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International Human Rights Law and New Zealand's Foreign Relations: A Comparative Study of New Zealand's Relations With South Africa and Iran

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I. INTRODUCTION

Prior to World War II, the subject of international relations was confined primarily to relations between states.[1] The systematic slaughter of six million Jews by Hitler's Nazi regime provided the initial impetus for international concern for the global promotion of human rights.[2] The decision to try as crimes against humanity the shocking crimes perpetrated by Hitler's regime against the Jews constituted an irretrievable step toward both the recognition that the state is not absolutely sovereign in the treatment of its own citizens, and the realization that human rights are a legitimate matter of international concern.[3]

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[1] The relationship between a state and its citizens is exclusively within the domestic jurisdiction of the state. International law does not obligate a state to treat its own nationals in any particular manner. *Human Rights and Foreign Policy*, NETHERLANDS PARLIAMENTARY DOCUMENTS (1978-79 Sess.) (memorandum from Netherlands Minister of Foreign Affairs and Minister for Development Co-operation to the Lower House of the States General of the Netherlands) [hereinafter NETHERLANDS]; Buergenthal, *Domestic Jurisdiction, Intervention, and Human Rights: The International Law Perspective*, in HUMAN RIGHTS AND U.S. FOREIGN POLICY 114-16 (P. Brown & D. MacLean eds. 1980).

[2] NETHERLANDS, *supra* note 1, at 22.

[3] Commentators agree that the Nuremburg doctrine of crimes against humanity marked a watershed. The doctrine recognized human rights as a legitimate matter for international concern and neccesarily restricted a gonvernment's treatment of its own nationals. E. MORSE, MODERNIZA-

With the establishment of the United Nations (U.N.) after the Second World War, international politics has been extended to include consideration of relations between individuals and their own government.[4] The Charter of the U.N. provides in pertinent part, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[5] From these references to this international standard of human rights in the U.N. Charter, there emerged an International Bill of Human Rights which incorporated into binding international law specific provisions which elaborate on particular aspects of human rights guarantees. This International Bill of Human Rights includes the Universal Declaration adopted in 1948 as well as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights adopted in 1966, under which ratifying states agreed to be bound by the obligation to respect and secure the human rights of their own citizens.[6] The International Bill of Human Rights has been continually expanded by many international agreements and resolutions specifically addressing the norms which should be respected to safeguard human rights.[7]

New Zealand deserves some credit for the progress in developing a set of international standards that establish the fundamental rights of individuals and

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TION AND THE TRANSFORMATION OF INTERNATIONAL RELATIONS 159-166 (1976); Quentin-Baxter, *International Protection of Human Rights*, in ESSAYS ON HUMAN RIGHTS 132, 144 (K. Keith ed. 1968).

[4] NETHERLANDS, *supra* note 1, at 22; Quentin-Baxter, *supra* note 3, at 144.

[5] Miller, *Human Rights and Diplomacy*, in TEACHING HUMAN RIGHTS AN AUSTRALIAN SYMPOSIUM 69 (1981) (sponsored by the Australia National Commission for UNESCO); U.N. CHARTER art. 55.

[6] For the first time, the Universal Declaration established a standard for a government's treatment of its own citizens. Nations agreed to judge other nations according to this standard. The Universal Declaration recognized that human rights are a legitimate concern of the international community. Although the Universal Declaration is only a recommendation, it guides interpretion of the U.N. Charter and is cited to justify many U.N. actions. In 1968, the U.N. International Conference on Human Rights agreed that the Declaration obligates members of the international community to comply with its standards. Commentators assert that the Universal Declaration has the force of customary international law. Forsythe, *The Politics of Efficacy: The United Nations and Human Rights*, in POLITICS IN THE UNITED NATIONS SYSTEM 246-50 (L. Finkelstein ed. 1988); NETHERLANDS, *supra* note 1 at 34; UNITED NATIONS, HUMAN RIGHTS QUESTIONS AND ANSWERS 4 (1987) (source: Ministry of External Relations and Trade at the Aotearoa/New Zealand Human Rights Conference held in Wellington in 1989).

[7] For example, in 1963, the U.N. General Assembly adopted a U.N. Declaration on the Elimination of All Forms of Racial Discrimination. The declaration provides, *inter alia*, that racial discrimination not only contravenes the principles set forth in the U.N. Charter but also constitutes a violation of the Universal Declaration of Human Rights. The General Assembly adopted the Convention on the Elimination of All Forms of Racial Discrimination in 1965. Legum, *The International Moral Protest*, in INTERNATIONAL POLITICS IN SOUTHERN AFRICA 223, 225 (G. Carter & P. O'Meara eds. 1982); Forsythe, *supra* note 6, at 246-50.

the obligations of states to protect these rights.[8] New Zealand has sought to advance human rights mainly through its involvement in the United Nations. New Zealand played a role in drafting the Universal Declaration.[9] New Zealand also lent support to the international norms on human rights by signing both International Covenants.[10] New Zealand was closely involved in the formation of the Draft U.N. Convention Against Torture and lobbied strongly for its adoption.[11] More recently, New Zealand has announced its accession to the Optional Protocol to the International Covenant on Civil and Political Rights.[12] In addition, New Zealand has played an active role as a member of the Economic and Social Council, the body established by the U.N. Charter that oversees all social activities, including human rights.[13] New Zealand also played an active role as a member of the Commission on Human Rights until 1971.[14]

The emergence of an international law of human rights has had a profound impact on relations between states because the conduct of states can now be examined in light of their observance of certain basic rights and freedoms of their own citizens.[15] As one commentator accurately observed:

> The promotion of human rights to the agenda of international politics is part of

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[8] Speech by Chris Beeby, Deputy Secretary of the New Zealand Ministry of External Relations and Trade, to the United Nations Association in Christchurch (Oct. 26, 1988), *reprinted in A Growing Respect for the U.N.*, NEW ZEALAND EXTERNAL REL. REV. 23, 25 (Oct.-Dec. 1988).

[9] *Id.*

[10] HUMAN RIGHTS STATUS OF INTERNATIONAL INSTRUMENTS AS AT 1 SEPTEMBER 1988, at 8, U.N. DOC. ST/HR/5, U.N. Sales No. GE. 88-17895 (1988).

[11] The Convention Against Torture was adopted by consensus. *See* Speech by the Hon. F.D. O'Flynn, New Zealand's Deputy Minister of Foreign Affairs, to the U.N. Association of New Zealand (June 21, 1985), *reprinted in* INFORMATION BULLETIN NO. 14, NEW ZEALAND MINISTRY OF FOREIGN AFF., Nov. 1985, at 18.

[12] This will enable New Zealanders who claim their rights have been violated, and who have exhausted all their domestic remedies, to have their case heard by the Human Rights Committee of the U.N. Prime Minister Lange has outlined the relevance New Zealand's accession to the Optional Protocol has to the development of New Zealand's international human rights policy:

> The promotion of human rights further afield must in the end be based on the achievements of a just society at home. No country can hope to intercede effectively with another government over human rights abuses if it has not faced up to shortcomings in its own society. New Zealand's willingness to submit its human rights record to international review is a clear demonstration of our commitment.

Speech by the Rt. Hon. David Lange to the New Zealand Human Rights Conference in Wellington (May 26, 1989), *reprinted in A Policy Conference on Human Rights Aotearoa/New Zealand and Human Rights in the Pacific and Asia*, WORLD AFF., 2nd Quarter, 1989, at 15, 17-18.

[13] *Economic and Social Council of the U.N. (ESOSOC)*, NEW ZEALAND EXTERNAL REL. REV. Jan.-Mar. 1989, at 49.

[14] New Zealand still participates as an observer in the annual sessions of the Commission on Human Rights. *Id.*

[15] NETHERLANDS, *supra* note 1, at 23.

> an effort at moving beyond Machiavellian Statecraft . . . .
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> In the field of human rights legalization is indispensable. It is the prerequisite to the efficacy of moral obligations, it makes it possible for this sense of moral duty to have political effects. If I, as a statesman, sign a treaty in which I accept the legal obligation to respect certain human rights, it means that I acknowledge not only a domestic responsibility, but a 'cosmopolitan' one as well. I recognise that you, too, have a right to see to it that I respect these rights. This is a major breakthrough in a world in which previously you were entitled only to ensure that I treated fairly your nationals settled in or visiting my country. If you sign such a treaty and don't carry out your legal obligations to your people, I can as a cosignatory, raise the issue of your neglect or violation . . . the treatment of individuals (including nationals) is now a legitimate concern of the members of the international society, the notion of sovereignty, the very cornerstone of the 'Westphalian order' — which essentially reduced international affairs to arrangements and conflicts about and among states, and left almost everything happening within a sovereign state to its jurisdiction — has been breached.[16]

While the above quote is certainly accurate, observance of human rights in many countries fails to meet the norms established in the International Bill of Human Rights and other international human rights instruments.[17] The inability of the U.N. to ensure compliance with international standards of human rights results from the lack of a strong international enforcement mechanism.[18] Due to the lack of an effective internationally sanctioned enforcement mechanism to foster observance of human rights standards, it is incumbent upon individual governments to exercise whatever leverage they can to promote the observance of established international norms of human rights.[19]

Though New Zealand has played a prominent role in drafting the international norms of human rights that governments should observe, the New Zealand government has historically not accorded human rights considerations a top

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[16] Hoffmann, *Reaching For The Most Difficult: Human Rights as a Foreign Policy Goal*, in DAEDALUS 20-21 (American Academy of Arts and Sciences 1983).

[17] NETHERLANDS, *supra* note 1, at 26.

[18] In this respect, the international law of human rights differs from domestic law. A commentator correctly suggests that the lack of a strong international enforcement procedure may not be a weakness of international law. The scope of authority and accountability of such an enforcement mechanism would be difficult, if not impossible, to establish. Another commentator suggests that U.N. activity and international human rights instruments are aimed to indirectly influence governments to respect human rights. D. MACLEAN, HUMAN RIGHTS AND U.S. FOREIGN POLICY 106-107 (1980); Forsythe, *supra* note 6, at 267.

[19] The writer does not intend to minimize the importance of U.N. activity and the activities of non-governmental organizations in the area of human rights. Certainly, the activities of non-governmental organizations pledged to fighting human rights abuses have elicited widespread publicity and forced states to communicate with each other on these matters. R.J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS 137 (1986).

priority in its bilateral relations with other countries. In a September 1988 speech to Amnesty International, Foreign Affairs Minister Russell Marshall conceded that New Zealand has traditionally avoided including human rights considerations in its bilateral relations with other governments:

> To date, it is probably fair to say that New Zealand has sought to advance the cause of human rights through international action than through direct bilateral pressure on other governments. We have been a staunch supporter of the U.N.'s standard-setting work . . . . I believe that, in the longer term, the most effective way of improving human rights is to establish the highest possible standards on a world basis and then persuade individual countries to conform to them. This seems to me to be a more constructive approach than the scatter-shot approach of criticizing specific countries' human rights records . . . . In some cases criticism of another country's human rights record may be counter-productive, making flexibility on the part of the other government difficult. It may even lead to tougher measures to save face.[20]

Human rights considerations in the formation of foreign policy must obviously take into account the likely impact such a policy will have in improving human rights conditions in offending countries. The emphasis placed on human rights considerations in bilateral relations between countries must also be balanced against and coordinated with the promotion of other values and interests of the state and may necessarily be limited by conflicting interests, such as national security and economic trade considerations.[21]

These sometimes conflicting interests and considerations, whether real or imagined, are grappled with by states differently. While undoubtedly some of these considerations may at times deserve precedence over human rights considerations, the writer firmly believes that States have at times demonstrated a propensity to: (1) overemphasize the repercussions of pursuing a strong human rights policy on these other competing interests; (2) rely upon these other perceived conflicting interests as a guise for a genuine lack of commitment to addressing human rights abuses in other countries; and/or (3) underemphasize the utility of pursuing a vigorous human rights policy of influencing offending countries to desist from engaging in violations of international human rights law. This article will examine the writer's submission in the context of the role that human rights considerations play in New Zealand's relations with Iran and South Africa.

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[20] Speech by the Hon. Russell Marshall to Amnesty International (Sept. 13, 1988), *reprinted in Human Rights and the U.N. (speech by Mr. Marshall)*, NEW ZEALAND FOREIGN AFF. REV. July-Sept. 1988, at 42, 45.

[21] L. SCHOULTZ, HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA 109-10 (1981).

The overall approach of New Zealand to relations with Iran and South Africa raises a host of pertinent issues, all of which are inexorably intertwined. To what extent and under what circumstances do human rights considerations influence New Zealand's approach to relations with these two countries? How is New Zealand's human rights policy towards these countries affected by other real, perceived and/or fabricated competing considerations? To what extent and under what circumstances should these competing interests justify a less vigorous human rights policy? To what extent is New Zealand's human rights policy influenced by international and domestic pressure? To what extent is New Zealand's human rights policy influenced by political and economic expediency? What implications does New Zealand's human rights policy have for the future vitality of international human rights law? A comparative study of New Zealand's foreign relations with Iran and South Africa provides an ideal medium through which to examine and assess all of these issues.

II. NEW ZEALAND'S RELATIONS WITH SOUTH AFRICA

In 1984, Commonwealth Secretary-General Shridath Ramphal stated:

> Apartheid is the modern face of slavery; it is as cruel, as dehumanising, as institutionalised slavery was. It evokes . . . the same moral indignation and passionate commitment to its abolition from our human society that procured slavery's abolition through action at Westminster 150 years ago. It is the deepest scar of racism that disfigures our civilisation as we approach the twenty-first century.[22]

South Africa is the only country in the world whose political system of institutionalised racism has been universally condemned by nations of the world.[23] The institutionalised exclusion of, and discrimination against, the black majority in South Africa[24] has taken place in the context of a world community that has adopted through the United Nations a body of international law proclaiming

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[22] Speech by Commonwealth Secretary Shridath Ramphal (1984), *reprinted in* RACISM IN SOUTHERN AFRICA, THE COMMONWEALTH STAND 1 (1987).

