the regulatory scheme has been rendered toothless, as there are still no tests to ensure that preparers are competent to do the job.[35] The level of oversight granted to the IRS could be hugely impactful on increasing tax compliance, as evidenced by experimental programs on the state level.[36] Before the IRS proposed the PTIN program, the State of Oregon already regulated paid return preparers under a similar regulatory scheme to the IRS's attempted fix in 2011, and the state reduced its tax gap by $390 million.[37] The State of California, which maintains less stringent requirements for tax preparers, saw a decrease in compliance with their program, demonstrating that a regulatory system without teeth is not cost effective.[38]

Although it may make sense to emulate Oregon's regime on the national level, the courts have been clear that the IRS does not have the authority to do so. As such, Congress must resolve the problem. A legislative solution is now more important than ever, not only because of the CTC's potential effect on the tax gap and taxpayers, but because preparers need to be educated on what is changing between Tax Years 2017 and 2018 due to the Act.

IV. LEGISLATIVE SOLUTIONS TO THE PREPARER PROBLEM

There have been legislative efforts in both the House and Senate to expand the IRS's authority to establish competency standards for preparers in the wake of a growing tax gap, but nothing has been put into law.[39] In addition

33. *Id.* at 1022.

34. *See* Steele v. United States, 260 F. Supp. 3d 52, 67-68 (D.D.C. 2017) (leading to an ongoing appeal and a court order estopping the IRS from continuing to charge for PTINs in the interim).

35. *See id.* (requiring that preparers need only possess a PTIN to prepare a return).

36. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-781, TAX PREPARERS: OREGON'S REGULATORY REGIME MAY LEAD TO IMPROVED FEDERAL TAX RETURN ACCURACY AND PROVIDES A POSSIBLE MODEL FOR NATIONAL REGULATION (2008) (showing that greater standards for NCRPs increased overall compliance).

37. *See id.* (attributing that the increase in compliance to the testing and education requirements of tax preparers).

38. *See id.* (recognizing that Oregon had more stringent requirements and testing for return preparers than California, with only fifty-four percent passing the state's basic examination).

39. *See* Tax Return Preparer Competency Act of 2015, H.R. 4141, 114th Cong. § 2

to these actions, the National Taxpayer Advocate ("NTA"), an independent officer inside the IRS working on systemic issues affecting taxpayers, has made the authorization of the IRS to establish minimum competency standards one of her annual recommendations.[40]

The American Institute of CPAs ("AICPA") has expressed concern about the expansion the IRS's authority to regulate tax preparers in the way that these bills have proposed.[41] One of the AICPA's main concerns is that CPAs, and other credentialed preparers, will have the additional burden of getting PTINs and will have to go through trainings and testing despite being "highly-regulated and licensed at the state level."[42] Another concern expressed by the AICPA is market confusion.[43] This concern is not a deal breaker for the AICPA, but rather, the organization is asking that the IRS have some sort of mitigating regulation that would require preparers with this new level of certification to have a disclaimer that they are in fact different from the already existing types of certified preparers.[44]

The NTA responded to the AICPA's concerns in her report, asserting that

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(2015) (adding language to 31 U.S.C. § 330 that would allow the IRS to create minimum standards for preparers); Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 202 (2015) (mimicking language in the Tax Return Preparer Competency Act); *see also Description of the Chairman's Mark of a Bill to Prevent Identity Theft and Tax Refund Fraud Before the S. Comm. on Fin.*, 114th Cong. 16-21 (2015) (outlining a plan requiring third-party examination and continuing education for providers).

40. *See* PURPLE BOOK, *supra* note 5, at 14-16 (outlining the necessity for this change and suggesting how it could be done).

41. *See* Letter from Troy K. Lewis, Chairman, AICPA Tax Exec. Comm., to the Honorable Orrin G. Hatch, Chairman, Senate Comm. on Fin., and the Honorable Ron Wyden, Ranking Member, Sen. Comm. on Fin. 6 (Sept. 15, 2015) [hereinafter AICPA Letter to Senate], https://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/2015-09-15-Prevent-ID-Theft-and-Tax-Refund-Fraud-Comment-Letter-FINAL.pdf (asking that Congress limit the PTIN requirement to preparers "*not* supervised by an attorney, [CPA], or 'enrolled preparer'" and that the IRS take steps to limit market confusion that may occur if any of these laws are passed); *see also* Letter from Troy K. Lewis, Chairman, AICPA Tax Exec. Comm., to the Honorable Kevin Brady, Chairman, Comm. on Ways & Means, and the Honorable Sander Levin, Ranking Member, Comm. on Ways & Means 2 (Dec. 4, 2015) [hereinafter AICPA Letter to House], https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/2015-12-4-aicpa-comments-on-hr-4141-final.pdf (expressing concerns with H.R. 4141 because it may require CPAs and otherwise credentialed preparers to have the additional burden of certifying with the IRS).