[23] Legum, *supra* note 7, at 223.

[24] South Africa adopted its extensive apartheid laws after the National Party government came to power in 1948. The most notable apartheid laws include the 1950 Group Areas Act which legislatively segregates residential areas on the basis of race, and the 1950 Population Registration Act which classifies South Africans according to race. White South Africans constitute approximately 15% of the population of South Africa and have reserved for their use and ownership 87% of the land. The remaining 85% of the population are confined to Bantustans which comprise 13% of the territory. Speech, *supra* note 22, at 2; B. Kingsbury and S. Zulu, Apartheid and International Peace 1 (1980) (unpublished paper) (source: Africa Information Centre, Wellington).

apartheid a crime against humanity.[25] Even though an international law of human rights against apartheid has been developed, the commitment of nations and their approach to defeating institutionalised racism has varied.

New Zealand's record on relations with South Africa has been a checkered one. These relations have developed from a situation in which the conduct of South Africa in the treatment of its citizens had no impact on sporting, economic and diplomatic relations between the two countries to one in which such conduct permeated every aspect of relations between the two countries. This dramatic change attests to: (1) the developing body of international human rights law against apartheid spurred by an escalating international awareness of, and abhorrence of, South Africa's system of institutionalised racism; and (2) the influence such changes in the international legal order and environment exerted on domestic opinion and inevitably on the formation and execution of foreign policy in New Zealand.

New Zealand's relations with South Africa stretch back to the nineteenth century.[26] Both countries share a common colonial heritage:

> New Zealand and the South African colonists shared a common determination to assert their ascendancy over the indigenous people . . . . For all her loyalty to Britain and British imperialism, New Zealand at times supported the South African colonies against British interference with their autonomy.[27]

In 1906, South Africa and New Zealand extended bilateral trade preferences to each other.[28] The close relationship between New Zealand and South Africa continued throughout the early and mid-twentieth century.[29] The countries fought as allies during both World Wars.

Sporting contacts between the rugby teams of both countries reflected and reinforced the strong association between the white populations of both countries.[30] The first official rugby contacts between teams from both countries took

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[25] In 1966, the U.N. General Assembly adopted Resolution 2202A which condemned apartheid as a crime against humanity. In 1973, the U.N. General Assembly adopted an International Convention on the Suppression and Punishment of the Crime of Apartheid. The Convention not only proclaims apartheid a crime against humanity, but also declares that "inhuman acts resulting from its policies and practices . . . of racial segregation and discrimination . . . are crimes violating the principles of international law and, in particular, the purposes and principles of the U.N. Charter." Legum, *supra* note 7, at 226-28; Speech, *supra* note 22, at 30.

[26] M.P.K. Sorrenson, New Zealand's Relations with Africa 2, 9 (Oct. 1979) (unpublished paper) (source: Africa Information Centre, Wellington).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] New Zealanders played rugby in South Africa after both the Anglo-Boer War and World War I. *Id.* at 3.

place when the South African Springbok team toured New Zealand in 1921.[31] Rugby contacts between the South African Springbok team and the New Zealand All Blacks team took place again in 1928, 1937 and 1948 without the participation of Maoris.[32]

Even though prominent members of the Maori community criticized the exclusion of Maoris from rugby contacts with South African sportsmen, white New Zealanders "regarded the quest for rugby supremacy of more importance than upholding New Zealand's idea of racial equality."[33] The willingness to engage in rugby contacts without the participation of Maoris can be understood (though certainly not justified) by the passion for rugby shared by white male New Zealanders. As one writer explained:

> Rugby football is New Zealand's national game and New Zealand and South Africa are two of the strongest rugby-playing countries in the world . . . . [The] alliance in sports between South Africa and New Zealand stems from a shared passion for rugby football . . . . New Zealand and South Africa share not merely a passion for rugby, but a similar approach to the game, and the rugby rivalry between the two countries is felt to be distinctive. New Zealanders showed themselves to be highly sensitive to the feelings and opinions of South Africans who were white and highly insensitive to the problems and aspirations of those who were black . . . . New Zealand policy reflected this limited viewpoint and a more appropriate response was not to be expected without a greater awareness of the situation as experienced by other groups of South African people . . . . In New Zealand, the lure of rugby competition with South Africa proved stronger than the mores forbidding race discrimination . . . .[34]

After the Second World War, relations between the two countries remained strong. New Zealand engaged in diplomatic relations with South Africa.[35] Although trade with South Africa was minimal during the 1960's, New Zealand sought to foster increased trade through the continuation of bilateral trade pref-

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[31] The 1921 tour provoked some controversy in New Zealand when a South African correspondent accompanying the touring Springboks sent a message to his newspaper deploring "the spectacle of thousands of Europeans frantically cheering on a band of coloured men to defeat members of their own race . . . ." R. THOMPSON, RETREAT FROM APARTHEID NEW ZEALAND'S SPORTING CONTACTS WITH SOUTH AFRICA 12-14 (1975).

[32] Maoris were expressly excluded from the 1928 All Blacks tour to South Africa. The Springbok team toured New Zealand in 1937 but did not play a game against the Maoris. A 1948 All Blacks tour to South Africa proceeded which excluded the Maoris. *Id.* at 12-18.

[33] Sorrenson, *supra* note 26, at 3-4.

[34] R. THOMPSON, *supra* note 31, at 1-2, 98-99.

[35] In 1962, South Africa opened a consulate in Wellington. The South African Consul-General used his position as a platform from which to extol the virtues of apartheid and emphasize the importance of sporting contacts. Kingsbury, *supra* note 24, at 6.

erences to South Africa.[36]

Though sporting contacts with South Africa continued to flourish, such contacts elicited increasingly greater domestic and international controversy. Members of the New Zealand public became gradually more aware of the implications of excluding Maoris from sporting contacts with South Africa. Protest action was mounted against the 1960 All Blacks tour to South Africa due to the exclusion of Maoris.[37] The 1967 All Blacks tour to South Africa was postponed when South Africa refused to allow Maoris to play on the team.[38]

The New Zealand public also progressively acquired an awareness of the evils of apartheid and the implications of sporting contacts with an apartheid regime. This greater awareness manifested itself in civil protest action against sporting links with South Africa. In 1970, the South African Rugby Union did not object to the inclusion of Maoris on the New Zealand tour. Nevertheless, the 1970 tour created a stir in New Zealand because the anti-apartheid movement had gained momentum and public awareness had heightened over New Zealand's increasingly isolated role in the world community resulting from the pursuit of sporting contacts with a racist regime. There were massive demonstrations when the All Blacks team assembled in Wellington prior to their departure.[39]

There emerged a growing debate within New Zealand on the relationship between domestic opinion and international human rights standards. Writing in 1968, author Quentin-Baxter observed:

> We can hardly expect to deal finally with problems as deep-rooted as those of racial discrimination and human poverty, unless the world develops a cohesion and corporate sense which can now be found only within the confines of a particular state. We have therefore to work towards the democratic ideal of informed popular support for a world organisation in which states are the constituencies and governments are the representatives . . . . The power of the Universal Declaration is as great as the force of world opinion allows it to be. This is why it is so important to create within each member state an alert public interest in, and

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[36] Sorrenson, *supra* note 26, at 9.

[37] Although the New Zealand Rugby Union (NZRU) publicly stated that it had independently decided to exclude Maori players in the interests of Maoris, it is probable that the NZRU excluded Maori players at the request of the South African Rugby Union. In 1959, shortly after the NZRU rendered its decision to exclude Maoris, a citizens All Black Tour Association was formed to demand the abandonment of the tour unless absolute equality could be guaranteed. Opposition to the tour became more widespread and continued until the tour actually left for South Africa. R. THOMPSON, *supra* note 31, at 18-26.

[38] Prime Minister Holyoake expressed the Government's view that a team selected on the basis of race would not fully represent New Zealand. It is unclear if the NZRU postponed the tour as a result of governmental pressure or on its own accord. *Id.* at 94-95.

[39] Sorrenson, *supra* note 26, at 13; R. THOMPSON, *supra* note 31, at 18-26, 48.

> support for, the objectives of the United Nations Charter and of the Universal Declaration of Human Rights.[40]

Neither escalating domestic pressure nor mounting international protest action in the United Nations and in the world community[41] translated into either a cessation of sporting contacts or an aggressive governmental policy of actively discouraging all sporting contacts with South Africa. By playing with racially segregated teams, New Zealand sports teams were effectively condoning the system of apartheid. By failing to actively discourage such contacts, the New Zealand government was condoning collaboration with South Africa's racially discriminatory policies. The refusal to actively discourage sporting contacts in the face of increasing global and domestic opposition to such contacts represented a genuine insensitivity to, and disinterest in, combating the evils of apartheid.

This insensitivity and disinterest also manifested itself in New Zealand's actions in the U.N. and the Commonwealth. New Zealand frequently sided with Britain on matters dealing with apartheid in the U.N. and the Commonwealth. In addressing the New Zealand Institute of International Affairs in 1966, Hugh Templeton accurately portrayed the influence European values and prejudices exerted on New Zealand's perceptions of Africa, "[h]owever objective [New Zealanders] seek to be in their assessment of Africa, European interests, European standards and, sadly, European prejudices, often intrude!"[42] In 1961, a Commonwealth Conference was adjourned to discuss South Africa's application to remain in the Commonwealth as a republic.[43] The overwhelming majority of Commonwealth governments opposed South Africa's continued membership because of its apartheid policies.[44] New Zealand and Britain sought to forge a compromise permitting South Africa to remain in the Commonwealth while at the same time enabling Commonwealth countries to voice their opposition to apartheid.[45] South Africa subsequently withdrew from the Commonwealth, apparently rejecting the compromise proposal.[46] Though condemning apartheid,

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[40] Quentin-Baxter, *supra* note 3, at 144-5.

[41] Governments began to exclude South Africa from international sports competitions in the 1960's. Since that time, the policy of exclusion has gained momentum. In June 1970, the Chairman of the U.N. Special Committee on Apartheid criticized New Zealand for allowing the All Blacks tour to South Africa and stated the tour undermined the global aspirations for a world boycott of South African sports. Sorrenson, *supra* note 26, at 13.

[42] Address by Hugh Templeton to the New Zealand Institute of International Affairs (1966), *reprinted in* Laidlaw, *Stepping Across the Last Great Frontier*, 9 NEW ZEALAND INT'L REV. 7 (1986).

[43] Sorrenson, *supra* note 26, at 5.

[44] *Id.*

[45] *Id.*

[46] *Id.*

New Zealand expressed its regret for South Africa's withdrawal.[47]

New Zealand's position on retaining South Africa in the Commonwealth was publicly stated to be motivated by a desire to maintain open channels of communication through which to influence South Africa's racist policies.[48] Both the Reagan Administration in the United States and the Thatcher government in Great Britain advocated just such a policy of constructive engagement. Some critics have suggested that this policy represents a fundamental indifference to combating apartheid in that it allows South Africa to portray itself as willing to change while at the same time affording it the opportunity to maintain its oppressive system.[49]

New Zealand's approach to, and voting record on, South Africa in the United Nations during this period further reinforces the impression of New Zealand's ambivalence toward apartheid. Prior to 1958, New Zealand took the position that apartheid was a domestic matter and thus outside the jurisdiction of the U.N., pursuant to Article 2(7) of the U.N. Charter. On that basis, the New Zealand government refused to take a position against apartheid.[50]

In 1958, New Zealand acknowledged in the U.N. General Assembly that apartheid violated international human rights law codified in Articles 55 and 56 of the U.N. Charter.[51] New Zealand implemented all of the Security Council Resolutions against South Africa, including the voluntary arms embargo.[52] However, during this same period New Zealand usually voted against or abstained from resolutions in the General Assembly condemning South Africa or advocating sanctions.[53] As one commentator stated:

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[47] *Id.*

[48] *Id.*

[49] *See e.g.*, Patel, *South Africa's Destabilization Policy*, 303 THE ROUND TABLE: COMMONWEALTH J. OF INT'L AFF., 302, 304 (1987).

[50] Buergenthal, *supra* note 1, at 111-118; NETHERLANDS, *supra* note 1, at 88-89; Male, *New Zealand and the United Nations*, in BEYOND NEW ZEALAND THE FOREIGN POLICY OF A SMALL STATE 106, 108 (1980).

[51] *Id.*

[52] This was a virtually painless manoeuvre since New Zealand has never supplied South Africa with arms.

[53] New Zealand abstained on a 1970 General Assembly Resolution which urged member governments to suspend diplomatic, commercial, consular and sporting ties with South Africa. New Zealand also abstained on a 1971 General Assembly Resolution which urged member states to deny support to sporting events organized in violation of the Olympic principle of non-racial discrimination in sport. One hundred and six countries voted in favor of this resolution. Two voted against the resolution and seven (New Zealand included) abstained.

One of the few resolutions New Zealand supported was a 1965 General Assembly Resolution to set up a U.N. Trust Fund to assist political prisoners in South Africa. New Zealand failed to contribute to this U.N. Trust Fund until the Labour Party assumed power in 1972. Consequently, critics alleged that the government was not genuinely sensitive to the evils of apartheid. A commentator noted that:

> For most of the sixties New Zealand withdrew into silence on debates on apartheid. She remained one of a steadily diminishing minority of members who refused to concede that the South African situation amounted to a threat to international peace and security . . . . New Zealand's performance in the U.N. until the advent of the Labour Government in 1972 had much in common with that of the U.K., the U.S., and Australia. She fell back on a pedantic, legalistic interpretation of the Charter, with little appreciation of changing attitudes in the third world. She earned the reputation of being unduly sympathetic to the white regimes of southern Africa, a reputation amply confirmed by her continued economic and sporting contacts with South Africa.[54]

After the Labour Party took office in 1972 a more credible anti-apartheid stance was adopted.[55] For the first time, New Zealand began voting in favor of General Assembly resolutions condemning apartheid.[56] During the 1973 Com-

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> Critics of New Zealand's African policies have . . . pointed to anomalies such as support, in principle, in the General Assembly for establishment of a trust fund for the relief of victims of apartheid, but unwillingness to make a financial contribution (despite regular contributions to three U.N. trust funds for South Africa).

Male, *supra* note 50, at 108.

Just prior to the 1972 general election in New Zealand, the National Government announced that New Zealand had ratified the International Covenant on the Elimination of All Forms of Racial Discrimination. Pursuant to this convention, New Zealand undertook to prevent all practices of racial segregation and apartheid in its territory. The ratification of the convention raised the issue of whether a tour of New Zealand by a racially segregated South African rugby team would constitute a breach of New Zealand's obligation under the Convention. Legum, *supra* note 7, at 227; Sorrenson, *supra* note 26, at 7; R. THOMPSON, *supra* note 31, at 96-97.

[54] Sorrenson, *supra* note 26, at 8-9.

[55] New Zealand declined to unilaterally align itself with Britain after Britain's entry into the EEC during 1973. New Zealand could no longer depend exclusively on Britain for its continued economic success. New Zealand lauched a diplomatic offensive in Europe, the Middle East and Latin America in an attempt to explore and to expand its export markets. Consequently, New Zealand placed more emphasis on its relations with third world countries. Its voting record during the three year tenure of the Labour government from 1973-1975 began to reflect this shift in alignment. *See* Speech by Emeka Anyaoku, Deputy Commonwealth Secretary-General (June 30, 1984), *reprinted in New Zealand Foreign Policy: Choices, Challenges and Opportunites*, in PROCEEDINGS OF THE 50TH ANNIVERSARY CONFERENCE OF THE NEW ZEALAND INSTITUTE OF INTERNATIONAL AFFAIRS HELD AT WELLINGTON ON 29 AND 30 JUNE 1984 80-81 (1984) (pamphlet published by the New Zealand Institute of International Affairs in Wellington).

[56] For example, New Zealand voted for a 1973 General Assembly Resolution condemning apartheid. Nevertheless, New Zealand failed to ratify the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. To this day, New Zealand has failed to ratify this International Convention as well as the 1985 International Convention against Apartheid in Sports (based on a 1977 General Assembly resolution adopting an International Declaration against Apartheid in Sports). Very few Western countries have signed these two conventions. Countries may have refused to support the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid because of the jurisprudential implications of establishing the apartheid system as a distinct crime against humanity. Most of the states

monwealth Conference in Ottawa, Canada, Prime Minister Kirk spoke out forcefully in opposition to apartheid.[57] New Zealand's governmental policy toward South Africa also reflected an appreciation of the evolving international human rights law against apartheid in sports and the relationship between such law and New Zealand's rugby contacts with South Africa. The Labour government adopted a policy concerning sporting contacts with South Africa which brought New Zealand in line with most of the international community. Sports teams from South Africa were denied entry permits to New Zealand unless they could demonstrate that members of the team had been selected on the basis of merit in a process in which apartheid was not practiced in any form.[58] The Labour government refused to grant entry visas for the proposed Springbok tour of New Zealand in 1973.[59] The Labour government also removed preferential tariffs to South Africa.[60] At the same time, however, the government flatly refused to endorse any trade sanctions against South Africa and exports to South Africa almost doubled during the three year tenure of the Labour government.[61]

In 1976, the National Government returned to power as did its two-faced anti-apartheid approach. The 1975 National Party Manifesto reflects an approach to South Africa only marginally more progressive than the pre-1958 governmental policy on apartheid. While condemning apartheid, the Manifesto supports the non-intervention argument invariably advanced by repressive regimes, "[t]he National Party does not support apartheid or communism or any other form of political extremism. But we do respect the rights of other nations to deal with their own internal affairs in their own way — even if we disagree with their methods."[62] While the previous Labour government recognized the relationship between the evolving international law of human rights as reflected

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that ratified the conventions were black African, Eastern bloc, and third world nations. Sorrenson, *supra* note 29, at 15; HUMAN RIGHTS STATUS OF INTERNATIONAL INSTRUMENTS AS AT 1 SEPTEMBER 1988, at 8, U.N. DOC. NO. ST/HR/5, U.N. Sales No. GE.88-17895 (Nov. 1988) at 8; UNITED NATIONS, HUMAN RIGHTS QUESTIONS AND ANSWERS 25-28 (1987).

[57] Sorrenson, *supra* note 29, at 15; Holland, *New Zealand's Relations With Africa The Changing Foreign Policy of A Small State*, 303 THE ROUND TABLE: THE COMMONWEALTH J. OF INT'L AFF., 343, 346 (1987).

[58] R. THOMPSON, *supra* note 31, at 97.

[59] Though the Labour Government discouraged New Zealand teams to tour South Africa, it refused to intervene to prevent such teams from visiting South Africa. *Id.*; R. THOMPSON, *supra* note 31, at 97.

[60] Holland, *supra* note 57, at 346.

[61] One commentator notes that New Zealand's approach to South Africa during this period was not unique: "the typical Western approach to South Africa . . . was an asymmetrical amalgam of rhetorical condemnation of apartheid with the firm conviction that any form of direct action (other than a sports isolation) would be undesirable, a conclusion bolstered by the commonly held misconception that sanctions do not work." Holland, *supra* note 57, at 346.

[62] Trainor, *Sports and Foreign Policy*, NEW ZEALAND INT'L REV., May-June 1976, at 6.

in U.N. resolutions condemning apartheid in sports and the issue of New Zealand rugby contacts with South Africa, the National Government chose to disregard any such connection. One writer observed:

> Marshall, in his last speech as leader, emphasised the international context of the sports contact issue and wanted to encourage sports bodies to have regard for U.N. documents on racial discrimination and human rights. Muldoon struck an opposite note two days later as a new leader, promising the reinstatement of sports exchanges with South Africa.[63]

In 1976, the government held an official farewell to the All Blacks Rugby tour to South Africa.[64] The tour took place notwithstanding the Soweto riots and countless warnings by the U.N. Special Committee Against Apartheid and African diplomatic sources that such a move would prompt an African boycott of the Montreal Olympics.[65] One commentator aptly explains why these events failed to inspire a policy reversal by the National Government:

> Criticisms from abroad or even from within were calculated to carry little weight with that part of the electorate which supported the government's stand. Indeed, conflict with this opposition might be interpreted as helping the government's standing . . . . The international implications of the policy were possibly under-rated. It was believed that the diplomatic implications were only African, that African governments would be unlikely to be united especially in something as important as a sports boycott, not against South Africa, but against a country whose nationals played with them . . . . The reluctance to retreat was not simply pigheadedness or preservation of image but rather a desire to maintain links with Muldoon's 'ordinary bloke', who was perceived as sympathetic to the ideological elements involved in the policy . . . . The result for New Zealand's external relations . . . was invariably unfortunate.[66]

The black African nations perceived the new governmental policy as an affront. These countries were outraged by New Zealand's renewed sporting contacts with South Africa. New Zealand's expulsion from the 1976 Montreal Olympics was unsuccessfully sought by these nations.[67] As a result of their in-

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[63] Trainor, *Race, Sport, Gleneagles*, in BEYOND NEW ZEALAND THE FOREIGN POLICY OF A SMALL STATE 134 (1980).

[64] B. Kingsbury and S. Zulu, *supra* note 24, at 4.

[65] *Id.*

[66] Trainor, *supra* note 63, at 136, 141.

[67] New Zealanders were surprised by the Olympic boycott. The Soweto riots received extensive news coverage in New Zealand and the domestic anti-apartheid movement strengthened considerably. Several public opinion polls taken in late 1976 indicated that a majority of New Zealanders no longer supported rugby tours with South Africa. B. Kingsbury and S. Zulu, *supra* note 24, at 4. *See also* R. Millen, New Zealand and Black Africa : Where To From Here? 1

ability to accomplish this objective, twenty-one black African nations boycotted the Olympics.[68] International media attention was focused on New Zealand's sporting policy with South Africa. The perception of New Zealand in the world community, and particularly in Africa, was again injured by New Zealand's regressive policy toward sporting contacts with South Africa.[69]

The government attempted to diffuse the international and domestic furor over its sporting policy by vocally condemning apartheid, and the selection of any team on a non-merit basis, as well as by adopting a diplomatic posture sympathetic to black African nations.[70] Despite these overtures, African nations threatened to boycott the 1978 Commonwealth Games in Edmonton unless New Zealand curtailed its sporting contacts with South Africa.[71] A compromise was reached during a 1977 Commonwealth Conference in which the Gleneagles Agreement was drafted.[72] The Agreement required Commonwealth Governments "vigorously to combat the evils of apartheid by withholding any form of support for and by taking every practical step to discourage contact or competition by their nationals with sporting organizations, teams or sportsmen from South Africa."[73] The Agreement also provided that it was for each government to determine in accordance with its laws the methods by which to discharge its obligations under the agreement.[74]

The National Government abided by the language but definitely not the spirit of the Gleneagles Agreement. No major public speeches were made domestically by Prime Minister Muldoon supporting the agreement. New Zealand's continued lack of commitment to discouraging apartheid in sport is clearly reflected in the abstention it cast on the 1977 U.N. Declaration Against

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(1985) (unpublished paper) (source: Africa Information Centre, Wellington).

[68] Sorrenson, *supra* note 26, at 20; Holland, *supra* note 57, at 346; R. Millen, *supra* note 67, at 1.

[69] Holland, *supra* note 57, at 346; R. Millen, *supra* note 67, at 1.

[70] Trainor, *supra* note 62, at 4; Trainor, *supra*, note 63, at 139.

[71] Thompson, *An Unhealed Wound*, NEW ZEALAND INT'L REV. July-Aug. 1983, at 2.

[72] Prime Minister Muldoon served upon the subcommitee which drafted the Gleneagles Agreement. The Agreement saved the Edmonton Games from a boycott. Nigeria was the only black African nation which boycotted the Games because of New Zealand's participation. Trainor, *Has Gleneagles Worked? New Zealand vs. The African States And Almost Everybody Else*, NEW ZEALAND INT'L REV., July-Aug. 1979, at 3-5.

[73] R. Thompson, Sporting Contacts With South Africa: The African Challenge and New Zealand Government Policy 1975-1981 4 (Aug. 1981) (unpublished paper) (source: African Information Centre, Wellington); Trainor, *supra* note 63, at 138.

[74] The Agreement noted that it was unlikely future sporting contacts of any significance would take place with South Africa "while that country continues to pursue the detestable policy of apartheid." Prime Minister Muldoon reportedly assured the Conference that there would be no further Rugby matches between New Zealand and South Africa would occur until their teams were fully integrated. Mr. Muldoon later stated that he had been mistaken in his belief at the time such assurances were made. R. Thompson, *supra* note 73, at 4.

Apartheid in Sport.[75] The 1978 National Party Manifesto declared that New Zealand would continue to observe the Gleneagles Agreement while at the same time not interfere with the decisions of sporting bodies.[76]

The inconsistency in this policy soon became clear when a 1981 South African Springbok Rugby tour of New Zealand was allowed to proceed.[77] Prime Minister Muldoon asserted that Gleneagles merely required the government to discourage sporting contacts, not prohibit them. Visas would not be denied to visiting South African sportsmen. In reality, the government was encouraging continued contacts with South Africa and Muldoon's refusal to revoke the visas of visiting South Africans effectively amounted to a renunciation of earlier private assurances he had given during the 1977 Commonwealth Conference that there would be no further rugby contacts with South Africa until its teams were racially integrated.[78]

African nations were again outraged by New Zealand's effective repudiation of its obligations under Gleneagles.[79] The Commonwealth African nations sought to exclude New Zealand from the Brisbane Commonwealth Games. A compromise was again reached. The constitution of the Commonwealth Federation was amended to include a Code of Conduct permitting suspension in the event of gross non-fulfillment of the Gleneagles Agreement.[80]

In addition to arousing enmity from most African Commonwealth countries, the 1981 Springbok tour led to tremendous divisiveness and civil turmoil in New Zealand. This mounting civil protest reflected both a growing domestic awareness of the evils of apartheid and an interaction between domestic opinion and international human rights policies. In 1981 after the Springbok tour, one

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[75] Trainor, *supra* note 63, at 139; Trainor, *supra* note 72, at 2-4.

[76] R. Thompson, *supra* note 73, at 4.

[77] One commentator suggests that New Zealand was effectively pursuing two policies on sporting ties with South Africa at the same time:

> The formally stated policy is one of non-intervention in the affairs of sports bodies. The informal but effective policy encourages the restoration of sports ties with South Africa
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> . . . . .
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> The division of effective policy on sporting contacts into the formally stated and the informal has proved to be a very effective one, especially if it is desirable to convey one impression abroad and a different impression at home. The emptiness of the official statements leaves room for manoeuvre.

Thompson, *The Double Policy on Sport*, NEW ZEALAND MONTHLY REV. Aug. 1976, at 16. The National Government's approach may help explain why public opinion in 1980 supported the Springbok Rugby tour of New Zealand.

[78] The organization of African Unity described the Springbok tour as a violation of the Gleneagles Agreement and the International Declaration Against Apartheid in Sport. Thompson, *supra* note 71, at 4.