42. *See* AICPA Letter to House, *supra* note 41, at 2.

43. *See id.* (arguing that consumers would have difficulty understanding the differences between otherwise credentialed preparers and this new class of "certified" preparers and this would hurt CPAs' business and cause harm to taxpayers).

44. *See* AICPA Letter to Senate, *supra* note 41, at 6 (highlighting that the IRS recognized the potential for market confusions "when they required the currently unenrolled community be made subject to the guidance in Notice 2011-45, 2011-25 IRB 886 with regard to advertising restrictions").

the AICPA's argument about market confusion is unconvincing, and, regardless, the IRS "can and should" take the necessary steps to assure that people are not confused about the varying levels of credentials.[45] The NTA also ensured that the requirement of passing any tests or trainings would lie solely on non-credentialed preparers.[46]

The AICPA also suggested that there is room in the proposed bills for changes that could lead to more effective oversight, including granting the IRS the authority to rescind a PTIN from a preparer that has been proven to be preparing fraudulent tax returns.[47] Another suggestion is that the IRS could do more to exchange information about preparers with state governments in order to "improve tax administration" in a way that could reduce overall government expenditures.[48]

It does not seem that the AICPA, Congress, and the NTA have irreconcilable views, especially considering all parties recognize the damage done by underreporting. It seems that this decision will be one that depends on political expediency.[49] The Act may be the political catalyst necessary for this legislation to pass as Republicans are looking to ensure that it is implemented smoothly.[50] Just as the Act may create a potential for an increase in the tax gap, it has created an opportunity for bipartisan reform of a problem that is plaguing tax administration.[51]

V. CONCLUSION

The Act has increased the need of tax preparer regulation and has provided a politically feasible path to its possibility. Given the authority to do so, the IRS could make significant headway in shrinking the tax gap and increasing revenue by hundreds of billions of dollars. While its impact on overall revenue may be the strongest political talking point, it is important to recognize the impact a lack of regulation will have on individual taxpayers

45. PURPLE BOOK, *supra* note 5, at 16.

46. *Id.*

47. *See* AICPA Letter to House, *supra* note 41, at 2 (stating that the IRS does not already have this authority).

48. *Id.* at 3.

49. *See* PURPLE BOOK, *supra* note 5, at 16 (stating that the support for the legislation is bipartisan).

50. *See* Erica Werner & Jeff Stein, *In Shift, GOP Eyes More Funding for IRS to Implement New Tax Law*, WASH. POST (Jan. 10, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/01/10/report-irs-to-face-massive-strain-under-gop-tax-law/?utm_term=.6a6bc4a38269 (expressing support from Republicans to increase funding to the IRS).

51. *See id.* (adding that the Republicans may head the advice of the NTA because of the Act's passage).

and their trust in the tax system.

Imagine you are a single parent of two children who is counting on a tax refund to pay the bills or feed your family. You should not be worried that the IRS is going to ask for that refund back, plus interest, in a few years because you trusted in a stranger who claimed to have prepared your taxes correctly.[52] If CPAs, attorneys, enrolled preparers, and Volunteer Income Tax Assistance ("VITA") volunteers are required to demonstrate knowledge of the tax code and update their training on a regular basis, it is preposterous that virtually all you need to do to advertise as a professional tax preparer is to fill out some paperwork.[53]

The IRS needs to have a greater role in the oversight of tax preparers and should work with Congress, preparers, and taxpayers to create a regulatory scheme that will help close the tax gap and decrease negative impact on taxpayers.

52. *See* 26 U.S.C. § 24(h) (2018) (estimating that claiming even on child incorrectly for the CTC could result in a taxpayer owing 2,000 dollars to the IRS).

53. *See PTIN Application Checklist: What You Need To Get Started*, IRS, https://www.irs.gov/tax-professionals/ptin-application-checklist-what-you-need-to-get-started (last updated Mar. 19, 2018) (listing the following requirements to receive a PTIN).

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