[79] *Id.*

[80] The Code of Conduct was adopted by the Commonwealth Games Federation. New Zealand abstained on the vote. *Id.*; *see* Speech, *supra* note 22, at 8.

commentator stated:

> [T]he tour became an outlet for real and imagined grievances, personal, racial, philosophical and political as well as for the deepest Christian and humanitarian motivations . . . inexorably the law moved to the side of ensuring an unhindered tour. Those opposing it were left, finally with an extreme sense of moral outrage and political impotence — the classical ingredients for street demonstrations . . . the important question is what happens to us now? What do we decide when we sit in the quiet of our homes and reflect upon the cost — not only in broken heads and property, but in long term legacies such as our coarsened attitude towards the police, our willingness to spend millions of dollars supporting apartheid sport, the scale of disruption we may have triggered for our internal problems of race and inequity, and what attitude do we really have toward South African apartheid? Isolation has for so long been a part of our protection that we are still bemused to find ourselves, so violently, at the point of international focus on apartheid.
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> *We are realising that while we say we abhor apartheid, we mean its a foreign problem and we don't want the responsibility of doing anything about it especially if it discomforts us.*[81]

New Zealand's failure to completely disassociate itself from sporting contacts with South Africa was exacting a heavy price both domestically[82] and internationally.[83] Not only was New Zealand's international prestige adversely affected, but also there were indications that New Zealand's trade with Arab and Middle East markets could possibly be in jeopardy.[84]

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[81] Statement of D.L. Kelly, *reprinted in* THE TOUR PHOTOGRAPHS 3-4 (A. McCredie ed. 1981) (emphasis added).

[82] Public opinion polls taken after the tour indicated again that the majority of New Zealanders no longer supported sporting contacts with South Africa. Prime Minister Muldoon's criticism of those opposing the tour, including Ambassador Harriman of the U.N. Committee Against Apartheid, did not elicit widespread support from the New Zealand public. Trainor, *supra* note 63, at 140.

[83] In 1976, one third of the members of the U.N. were African. One commentator suggested that other governments were less likely to elect New Zealand as a representative to international bodies because of New Zealand's relatively insensitive profile in combating apartheid sports. Trainor, *supra* note 62, at 8.

[84] One oberserver asserts that New Zealand's trade negotiations with Middle East and Arab countries could have been hindered by the government's position on apartheid:

> the newly expanded Middle East markets are highly competitive so that small considerations can tip the balance . . . . Egypt, through its membership in the O.A.U. will adhere to a strong anti-apartheid line, for it is almost the first item in the O.A.U. credo . . . there has been large scale sales of wool dairy products . . . and pulp to [Cairo] but the sports boycott was recognized as a dark cloud over [Talboy's] visit.

Trainor, *supra* note 62, at 8. This observer contends that it was unlikely that New Zealand's apartheid policy substantially affected the export negotiations. However, the O.A.U. was shrewd

With the return of a Labour government to office in 1984, New Zealand finally adopted a more definitive commitment to combating apartheid. The government discouraged sporting contacts, severed diplomatic contacts and implemented sanctions against South Africa. The Lange government has demonstrated a willingness to comply with both the letter and the spirit of Gleneagles. Individual South African passport holders who represent a South African sport at any level are not permitted entry to New Zealand for purposes of taking part in competition.[85] New Zealand sporting teams have also been actively discouraged from competing with South African sporting teams.[86] The government did everything it could to dissuade the New Zealand Rugby Union from a proposed 1985 All Black Tour of South Africa.[87] The South African Consulate in Wellington closed on its own accord in 1984 after Prime Minister Lange stated in a television interview that the Consulate would be requested to cease its operations in New Zealand.[88] Even though Prime Minister Lange has not played a prominent role in the discussion of South Africa in the Commonwealth,[89] New Zealand has implemented all measures against South Africa recommended by the Commonwealth as well as all voluntary and mandatory Se-

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enough to sense that New Zealand's government officals were hypersensitive to threats of economic reprisal.

[85] South African nationals may participate in sports in New Zealand, provided that they sign a declaration confirming that they are competing as individual sports people, not as South African representatives. *Sporting Contacts with South Africa*, NEW ZEALAND FOREIGN AFF. REV., Oct.-Dec. 1984, at 18.

[86] *Sporting Contacts with South Africa*, NEW ZEALAND FOREIGN AFF. REV., Jan.-Mar. 1985, at 32, 33.

[87] The Prime Minister held several meetings with the NZRU. On March 30, 1985, he released a letter to the Rugby Union which stated in pertinent part:

> The Government has acted to implement its considered view that it is in the best interest of New Zealand that such visits do not take place . . . . My assessment . . . has convinced me that a rugby tour of South Africa would do New Zealand great damage, and . . . for that reason the tour must not proceed . . . while the first concern of rugby people will be rugby, they cannot reasonably disclaim responsibility for the consequences that will inevitably flow from their actions . . . .

Excerpts of letter from the Rt. Hon. David Lange to the Rugby Union (Mar. 30, 1985), *reprinted in Proposed All Black Tour*, NEW ZEALAND FOREIGN AFF. REV., Jan.-Mar. 1985, at 35-36. NZRU ultimately cancelled the tour as a result of the High Court's decision in *Finnegan and Recordon v. Council of the New Zealand Rugby Football Union*. In that case, two rugby players filed suit against the rugby union. The High Court granted an interim injunction which prevented the All Blacks from leaving New Zealand on the scheduled departure date. *All Blacks Tour Decision*, NEW ZEALAND FOREIGN AFF. REV., July-Sept. 1985, at 41.

[88] *Regional and Country Links: Africa: South Africa Consulate General Closes*, NEW ZEALAND FOREIGN AFF. REV., July-Sept. 1984, at 20-21; Holland, *supra* note 57, at 352.

[89] One commentator described New Zealand's role at the 1985 Commonwealth Conference as similar to the parts of "bit players . . . extras in the chorus." Holland, *supra* note 57, at 358.

curity Council Resolutions on sanctions against South Africa.[90]

III. Implications of New Zealand's Relations with South Africa

Viewed optimistically, New Zealand has finally come to acknowledge the importance of both international law and the actions of individual states in promoting observance of such laws in combating apartheid. On the other hand, viewed cynically, human rights have historically played a small role in New Zealand's relations with South Africa. This has been true except on occasions when consideration of such rights has been allowed by political and economic expediency, and necessitated by international pressure and domestic outrage.

The position of human rights in New Zealand's foreign policy with South Africa has evolved through a painfully slow process of refusal to acknowledge apartheid as a valid matter of international discussion and concern to a grudging recognition of apartheid in international forums as a violation of international human rights law. This recognition was not initially accompanied by any type of genuine commitment to sacrifice New Zealand's economic interests for the sake of exercising whatever leverage New Zealand could to express its abhorrence of apartheid.

The slow pace at which South Africa's treatment of its citizens affected New Zealand's sporting, economic and diplomatic relations with that country can be understood (though not justified) in the context of a common colonial heritage dating back to the 19th century, a mutual passion for rugby football as well as a distinctive historical rugby rivalry. Such common historical links rendered New Zealand's sporting, economic and diplomatic relations remarkably resistant to change. Increasingly severe domestic political outrage over rugby contacts with South Africa reflected a growing interaction between domestic opinion and international human rights policy. This, coupled with a growing body of international human rights law against apartheid and protracted international pressure and humiliation, prompted New Zealand to finally adopt an approach expressing in no uncertain terms its opposition to apartheid. However commendable the current Labour government's approach to South Africa's system of apartheid may be, it is one which is long overdue.

The current government's anti-apartheid approach is compatible with New

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[90] A 1985 Commonwealth Accord on South Africa adopted limited economic sanctions. The 1985 Accord also set up an Eminent Persons Group which visited South Africa three times in an effort to foster a dialogue towards an end to apartheid. As a result of the pessimistic report issued by this group, a group of seven Commonwealth leaders agreed that further sanctions should be applied by the Commonwealth. Most Commonwealth countries including New Zealand implemented these additional measures. Speech, *supra* note 22, at 24-28; Commonwealth Committee of Foreign Ministers on South Africa: Expert Study Group Questionnaire; New Zealand Response 1-6, Ministry of External Relations and Trade, Wellington (Jan. 1989).

Zealand's long term foreign policy and economic objectives and is thus one in which New Zealand has much to gain and little to lose. By adopting a more assertive anti-apartheid stance, New Zealand's relations with black African nations have improved dramatically and consequently so has its international prestige.[91]

New Zealand's short-term economic interests have been virtually unaffected but its long-term economic interests have probably been enhanced. South Africa remains New Zealand's largest trading partner in Africa notwithstanding the sanctions implemented by New Zealand against South Africa.[92] The economic implications of sanctions are minimal because New Zealand's trade with South Africa is minimal. In addition, the specific Commonwealth and U.N. sanctions already implemented by New Zealand have been, in the words of Prime Minister Lange, "relatively painless."[93]

The Lange government has been unwilling to take any independent action which would compromise its economic interests in any way. While the Lange government has expressed a willingness to be bound by any future sanctions adopted by the U.N. or the Commonwealth, New Zealand has failed to exercise any independent leadership by imposing a total trade embargo on South Africa. By imposing a total trade ban on South Africa, New Zealand would forcefully and definitively establish its abhorrence of apartheid and its own independent commitment to its abolition. Sweden, Norway, Denmark and Finland have already adopted total trade bans against South Africa.[94] By joining these countries, New Zealand would be delivering a strong message internationally at a relatively low cost economically.

Human rights have been able to play such a prominent role in New Zealand's current relations with South Africa precisely because such prominence has

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[91] Because of its lack of African support, New Zealand was unable to secure a seat on the U.N. Security Council in mid-1970. Since then, New Zealand has obtained African support and now may may be able to secure a U.N. Security Council seat. Holland, *supra* note 57, at 355, 358

[92] In the year ending June 1987, New Zealand imported $23,530,326 worth of goods from South Africa or .20% of total imports. For the year ending June 1988, New Zealand imported $15,813,955 worth of goods from South Africa or .14% of total imports. In the year ending June 1987, New Zealand exported $14,518,362 worth of goods to South Africa or .12% of total exports. For the year ending June 1988, New Zealand exported $20,069,210 worth of goods or .17% of total exports, a noticeable 38% increase over the previous year. Wellington, New Zealand, Ministry of Foreign Affairs, New Zealand's External Trade Statistics for the Year ended June 1988 (1988).

[93] Only twenty percent of all goods that can be imported into New Zealand have been banned from South Africa. *CHOGM and South Africa*, NEW ZEALAND FOREIGN AFF. REV., OCT.-DEC. 1985, at 15-19; Holland, *supra* note 57, at 350; MCLENNAN, THE SANCTIONS HANDBOOK 1 (1988).

[94] MCLENNAN, *supra* note 93, at 8.

been increasingly necessitated by domestic pressure as well as by a developing body of human rights law against apartheid. New Zealand could not ignore this developing body of law, particularly since New Zealand was faced with escalating global pressure to alter its relations with South Africa to reflect these changes. It has also been shown that as soon as the economic interests of the State are at stake (as in the case of unilaterally implementing a total ban on trade with South Africa), the New Zealand government has demonstrated a penchant for not initiating any independent action in the human rights arena which would compromise these interests. This inclination to avoid involvement in human rights issues where perceived economic interests of the State are in jeopardy can be appreciated nowhere more clearly than in New Zealand's foreign relations with Iran.

IV. IRAN'S HUMAN RIGHTS RECORD

Iran is a signatory to the International Covenant on Civil and Political Rights.[95] Nevertheless, Iran has consistently violated the strictures of this and other human rights treaties during the Shah's reign and under the current regime.[96] Since the creation of the Islamic Republic in 1979, numerous human rights violations perpetrated by Iranian authorities have increased dramatically.[97]

Thousands of Iranians have been imprisoned, tortured and executed for their religious and/or political beliefs.[98] As the wave of human rights abuses esca-

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[95] In 1977, Iran reinforced its support for the prohibition against torture by executing a unilateral declaration indicating its intent not only to comply with a 1975 U.N. Declaration Against Torture previously adopted by acclamation but also to implement the provisions of that Declaration through legislation. AMNESTY INTERNATIONAL, SYDNEY, AUSTRALIA, TORTURE IN THE EIGHTIES 27-32 (1984); *See also* P. SEIGHERT, INTERNATIONAL LAW OF HUMAN RIGHTS 14-15 (1983).

[96] Amnesty International focused attention on human rights abuses in Iran, beginning in 1968. AMNESTY INTERNATIONAL, LONDON, IRAN AMNESTY INTERNATIONAL BRIEFING 1 (1987) (doc. no. MDE 13/08/87) (obtain from Amnesty International Publications, 1 Easton St., London WC1X8DJ).

[97] Amnesty International reports that since 1979, judges, local officials, and the Revolutionary Guard have abused their authority. The government does not apprise prisoners of the charges against them before trial. Prisoners do not have an opportunity to challenge the government's arbitrary detention of them at an impartial court hearing, and cannot present defenses during the course of summary trial proceedings which are often completed within a few minutes. The government tortures prisoners to extract confessions and uses these confessions as a basis for subsequent judgments. *Id.* at 1-12.

[98] The Islamic Penal Code prescribes several barbaric methods of punishment including amputation, flogging, stoning and crucifixion. Provisions in the Islamic Penal code dealing with stoning to death provide a stark illustration of the inhuman nature of punishments allowed under Iranian law: "In the punishment of stoning to death, the stones should not be too large, so that the person dies on being hit by one or two of them; they should not be so small either that they

lated, New Zealand's trade and diplomatic ties with Iran grew successively closer.

V. New Zealand's Developing Diplomatic and Trade Ties with Iran

Until the 1950's, New Zealand ranked among the top five countries in the world in Gross National Product per capita. Its position has since continually declined.[99] New Zealand's economy has historically been primarily dependent upon agricultural exports[100] and oil imports.[101] Prior to 1973, New Zealand engaged in relatively low levels of trade with Middle East states and, except for Israel, maintained virtually no direct diplomatic ties with these countries.[102]

A turning point in New Zealand's relations with countries in the Middle East came about during the October Middle East War of 1973 and the subsequent oil crisis initiated by the Arab member states of OPEC.[103] These events highlighted New Zealand's overwhelming dependence on imported oil and its vulnerability to oil production cutbacks by OPEC members.[104] Britain's entry into the European Economic Community during the same year, coupled with the rapid increase of agricultural protectionism in the European, North American and Japanese markets severely threatened New Zealand's export trade.[105] These events reinforced the necessity of diversifying New Zealand's agricultural export markets.[106]

Iran provided an ideal source through which New Zealand could diversify its

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could not be defined as stones." *Id.*

[99] Pryde, *New Zealand's Agriculture and Foreign Policy - An Assessment of Possible Future Policy Options*, in Economic Strategies And Foreign Policy, Proceedings Of The Fourteenth Foreign Policy School 41 (R. Hayburn & B. Webb eds. 1980).

[100] Brill, *Labour Trade Policy: Promise and Performance*, in New Directions In New Zealand Foreign Policy 99, 105 (1985).

[101] For example, New Zealand imported approximately 98% of its fuel requirements during 1973-73. New Zealand obtained 83% of its total imported fuel from Middle East countries. *See* R. MacIntyre, New Zealand and the Middle East, Politics, Energy and Trade 1, 16 (1985).

[102] In 1966-67, trade with Iran accounted for less than .1% of the total export receipts of New Zealand. During the same period, the largest single Middle East market for New Zealand exports was Israel. *Id.* at 11, 16.

[103] R. MacIntyre, New Zealand and the Middle East, Politics, Energy and Trade 72 (1985).

[104] *Id.*

[105] Richards, *New Zealand Meat Producers Board's Marketing Strategy In The Middle East* in New Zealand and the Middle East, Politics, Energy and Trade 116 (R. MacIntyre ed. 1985).

[106] Rooney, *Live Sheep Exports form New Zealand to the Middle East: A Future Trade for New Zealand*, in New Zealand and the Middle East, Politics, Energy and Trade 132 (R. MacIntyre ed. 1985).

oil imports and reduce its susceptibility to future OPEC oil cutbacks.[107] Iran also represented a prime opportunity for New Zealand to maximize access for its agricultural exports.[108]

In 1973, New Zealand's Labour government engaged in a flurry of diplomatic contacts with Iran culminating in the establishment of diplomatic relations with Iran in December of that year.[109] In 1974, ministerial level contacts continued and led to the visit of the Shah of Iran to New Zealand, the consummation of a trade agreement between the two countries, and a decision to establish an embassy in Teheran in January 1975.[110] The well chronicled human rights abuses of the Shah's regime were virtually discounted in the Labour government's formation of its relations with Iran.[111]

Since 1973, Iran has become New Zealand's largest single market for exports in the Middle East. Between 1973 and 1988 exports increased from $5.7 (N.Z.) million[112] to over $206 (N.Z.) million.[113] For the year ending June 1988, the most recent period for which statistics are available, Iran accounted for over 42% of New Zealand's Middle East exports.[114] Iran currently ranks twelfth in export value among the countries to whom New Zealand exports, constituting 1.71% of total exports.[115] This is virtually the same percentage of New Zealand exports to all countries of Eastern Europe.[116]

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[107] R. MACINTYRE, *supra* note 101 at 16, 38.

[108] Brill, *supra* note 100, at 99.

[109] R. MACINTYRE, *supra* note 101, at 17.

[110] New Zealand's desire to increase trade exports to Iran was well received by the Shah. The Shah's vision of Iran as a major industrial and military power in the 1980's necessitated an economic expansion prompted by the importation of greatly increased amounts of Western capital equipment and military hardware as well as food. Iran's imports grew from $560(U.S.) million in 1963 to over $18,400(U.S.) million in 1978. Iran spent $2200(U.S.) million or 12% of the 1978 total on food imports. H. KATOUZIAN, THE POLITICAL ECONOMY OF MODERN IRAN 324-27 (1984); *See also* MacIntyre, *New Zealand and the Middle East Oil Crisis*, in BEYOND NEW ZEALAND: THE FOREIGN POLICY OF A SMALL STATE 93, 96 (1980).

[111] The National Opposition vehemently objected to New Zealand's developing relations with Iran because of the human rights abuses associated with the Shah's regime. In contrast, the National government demonstrated a strong reluctance to allow its anti-apartheid policy affect New Zealand's diplomatic, economic, and sporting relations with South Africa. MacIntyre, *supra* note 110, at 96.

[112] Exports to Iran reached a record high of over $406(N.Z.)million in the year ending 1984. Lamb exports to Iran during that year actually exceeded lamb exports to Britain. *See* R. MACINTYRE, *supra* note 101, at 18-21.

[113] Christchurch, New Zealand, Department of Statistics.

[114] Total exports to all countries in the Middle East for the year ending June 1988 amounted to over $479(N.Z.)million or 3.97% of total exports. Wellington, New Zealand, Ministry of Foreign Affairs, New Zealand's External Trade Statistics for the Year ended June 1988 (1988).

[115] *Id.*

[116] Exports to all Eastern European countries for the year ending June 1988 was valued at over $211 (N.Z.) million or 1.75% of total exports. The U.S.S.R. is New Zealand's largest single

Lamb, wool, milk, cream, butter, cheese and curd and mutton and hogget constitute the bulk of New Zealand's exports to Iran.[117] The percentage of New Zealand's lamb and butter exports to Iran ranks second on a global scale to the United Kingdom.[118] Iran and Britain presently account for over 46% of lamb export production and over 64% of butter production.[119] Iran has obviously become a significant export market for New Zealand's lamb and butter. New Zealand is expected to export approximately $500 (N.Z.) million to Iran within the next few years, thereby rendering New Zealand increasingly dependent upon Iran as an export market.[120]

VI. The Connection Between Foreign Policy and Trade Considerations in New Zealand

The increasing dependence on trade with Iran has been perceived by New Zealand government officials as necessitating a concomitant change in New Zealand's attitude towards human rights abuses in Iran. For example, in 1986, a resolution was adopted by the U.N. General Assembly condemning human rights in Iran.[121] New Zealand's lukewarm reception of the resolution prompted harsh criticism from Western governments. New Zealand eventually endorsed the resolution with reservations.[122] The reservations expressed by New Zealand represent a perceived need to placate Iran.[123] The New Zealand repre-

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market for exports in Eastern Europe, accounting for over $146 (N.Z.) million in export value for the year ending June 1988 or 1.21% of total exports. *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] The Minister of Agriculture, Mr. Colin Moyle, recently indicated that New Zealand's exports to Iran should increase over the next few years to approximately half a billion dollars. Mr. Moyle also strongly emphasised the importance of such trade prospects for New Zealand. Transcript of Auckland Press Conference (Feb. 12 1988).

[121] G.A. Res. 159, 41st G.A. Sess., Supp. (No. 53) at 207-08, U.N. Doc. A/41/53 (1987).

[122] Foreign Affairs Officials in New Zealand have indicated to the writer that the reservations expressed by New Zealand drew strong criticism from Western governments. New Zealand voted without explanation in favor of two subsequent U.N. Resolutions condemning human rights abuses in Iran in 1987 and 1988, arguably in response to pressure from Western Governments. G.A. Res. 137, 43rd G.A. Sess., Vol. I, Supp. (No. 49) at 210-11, U.N. Doc. A/43/49 (1989); G.A. Res. 136, 42nd G.A. Sess, Vol I, Supp. (No. 49) at 227-28, U.N. Doc. A/42/49 (1988).

[123] New Zealand Foreign Affairs Officials confirmed to the writer that Iranian authorities never hesitate in both informal and formal discussions to link economic and foreign policy considerations. The New Zealand U.N. representative may have endorsed the resolution with reservations because the New Zealand government's desire to avoid offending Iran. The declared reservations also may have resulted from New Zealand's traditional reluctance to support U.N. efforts aimed at addressing human rights abuses in specific countries unless special rapporteurs who are appro-

sentative to the U.N. indicated that the resolution should have taken into account Iran's preference for the appointment of a special representative knowledgeable in Islamic jurisprudence.[124] New Zealand also asserted that U.N. machinery should not be employed in a discriminatory or selective way.[125] Accordingly, New Zealand urged the Commission on Human Rights to review the matter so that Iran could be assured of impartiality and understanding.[126]

New Zealand's approach to the 1986 U.N. vote evidences the inescapable link perceived by New Zealand government officials between foreign policy and trade considerations. Although New Zealand has subsequently voted for U.N. resolutions condemning human rights abuses in Iran, New Zealand has not publicly condemned human rights abuses in Iran. Foreign Affairs officials insist that human rights abuses in Iran are discussed privately. It is difficult to ascertain the extent, if any, to which human rights considerations play a role in, or dominate, private discussions between governmental officials in New Zealand and Iran.

No New Zealand government official has been as blunt in discussing the perceived nexus between economic self interest and a lack of commitment to addressing human rights abuses in Iran than the current Minister of Agriculture, Colin Moyle. After recently returning from a trade mission to Iran, Mr. Moyle characterized Iran as a democratic government and defended it against charges of human rights abuses.[127] It was New Zealand's nonjudgmental approach towards conditions in Iran which assisted New Zealand's status as Iran's favored Western Country:

> We have not criticized or been critical of, the regime in Iran. And it's highly important we understand the situation in Iran before any statements are made about conditions in the country . . . . They are strongly approving of New Zea-

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priately qualified and familiar with the customs of the particular country are appointed to investigate the allegations of human rights abuses. Historically, New Zealand has a thematic approach to the treatment of human rights violations. This approach highlights (identifies?) types of human rights abuses and provides an objective framework for allegations of human rights violations. *New Zealand at the Assembly*, INFORMATION BULLETIN NO. 24, MINISTRY OF EXTERNAL RELATIONS AND TRADE, WELLINGTON, May 1989, at 34.

[124] Transcript of Explanation of New Zealand's Vote on 1986 U.N. General Assembly draft resolution on Human Rights In Iran.

[125] *Id.*

[126] The position adopted by New Zealand with reference to this 1986 U.N. resolution prompted Amnesty International Spokesman Bob Rigg to characterize the Government's policy toward Iran as one of equivocation. *Amnesty Attacks Moyle*, Christchurch Press, Feb. 15, 1988, § 1, at 9, col. 4.

[127] During the 12 February 1988 Press Conference, Mr. Moyle lavished a tremendous amount of praise on Iran and described the Ayatollah Khomeini as "charismatic and influential". Transcript of Press Conference. *See also* Field, *New Zealand Iran Favourite Says Moyle*, Wellington Dominion, Feb. 13 1988, § 1, at 1, col. 1.

land's foreign policies and that weighs heavily with them. [128]

Foreign Affairs Minister Russell Marshall refused comment on Mr. Moyle's remark. Although distancing himself from Mr. Moyle's remarks, Prime Minister David Lange's reaction was surprisingly subdued.[129]

The recently appointed Iranian Ambassador to New Zealand has suggested that Mr. Moyle's remarks are accurate. During a radio interview on 27 July 1989, Ambassador Teheri stated that Iran was interested in developing trade relations with countries which are independent and which do not interfere with the domestic affairs of other countries.[130] The Ambassador stated that New Zealand was just such a country. The words, "interference with domestic affairs" are codewords used by repressive regimes to signal their distaste for criticism of human rights abuses.

The suggestion that New Zealand's lack of commitment to addressing human rights abuses in Iran serves as the basis for the strengthening of ties

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[128] Mr. Moyle also noted that Iran would be a key in the resurgence of the New Zealand economy due to its willingness to enter into long-term contracts at higher prices for New Zealand lamb and butter.

Mr. Moyle subsequently retreated significantly from his earlier position evincing a lack of concern and commitment about addressing human rights abuses in Iran:

> I . . . stated that there are a wide variety of disparate elements in Iran . . . and . . . any action in respect of the spate of . . . human rights abuses ought not to be assumed to have been orchestrated by the Government [of that country] . . . . I abhor and condemn all such acts of inhumanity and terrorism, but caution against ascribing all blame to any authority.

Id.; *See also* Field, *Huge Iran Lamb Deal Possible Says Minister*, Wellington Dominion, Feb. 13, 1988, § 1, at 2, col. 1; Letter from Colin Moyle to the Editor of the Wellington Dominion (Feb. 16 1988) (unpublished).

[129] Mr. Lange suggested Mr. Moyle's remark that Iran is democratic did not represent the Government view. Mr. Lange also told Parliament that New Zealand "has never in its trading pattern made a judgement of another country on the basis of its democracy." One National MP described Mr. Lange's response as a "double somersault and half-twist" and asked if the Prime Minister would stop his ministers grovelling at the feet of the Ayatollah, labelling Iran democratic and then returning to New Zealand and denying it. *Slip Confessed By Mr. Moyle*, Auckland Herald, Feb. 18, 1988, § 1, at 1, col. 6.

[130] He expressed a desire by Iran to enhance trade relations by increasing the volume of trade with New Zealand and to grant trade preferences for New Zealand exports over other countries. During a 1988 interview with The Evening Post, Iranian Deputy Agriculture Minister Jalal Rasul-Oss drew a veiled connection between New Zealand's criticism of human rights in Iran and New Zealand's highly lucrative trade with that country: "If there are attacks on Iran regarding cultural aspects, like human rights, then it will definitely have some effect on the other areas of relations." Foley, *Iran Ties Trade to Human Rights*, The Evening Post, Wellington, Dec. 10, 1988), § 1, at 1, col. 2; Radio Interview with Iranian Ambassador from Good Morning New Zealand Radio Program, Wellington, New Zealand (July 27, 1989).

between the two countries may be misplaced.[131] Even though economic reprisals have been threatened against countries whose human rights abuses have been publicly reproached, no such action has ever been taken by any country. Consequently, New Zealand governmental officials' obsession with the effect of criticism on trade may be an entirely irrational one. In fact, economic considerations may actually be a convenient guise for a genuine lack of interest in addressing human rights abuses in Iran.

VII. NEW ZEALAND'S RESPONSE TO THE SALMAN RUSHDIE AFFAIR AND THE UPROAR IT CAUSED IN THE WESTERN COMMUNITY

New Zealand's response to the Salman Rushdie affair further evidences the irrational obsession of the New Zealand government with the impact of criticism of breaches of international norms on economic relations. British-Indian author Salman Rushdie published a novel in 1989 entitled "The Satanic Verses." The book has been proclaimed by many Muslims to be a blasphemous attack on, and insult to, Islam.[132] On 14 February 1989, Ayatollah Khomeini (Khomeini), the spiritual and temporal leader of Iran, issued a death threat against Salman Rushdie.[133] In response to the death threat, Mr. Rushdie issued a statement declaring his regret for the "distress that the publication occasioned on the sincere followers of Islam."[134] In spite of this statement of regret, Khomeini reiterated several times his death threat against Mr. Rushdie.[135] Issuing death threats against citizens of another country effectively amounts to inciting international terrorism and constitutes a breach of the most fundamental customary norms of international behavior that govern relations between sovereign states.[136]

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[131] Recent statements by the new Iranian Ambassador to New Zealand suggest that bilateral relations between the two countries are strong because of New Zealand's non-interference in Iran's domestic affairs (a codeword used by repressive regimes for non-criticism of human rights abuses). It is difficult to assess whether these remarks are accurate or merely bluff.

[132] Initially, the book provoked no violent reaction from Iranian readers or critics. After publishers launched the book in England several weeks later, the Chairman of the Islamic Society for the Promotion of Religious Tolerance denounced the book as a blasphemous attack on Islam. Geering, *Speaking Evil*, 123 WELLINGTON LISTENER, Mar. 1989, at 25-31.

[133] Some believe the death threat was issued by Khomeini to solidify his leadership in Iran and the Islamic world, to stop any trend toward moderation through the strengthening of ties to the West, and to direct attention away from Iran's internal problems. *Id.*; Smith, *The New Satans*, TIME MAGAZINE, INT'L EDITION, Mar. 6, 1989, at 22-23.

[134] McEwen and Teimourian, *Rushdie's Fate In Balance*, The Times of London, Feb. 20, 1989, § 1, at 1, col.1.

[135] Smith, *supra* note 133; McEwen and Murray, *Iran Warns of Arrow for Rushdie*, The Times of London, Feb. 23, 1989, § 1, at 1, col. 1.

[136] Khomeini's edict spurred The Guardians of the Islamic Revolution, a terrorist group spon-

The first registered reaction of the New Zealand government to Khomeini's death threats came during a 20 February 1988 Press Conference with the Prime Minister. Mr. Lange emphatically stated that New Zealand would take no action against Iran nor take part in any international protest action against the threats made.[137] This refusal was based on a desire to avoid offending Iran, thereby jeopardizing the economic well-being of New Zealand.[138] Without hesitation, the Prime Minister discussed the link between economic and foreign policy considerations:

> with respect to New Zealand we have not had any escalation of hostility with Iran and we have a continuation of trade. And that probably is where it is best at. It is one of those things which is hard to explain; why you suddenly cause New Zealand sheep farmers to go out of business because of a threat made to a bookwriter in London. And I don't know whether any country in the world is proposing to jeopardise their entire economy. As presumably you are suggesting or questioning whether we would [take part in an international protest action] and my answer is 'no, we are not.' I am sorry for Mr. Rushdie. But in my experience I think he will live. I am threatened quite frequently.[139]

The Prime Minister's flippant attitude toward the threats against Mr. Rushdie and the forthright manner in which Mr. Lange disclosed the true motives for New Zealand's refusal to endorse diplomatic reprisals incensed Western governments.[140]

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sored at least indirectly by the Iranian Foreign Ministry's Department for Islamic Liberation Movements. The Guardians of the Islamic Revolution issued death threats against two British Ministers and a broadcaster who simply asked the Iranian Charge d'Affaires in London if he recognized that Britain does not regard it as civilized to kill people for their opinions. *United House Backs Decision On Iran*, The Times of London, Feb. 22, 1989, § 1, at 12, col. 1; Beetson, *Teheran Breaks U.K. Ties Over Rushdie*, The Times of London, Mar. 8, 1989, § 1, at 9, col. 1; *More Hostages*, The Times of London, Mar. 3, 1989, § 1, at 17, col. 1; *Incitement to Murder*, The Times of London, Feb. 15, 1989, § 1, at 15, col. 1, Morgan, *Rushdie Speaks From Hiding*, The Times of London, Mar. 2, 1989, § 1, at 7, col. 2.

[137] Transcript of the Rt. Hon D.R. Lange's Post-Cabinet Press Conference (Feb. 20, 1989).

[138] *Id.*

[139] Foreign Affairs officials in New Zealand attempted to explain Mr. Lange's initial lack of concern during the February 20, 1989 press conference to the writer. The officials stated that the twelve hour time difference between New Zealand and Europe and the consequent lack of guidance from European governments on how they would be responding to the Khomeini death threats left them unprepared to respond to Iran's actions. However, the overwhelming response of EEC governments prior to Mr. Lange's Press Conference arguably provided the New Zealand government with ample guidance as to an appropriate response to Khomeini's death threats. Kilroy-Silk, *Study in Appeasement*, The Times of London, Feb. 24 1989; *See also United House Backs Decision On Iran, supra* note 136.

[140] Conservative European Members of Parliament were especially incensed. Dr. Caroline Jackson, Conservative spokesman on consumer affairs in the European Parliament proclaimed, "[w]hy

As a concerted response to the death threat, all twelve members of the European Community agreed to withdraw their ambassadors from Iran and freeze high-level visits between Europe and Iran. In addition, all of the worlds seven leading industrial nations, except Japan, recalled their envoys from Teheran.[141]

The New Zealand government found itself in a thicket, forced to reconcile incompatible foreign economic interests. On the one hand, the government believed that it could not break off all channels of communication with Iran without risking economic sabotage from that country. On the other hand, New Zealand could not maintain the initial position propounded by the Prime Minister since that would potentially thwart New Zealand's prospects for accessibility to the European Economic Community.

New Zealand adopted the least intrusive approach conceivable. The Prime Minister sought to make amends for his previously dismissive comments on the Khomeini death threats by arranging for the Iranian envoy to New Zealand to meet the Acting Secretary of External Relations and Trade, Chris Beeby, on 23 February 1989.[142] The following day, Mike Moore, the Minister of External Relations and Trade, announced that New Zealand would not ban sales of "The Satanic Verses."[143] A trade mission to Iran by Mike Moore scheduled for

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should we fight for New Zealand lamb and butter exports against those of our community partners, and why should we stand up for it in our forthcoming election campaign if the New Zealand government will not stand up for free speech." Hornsby, *Lange's Stand On Reprisals Shocks Tory Euro MPs*, The Times of London, Feb. 22, 1989, § 1, at 6, col. 4.

[141] *Moscow Uses Rusdie Row to Boost Iran Links*, The Times of London, Feb. 28, 1989, § 1, at 1, col. 2; *Trading Partners Weigh Up Cost of Iran Sanctions*, The Times of London, Feb. 23, 1989, § 1, at 9, col. 4; McEwen, et. al., *Bush Rallies to Support of UK and Europe on Rushdie Threat*, The Times of London, Feb. 22, 1989, § 1, at 1, col. 1; Oakley, *Britain Will Expell Iran's Danger Men*, The Times of London, Mar. 9, 1989, § 1, at 1, col. 1.

[142] During the encounter, Mr. Beeby informed the Iranian charge that New Zealand finds it unacceptable for the leadership of any country to espouse violence against a citizen of another country. Press Statement of the Hon. Mike Moore (Feb. 23, 1989).

[143] On 2 March 1989, Minister of Foreign Affairs Russell Marshall delivered the most stinging public criticism of Iran by any New Zealand governmental official. Mr. Marshall described the situation as intolerable and abhorrent and remarked that New Zealand is "strongly opposed to what is effectively state terrorism . . . it is not something one would expect of any race or religion in the twentieth century." He also expressed understanding for those countries who severed diplomatic relations with Iran. He further indicated that New Zealand would reconsider its decision not to recall its envoy from Iran if the situation over the Rushdie affair worsened. Mr. Marshall's remarks are obviously much more forceful than either Mr. Lange's or Mr. Moore's publicly stated positions on the Khomeini death threats. The vacillating views expressed by authorized New Zealand government officials over the Rushdie affair created confusion and reflected poorly on the Government's formulation and coordination of foreign policy positions. The two Ministers in the Ministry of External Relations and Trade have overlapping responsibilities. The overlap creates a potential for schism in governmental policy that may be too damaging to continue. Press Statement of the Hon. Mike Moore (Feb. 24, 1989); Statement of the Hon. Russell Marshall at a Press Conference in Bahrain (Mar. 2, 1989).

April 1989 was postponed.[144] Even though this trade mission was postponed, New Zealand Trade Commissioner Duncan Watson travelled to Iran at the end of March 1989 and proclaimed that business was continuing with Iran as usual.[145]

Although registering its disapproval to Iran of the Khomeini death threats, the New Zealand government refused to withdraw its Ambassador from Teheran.[146] New Zealand only took diplomatic action against Iran when it was forced to by pressure from Western countries. Significantly, New Zealand's diplomatic actions have had absolutely no impact on long term trade or bilateral relations between the two countries.

The failure to engage in economic retaliation against New Zealand for its criticism of Iran's breach of fundamental norms of international behavior reinforces the impression that the link between criticism of human rights and trade considerations is in reality a tenuous one. Iran's policies toward New Zealand are presumably based on economic self-interest. It is unlikely that the determination of Iran's economic interests by its leaders would be significantly affected by criticism of its human rights record. Patterns of trade may thus be "sufficiently resilient to withstand criticism of human rights records."[147] As one commentator stated:

> It is now almost universally recognized that serious violations of human rights are a matter of concern to the international community as a whole and while the states accused will doubtless continue to protest when other governments criticise their record in this field, it is less and less likely that interstate relations will be fatally damaged because one state dares to criticise the performance of another in this field . . . .
>
> It is thus far less the case than is often suggested that governments must constantly maintain a prudent silence about the policies of other states which are important to them . . . . The fact is that governments today have come to expect comment on human rights affairs by other states; and there is no evidence that they will wantonly sacrifice the relations that are most important to them by over-reacting to expressions of concern which, however unwelcome to them, can never be a fatal threat to their interests . . . the government being criticized may attach quite as much importance to [the] relationship as the one that is doing the criticizing. In these circumstances even though the former may be resentful of criticism it will have in practice no alternative but to accept it and will be most

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[144] Press Statement of the Hon. Mike Moore (Mar. 14, 1989).

[145] Mr. Watson also pronounced that the Salman Rushdie affair would have little, if any, effect on New Zealand trade with Iran. *Iran Trade As Usual*, Wellington Dominion, Mar. 27, 1989, § 1, at 2, col. 5.

[146] *See supra* note 140.

[147] Luard, *Human Rights and Foreign Policy*, 56 INT'L AFF. 586 (Autumn 1980); R.J. VINCENT, *supra* note 19, at 138.

unlikely to take actions that are seriously damaging to its partners.[148]

Recent remarks made by New Zealand External Relations Minister Mike Moore appear to reflect an understanding of the relationship between trade and human rights considerations. In a 28 May 1989 speech to a Human Rights Conference in Wellington, Mr. Moore stated:

> In short, the way in which trade and human rights works [sic] together requires some very careful balancing . . . we are rarely confronted with a stark choice: trade or human rights — your money or your life. We can usually go for both . . . . The trick is to be as effective as we can in persuading other governments to improve their human rights without unnecessarily putting all the other interests of New Zealand at risk.[149]

Mr. Moore's remarks accurately imply that the tension between trade and human rights considerations is not as significant as is frequently represented.[150]

While Mr. Moore's remarks appear to reflect an appreciation of the issues involved in the relationship between trade, human rights and New Zealand's foreign policy, such understanding has not manifested itself in New Zealand's relations with Iran. New Zealand's approach to human rights abuses in Iran reflects an underlying reluctance to involve these considerations in bilateral relations between the two countries.

New Zealand's record on relations with Iran suggests: (1) an illogical obsession with the impact of pursuing a vigorous human rights policy on bilateral relations between the two countries and (2) a sellout of concern over human rights under the guise of economic interests rather than a tradeoff between the sometimes competing considerations of trade and human rights. This scenario gives rise to cynicism because it creates the impression that human rights can be paid off.[151]

VIII. INTERNATIONAL HUMAN RIGHTS LAW AND NEW ZEALAND'S RELATIONS VIS A VIS SOUTH AFRICA AND IRAN

After the Second World War, New Zealand sought to advance the cause of human rights by playing a role in the drafting of the Universal Declaration. During most of the 1950's, New Zealand refused to recognise the application of the embryonic principles of international human rights law to South Africa's

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[148] Luard, *supra* note 147, at 583-9.

[149] Speech by the Hon. Mike Moore to the Aotearoa/New Zealand Human Rights Conference in Wellington, New Zealand (May 28, 1989).

[150] Luard, *supra* note 147, at 589.

[151] Donnelley, *Human Rights and Foreign Policy*, 34 WORLD POL. 590 (July 1982).

newly created system of institutionalised racism. In 1958, New Zealand acknowledged that apartheid violated general human rights law as codified in the U.N. Charter.

From the 1960's through the early 1970's, a growing body of international human rights law against racial discrimination in general and apartheid in particular emerged. This body included the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the 1966 General Assembly resolution condemning apartheid as a crime against humanity and the 1973 International Covenant on the Suppression and Punishment of the Crime of Apartheid. New Zealand lent support to the general international norms on human rights during this period by signing both International Covenants. New Zealand also complied with its international legal obligations by implementing the mandatory Security Council Resolutions against South Africa. However, New Zealand failed to support and disregarded General Assembly Resolutions urging states to sever virtually all relations (particularly sporting ties) with South Africa and remained largely silent on debates on apartheid in the U.N.

South Africa's acknowledged violation of international human rights law did not affect New Zealand's relations with that country during this period. The New Zealand government refused to actively discourage all sporting contacts with South Africa even in the face of mounting domestic pressure and international protest action in the U.N. and in the world community. This protest action reflected a growing domestic and international awareness of the evils of apartheid. New Zealand also actively maintained bilateral trade and diplomatic contacts with South Africa during this period. A common colonial heritage, coupled with a mutual passion for rugby football helps explain (though it does not justify) the lack of impact South Africa's apartheid system exerted on bilateral relations between the two countries.

With the election of a Labour government to power in 1972, New Zealand's governmental policy reflected an appreciation of the evolving international human rights law against apartheid in sports and the relationship between such law and New Zealand's rugby contacts with South Africa. Unfortunately, this policy only lasted a short time. The return of the National Party to government in 1976 resulted in a regressive approach toward sporting links with South Africa. The National Government not only initially refused to actively discourage sporting contacts, but also effectively encouraged such contacts. This policy became increasingly unable to withstand: (1) the strains of a well entrenched body of international human rights law against apartheid in sports and the international pressure on New Zealand to alter its policy to reflect these changes in international law, and (2) a growing interaction between domestic opinion and international human rights standards.

New Zealand suffered international humiliation at the Montreal Olympics. In order to avoid further international embarrassment, New Zealand found it-

self forced to demonstrate its abhorrence of apartheid by vocally condemning apartheid in sport and by signing the Gleneagles Agreement. That these concessions were perceived by Prime Minister Muldoon to be merely cosmetic was reflected in the fact that the 1981 South African Springbok tour of New Zealand was allowed to proceed.

Tremendous domestic turmoil and international outrage and isolation finally took its toll on New Zealand's relations with South Africa. With the election of the Labour Party in 1984, New Zealand's policy toward South Africa reflected (rather than ignored) the firmly established international human rights law against apartheid as well as the widespread domestic and international abhorrence of apartheid.

Thus, New Zealand's relations with South Africa developed from a situation in which South Africa's apartheid system did not impact on bilateral relations to one in which the system of institutionalised racism virtually decimated relations between the two countries. This dramatic change attests in some respects to the changing nature of the international legal system from a Westphalian order, under which states were essentially sovereign in the treatment of their citizens, to one in which states have a responsibility to treat their citizens according to international normative standards.

New Zealand's relations with Iran present a different picture in that the conduct of Iran in the treatment of its citizens has not impacted on bilateral relations between the two countries.[152] In fact, as Iran's human rights abuses escalated New Zealand's relations with that country grew successively closer.

Formal diplomatic ties were established between New Zealand and Iran during the tenure of the Labour government in 1973. This was at a time when the International Covenant on Civil and Political Rights had been adopted by many countries, including Iran and New Zealand. Ironically, the same Labour government whose policy toward South Africa reflected an appreciation of the evolving international human rights law against apartheid in sports chose to disregard any connection between Iran's accession to the International Covenant on Civil and Political Rights, the existence of wide scale human rights abuses in Iran

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[152] The difference in impact can be explained by several factors. First, the nature of human rights abuses in Iran and South Africa are radically different. Though human rights abuses in Iran may be widespread, they are far from systematically institutionalized as in South Africa. Second, global abhorrence to South Africa's apartheid system spurred the enactment of a body of international human rights law specifically against apartheid. Iran's widespread human rights abuses have inspired far less international outrage and the application of international human rights law to Iran is based largely on more generalized international human rights law codified in the International Covenant on Civil and Political Rights and the U.N. Declaration Against Torture. Third, public opinion in New Zealand against South Africa's policy of apartheid is greater than public opinion against Iran's human rights abuses. Consequently, the New Zealand government has been under little domestic pressure to alter its relations with Iran or even to publicly criticize human rights abuses in that country.

and the establishment of diplomatic and trade ties between the two countries. At the same time, the National Party whose policies toward South Africa ignored the evolving international human rights law against apartheid in sport vehemently objected to New Zealand's developing relations with Iran because of the human rights abuses associated with the Shah's regime.

Successive governments in New Zealand have exhibited a tendency to avoid involvement of Iran's breach of international human rights law and other norms of international behavior in bilateral relations between the two countries. New Zealand's record on relations with Iran indicates an unwillingness to publicly and forcefully criticise Iran's breach of international norms unless under widespread international pressure to do so, as in the Salman Rushdie affair.

As one commentator has suggested, Iran assumed a domestic responsibility to respect certain human rights as a co-signatory to the International Covenant on Civil and Political Rights.[153] Iran also recognized that other states have a right to insist that such obligations are observed by raising the issue of Iran's violations in the U.N. and in the context of direct bilateral relations.[154] New Zealand's reluctance to exert direct bilateral pressure on Iran renders international human rights law inevitably less efficacious. If countries are unwilling to forcefully criticise other countries who violate international human rights law, then the expectations and attitudes of all countries, including the offending country, will progressively reflect such lack of commitment. In addition, if enough countries fail to criticise another country's violation of customary international human rights law, such as the Universal Declaration, such law may ultimately lose its status as customary international law. Since there is no effective international enforcement mechanism to ensure compliance with international human rights law, it is imperative that individual states exercise whatever leverage they can to promote observance of human rights. As one author insightfully pointed out:

> The international climate as a whole . . . will be altered by expressions of concern on such matters. The expectations that are placed on members of the international community are slowly changed. New norms of behavior to be expected from civilised governments are established. Regional organizations that may previously have been ineffective in this field may become more active. It is this wider effect, the slowest and most indirect of all, which may nonetheless ultimately be the most important in reducing the scale of human rights violations, for ultimately it will affect the expectations and attitudes of all; even those of future governments which might otherwise be tempted towards tyrannical policies.[155]

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[153] Hoffman, *supra* note 16.

[154] *Id.*

[155] Luard, *supra* note 147, at 589.

As stated in the introduction to this article, the historical tendency of the New Zealand government to avoid involving human rights in bilateral relations derives partly from a commonly held view that the best way to enhance human rights is through setting standards in the U.N. rather than through direct bilateral pressure which risks damaging relations and being counter-productive. This article has shown that the repercussions of pursuing a strong human rights policy on potentially conflicting interests are vastly overstated.[156] New Zealand's record on relations with Iran suggests, notwithstanding Mr. Moore's assertions to the contrary, a sellout of human rights considerations under the guise of economic interests rather than a balancing of trade and human rights considerations.

While exerting direct bilateral pressure may in some instances prove of limited utility, a government whose human rights violations are constantly criticized by other governments may gradually realize the merit in reforming their oppressive ways.[157] As one commentator suggested, the short term gains of overlooking human rights violations are outweighed by the long term risks of revolution resulting in part from the systematic human rights abuses disregarded by countries.[158] The overthrow of the Shah of Iran in 1979 provides ample proof of this assertion.

IX. CONCLUSION

Direct parallels can be drawn between the historical pattern of New Zealand's approach to human rights considerations in South Africa and Iran. This comparative study suggests that New Zealand's record on relations with South Africa and Iran reflects an inclination to place a low priority on, or, in some respects, to avoid consideration of human rights in its bilateral relations with both countries and in the formation and execution of foreign policy. Human rights considerations came to dominate New Zealand's relations with South Africa due to an evolving international law against apartheid, heightened domestic and international awareness of the evils of apartheid and the resulting protest action such awareness fostered. In contrast, New Zealand's approach to bilateral relations with Iran appears almost exclusively dominated by economic trade considerations rather than human rights considerations. This has been true except on those occasions when New Zealand has come under widespread international pressure to forcefully express its abhorrence of Iran's breach of international norms, as in the Salman Rushdie case.

The implications of New Zealand's record on relations with South Africa and

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[156] *Id.* at 588.

[157] *Id.*

[158] Donnelley, *supra* note 151, at 589.

Iran are clear. New Zealand is not likely to exert direct bilateral pressure on friendly foreign governments who commit egregious violations of international human rights law (particularly those on whom it relies heavily for trade) unless under intense international and/or domestic pressure to do so. It has been asserted that governments usually forcefully criticize a friendly state's human rights violations only when their domestic public opinion is aroused,"[h]ow far a government will go in criticizing a friendly or politically important state about its human rights policies usually depends on the degree to which public opinion at home demands it, rather than on the absolute scale of the atrocities."[159]

Author Quentin-Baxter's remarks in the 1968 book, "Essays on Human Rights" cited earlier in this article apply equally today: (1) the power of international human rights law is as effective as world opinion allows it to be, and (2) it is necessary to create an alert public interest in, and support for, such laws within each state.[160] In addition, a public well informed on egregious breaches of international human rights law will do much to foster more effective government criticism of such breaches. Yet, such public awareness is less likely to occur without the active encouragement of governmental officials. Thus, a "Catch-22" dilemma emerges. The human rights policy of the government is unlikely to change without public awareness and pressure, and such awareness is less likely to be aroused without prompting from the government. On the other hand, the media and non-governmental organizations, such as Amnesty International, can play an instrumental role in heightening public awareness of breaches of international human rights law. This occurred in the case of South Africa.[161]

In the final analysis, New Zealand's foreign policy should reflect values which it shares as a member of the world community. New Zealanders endorse the values which form the basis of international human rights law:

> What the promotion of human rights abroad requires is a coalition of liberal-democratic states willing to heed, in their foreign policy, the dictates of their values and to recognise the congruence between these values and their long-term interest in a transformed international system composed of states that respect human rights.[162]

This theme has been expanded. Another commentator aptly outlined compelling reasons which support promoting human rights as an integral component of foreign policy:

> The modern consciousness of global interdependence makes it virtually impossible

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[159] Luard, *supra* note 147, at 586-7.

[160] Quentin-Baxter, *supra* note 3, at 144-45.

[161] *See supra* note 19 and accompanying text.

[162] Hoffmann, *supra* note 16, at 48.

> to seek humane goals for one's own society while ignoring the extreme sufferings of others. For the sake of self-esteem and dignity, a concern for human rights is one element in the recognition of the unity of the human race . . . . This unity carries with it the implication that political boundaries are artificial . . . . The existence of widely supported legal norms can have mobilising effects in the domestic arenas that are the scene of violation . . . . Some violations of human rights may be curtailed by making foreign political bodies believe that without reform other serious interests of the state will suffer; these modifications may turn out to be cosmetic . . ., but, even if this is the case, particular individuals may be freed, torture may be eliminated or reduced, and the degree of repression may be diminished.[163]

The barbaric slaughter of six million Jews during the Second World War vividly established the risks associated with ignoring widescale human rights abuses as well as the collective responsibility of all states as members of the world community to exercise their influence to promote observance of basic human rights. After World War II, many asserted that they would never again witness the systematic slaughter of millions of innocent persons without taking action.[164] In Cambodia, this is precisely what happened during the mid-1970's while most of the international community remained largely silent on the atrocities committed.[165] As one writer pointed out:

> It would be a lot easier, diplomatically to do nothing, but in the long term we cannot afford to do nothing and experience shows that from time to time progress is made, on small fronts or occasionally on larger ones. If we are not prepared to help others in adversity, we ourselves may not be helped when we need to be. Our whole human attitude to international action for human rights must be based on consensus of conviction. If I may be a little dramatic, periodically the march of civilisation depends on the dedication of a few nations, a few people, to the basic premises of civilised behavior. I believe that this age is such a time.[166]

In a 30 April 1988 address to the U.N. Association in Wellington, Foreign Affairs Minister Russell Marshall conceded that New Zealand's approach to human rights may have "had insufficient drive to make the impact . . . desire[d]."[167] Perhaps such a desired result may be achieved if human rights play an increasingly more prominent role in New Zealand's foreign policy. For a

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[163] Falk, *Responding to Severe Violations*, in ENHANCING GLOBAL HUMAN RIGHTS 207, 211-12 (1979).

[164] Luard, *supra*, note 147, at 603.

[165] *Id.*

[166] Miller, *supra* note 5, at 69.

[167] Speech by the Hon. Russell Marshall to the U.N. Association in Wellington (April 30, 1988), NEW ZEALAND FOREIGN AFF. REV., April-June 1988, at 21-22.

nation, large or small, to disregard human rights in the formation and execution of foreign policy is almost tantamount to an admission that human rights standards are not worthy international norms by which the conduct of states should be judged. The inclusion of human rights considerations in foreign policy must come to be viewed as a "challenge rather than a recipe for disaster."[168]

[168] R.J. VINCENT, *supra* note 19, at 138.

Micronesian Legal History: Legacies of German and Japanese Law and Administration*

by J. David Fine**

I. Geography and History

Micronesia consists of over 2,000 islands having a total land area of less than 1,000 square miles (or approximately 2,300 square kilometres). Save for Guam and the Northern Mariana Islands (American territories, discussion of which is beyond the scope of this article[1]), Micronesia today comprises three politically

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The author gratefully acknowledges the invaluable assistance of the staff of the Columbia University Law Library, and of the Government and International Organizations Documents Divisions of the New York Public Library. He also notes with appreciation the financial support for his research of the Faculty of Law of the University of Western Australia.

[1]Guam and the Northern Mariana Islands are commonly described as having the status of "Commonwealths" of the United States: unincorporated territories with significant rights of internal self-government, albeit far less than those enjoyed by each of the 50 States. The organic laws of Guam are set out at 48 U.S.C. §§ 1421(a) through 1428(d) (1982). The organic laws of the Commonwealth of the Northern Mariana Islands are contained in 48 U.S.C. §§ 1681 through 1695 (1982), as amended by the *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America*, Act of March 24, 1976 (Pub. L. No. 94-241), which, in turn, is amended by the Acts of December 8, 1983 (Pub. L. No. 98-213, § 9) and of August 27, 1986 (Pub. L. No. 99-396, § 10). The Ninth Circuit Court of Appeals' description of the constitutional status of Guam might also aptly describe that of the Northern Mariana Islands:

> Since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam, 48 U.S.C. § 1421a, the Government of Guam is in essence an instrumentality of the federal government. Plenary control by Congress over the Guamanian government is illustrated by the provision that Congress may annul any act of Guam's Legislature.

Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1286 (9th Cir. 1984).

distinct mini-states.[2] "Independent"[3] Micronesia spreads across an expanse of the Pacific Ocean equivalent in area to the Australian continent. Immediately to the south lie Indonesia and Papua New Guinea; the Philippine archipelago is to the west. The region also extends nearly from the international date line on the east, to a meridian of longitude some 48° further westward (along which meridian also are situated Darwin in central Australia, and Vladivostok in the eastern U.S.S.R). It is these Micronesian jurisdictions — the Republic of the Marshall Islands,[4] the Republic of Palau,[5] and the Federated States of Micronesia[6] — whose legal heritage will be discussed briefly in this article.[7]

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[2] The term "state" should, perhaps, be used in a somewhat qualified sense in view of the "Compacts of Free Association" which render the three jurisdictions associated states of the U.S.A. This is a status not uncommon in the post-colonial Pacific. A broadly similar position is held, for example, by the Cook Islands and by Niue vis-à-vis New Zealand, of which each is an associated state. G. POWLES & M. PULEA, PACIFIC COURTS AND LEGAL SYSTEMS 300-01, 329 (1988).

[3] The three Compacts of Free Association are perhaps most easily found following the American enabling legislation, 48 U.S.C.S. § 1681 (1982).

But note the constitutional assertions by at least certain of the Micronesian jurisdictions of full sovereignty and of the absolute supremacy of their respective constitutions. *See, e.g.*, MARSHALL ISLANDS CONST., MARSHALL ISLANDS REV. CODE (1988) [hereinafter M.I.R.C.] *reproduced in* CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES (A. Blaunstein & P. Blaunstein, ed. 1975 & Supp. 1987). The Constitution of the Marshall Islands was drafted with the deliberate intention that it be able to stand alone as the constitution of a fully independent state, notwithstanding the anticipated Compact of Free Association with the U.S.A., and in contrast to certain other of the Micronesian constitutions.

In its Preamble, the Marshall Islands' sovereignty is said to follow directly from the grace of God, the will of the Islands' population, and the exploration and settlement of the Islands by "our forefathers who boldly ventured across the unknown waters of the vast Pacific Ocean many centuries ago . . . ." The Constitution recites, "This Constitution shall be the supreme law of the Marshall Islands . . . ." MARSHALL ISLANDS CONST. art. I § 1 (1). Furthermore, the provisions of Article IV, § 1 which (subject to the Bill of Rights in Article II and to further procedural limitations) appear sufficiently broad to afford the *Nitijela* (or Parliament) the fullest of legislative jurisdiction. *Id.* at art. IV, § 1.

[4] Population 37,000, land area 70 square miles. All populations figures cited herein are rounded to the nearest thousand, and are based upon census data compiled within the past decade.

[5] Population 14,000, land area 190 square miles.

[6] The Federated States of Micronesia itself is composed of four States; each constitutionally guaranteed a high degree of legal, administrative and cultural autonomy; and each inhabited by peoples who are highly dissimilar from one another in language, social customs, and in their attitudes with respect to "modernization," development, and the extent of desired intercourse with the outside world. The member States of the Federation are Yap (population 11,000, land area 118 square miles); Truk (population 46,000, land area 150 square miles); Ponape (population 29,000, land area 129 square miles); and Kosrae (population 7,000, land area 107 square miles).

[7] Two further jurisdictions, Kiribati (formerly know as the Gilbert Islands) and Nauru, might be regarded as forming a part of the geographic entity "Micronesia." However, as these nations

Prior to the 1860's, Western nations enjoyed only the most minimal of contacts with the territories which today comprise independent Micronesia. Although Spain laid claim to this vast area upon the tenuous basis of relatively infrequent and insubstantial navigation by sixteenth century explorers through certain of its waters,[8] European contact remained sporadic.[9] Prior to the cession of the region by Spain to the newly-emerging German Empire, piecemeal, between 1869 and 1899,[10] traditional forms of social organization remained generally untroubled by meaningful attempts to establish European authority.

German rule was to be brief — even if, as will be argued below, many German initiatives in Micronesia were to prove of enduring effect. With war in Europe looming on the horizon, the battle plan of Imperial Germany anticipated the withdrawal of its meagre military forces from Micronesia to the home port of Germany's (only) Cruiser Squadron at Tsingtao, on the southern coast of China, at the approach of the combatant units of any allied power. This indeed occurred, and its occurrence clearly was inevitable; for the Squadron's two heavy cruisers, four light cruisers and token numbers of destroyers and lumbering gunboats were both vastly outnumbered by, and individually less potent than, comparable ships in Asian waters of the combined British and Dominion, French, Russian and Japanese navies.[11]

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usually are not thought of as "Micronesian" for most purposes or by most contemporary scholars, and as they were excluded from the former Trust Territory of the Pacific, they too fall beyond the scope of this article.

[8] Including especially the 1521 voyage of discovery of Magellan. *See*, O. SPATE, THE SPANISH LAKE (1979). With respect to the tenuousness of a quite similar claim by Spain to another Pacific territory, the Island of Palmas, wherein Spain also failed to buttress a claim based upon early discovery with "any subsequent act," *see*, Huber Case (Netherlands v. U.S.), 2 R. Int'l Arb. Awards 829 (1928) (Perm. Ct. Arb. 1928).

[9] See the painstaking compilation of records of all calls by ships at ports in what is now independent Micronesia in F. HEZEL, FOREIGN SHIPS IN MICRONESIA: A COMPENDIUM OF CONTACTS WITH THE CAROLINE AND MARSHALL ISLANDS, 1521-1885 (1979) (Saipan: Trust Territory Historic Preservation Office).

[10] In various of the islands, the initial attempts of Germany to lend state authority to the attempts of German overseas trading companies to exert a measure of local authority were met by the introduction (often for the first time) of small numbers of Spanish troops and administrators. Indeed, on different islands and at different times such manifestations of Spanish authority were met by indigenous rebellion, often aided by Germany. *See*, *e.g.* P. HEMPENSTALL, PACIFIC ISLANDERS UNDER GERMAN RULE: A STUDY IN THE MEANING OF COLONIAL RESISTANCE, 73-79 (1978), detailing the events on Ponape during this era.

Direct German rule came to all of Micronesia by 1899, save for the Marshall Islands wherein the administration of the Jaluit Gesellschaft lasted until the introduction of direct rule in 1906. At all times Micronesia remained an appendage of Germany's New Guinea colony, wherein the German governor resided. *See*, GREAT BRITAIN, FOREIGN OFFICE, HISTORICAL SECTION, FORMER GERMAN POSSESSIONS IN OCEANIA, 26 (Handbook No. 146, 1920).

[11] *See*, *e.g.*, S. MORRISON, HISTORICAL NOTES ON THE GILBERT AND MARSHALL ISLANDS (1944); D. VAN DER VAT, GENTLEMEN OF WAR: THE AMAZING STORY OF CAPTAIN KARL VON

In keeping with contingency planning,[12] upon the outbreak of war in 1914 Vice-Admiral von Spee planned for the early removal of his fleet from the entire Pacific region, knowing that should he delay, his forces would be powerless to block moves of the Allied powers designed to deny him use of the Melanesian and Micronesian island coaling (and wireless telegraphy) stations, which were essential to the navigation of all of his ships.[13] Fortuitously,[14] it fell to vessels of the relatively modest Japanese navy to take the Micronesian island territories from Germany.[15]

Japanese naval occupation during the next eight years by its "Provisional South Seas Islands Defence Force" ultimately was confirmed by the grant to Japan of a Class C mandate over Micronesia by the League of Nations (subject only to what proved to be a nugatory right of access by the United States to the cable station at Yap[16]). While purporting to make most of Japanese public and private law applicable in its "South Sea Islands Territory"[17] (as Micronesia then

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MULLER AND THE S.M.S. "EMDEN" (1984), especially at 19-30.

[12] Germany's inability to protect its island territories in the Pacific in the event of global war, and the relative insignificance of them to Germany in this context, was manifestly obvious. In the year 1913 — a year which by no means was atypical of the era — the German naval presence in the region (whose major, most productive territory, in any event, was New Guinea, not the Micronesian islands) consisted of the *Planet*, a survey vessel of 650 tons displacement, and the light cruisers *Condor* and *Cormoran* (each of but 1,360 tons displacement and incapable of extended periods on station without refit and resupply at the distant home port of Tsingtao). By contrast, the Imperial German Navy's major combatant units in the Pacific (invariably deployed in or near Chinese waters) displaced in excess of 11,000 tons each. (*See* C. BURDICK, THE FRUSTRATED RAIDER: THE STORY OF THE GERMAN CRUISER "CORMORAN" IN WORLD WAR I 11-14 (1979).

[13] D. VAN DER VAT, *supra* note 11, at 33.

[14] The fall of Micronesia to Japan in 1914 was fortuitous only in the sense that no other, more powerful, allied nation's naval forces occupied the islands first. Only Japan's strategic contingency plan for a Pacific war afforded a high priority to the seizure of Micronesia, Japan having designs upon the islands dating from at least 1884. *See*, M. PEATTIE, NAN'YO: THE RISE AND FALL OF THE JAPANESE IN MICRONESIA, 1885-1945 (Pacific Island Monograph Series No. 4, 1988). As it happened in November of 1914 ships of the Royal Australian Navy were about to be dispatched to seize first Yap and then other islands of Micronesia from Germany, when news reached Sydney of Yap's capture by Admiral Matsumura's Second South Seas Squadron a month previously. A. JOSE, THE OFFICIAL HISTORY OF AUSTRALIA IN THE WAR OF 1914-1918, IX THE ROYAL AUSTRALIAN NAVY, 1914-1918 134-35 (1943). Japan justified its seizure of Micronesia (at least after the fact) on the pretext of "render[ing] the enemy homeless later on." *See*, Nakashima, *The Japanese Navy in the Great War*, 17 TRANSACTIONS AND PROCEEDINGS OF THE JAPAN SOCIETY 32, 36 (1920).

[15] *See, e.g.*, P. CLYDE, JAPAN'S PACIFIC MANDATE 25 (1935); T. YANAIHARA, PACIFIC ISLANDS UNDER JAPANESE MANDATE 23-28 (1940).

[16] *See*, Rattan, *The Yap Controversy and Its Significance*, 7 J. PAC. HIST. 124 (1972).

[17] *See*, M. MATSUISHI, JAPANESE MANDATE IN THE PACIFIC AREA 22-28 (1933) (unpublished manuscript, available in the Columbia University Law Library).

The fullest compilation of Japanese laws made specifically for the South Seas Islands is that of

became known to the outside world), the Japanese Imperial Government recognized that the Mandate Territory's status in international law would preclude Japan from regarding Micronesia, "as *bona fide* territory in the legal sense."[18] Unlike the situation of other overseas Japanese territories prior to World War II, no Imperial ordinances were enacted to extend the application of any post-1922 Japanese statutes to the South Sea Island Territory.[19]

II. PURPORTED TOTAL REPEAL OF GERMAN AND JAPANESE LAW

The islands of Micronesia fell to United States forces in the latter part of the Second World War, often at great cost in both Japanese and American lives. American administration of all of Micronesia was centred in the Mariana Islands. From the moment of U.S. naval conquest all preëxisting legal structures were superseded, and three levels of courts-martial were empowered to dispense (American) law and justice in the territory.[20] Local U.S. Naval administrators quickly issued subordinate legislation formally introducing American law, and

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235 pages in length which was submitted with Japan's 1930 annual report to the League of Nations Mandates Commission. JAPANESE GOVERNMENT'S LAWS AND REGULATIONS APPENDED TO THE ANNUAL REPORT OF THE ADMINISTRATION OF THE SOUTH SEA ISLANDS UNDER JAPANESE MANDATE FOR THE YEAR 1930 [hereinafter South Sea Islands Codification, 1930].

[18] Statement of one Dr Baba, Chief, Bureau of Jurisprudence, in the Upper House of the Diet (March 1, 1923); *quoted in* N. ASAMI, JAPANESE COLONIAL GOVERNMENT 41 (1924) (Master of Arts Thesis, Columbia University, New York). Curiously, perhaps, the courts of the successor U.S. administration were to view Japanese prerogatives under international law in the Micronesian islands more generously, and even to rule that, "Japan was free to apply its laws . . . to the same extent as though they [the islands of Micronesia] had been a geographic division of the Empire." Ngiraibiochel v. Trust Territory of the Pacific Islands, 1 Trust Territory Reports 485, 491 (Trial Div., Palau Dist. 1958) (upholding the validity of a Japanese proclamation declaring all land on Palau between the high and low water marks to be Government property). (All citations herein to cases reported in the Trust Territory Reports [hereinafter T.T.R.] are citations to decisions of the High Court of the Trust Territory of the Pacific Islands, unless otherwise indicated.) This Japanese enactment was perpetuated by Trust Territory Code [hereinafter T.T.C.] § 32 (1966). It, in turn, endures, subject to pre- and to post-independence modifications. *E.g.*, M.I.R.C., tit. 9, ch. 1, § 3(1); 1 P.N.C. § 305.

The present definitive general history of the Japanese presence in their South Seas Islands Territory clearly is that of Mark R. Peattie. M. PEATTIE, *supra* note 14. However, the disinterest of Pacific historians in the relative minutiae of Micronesian legal history is well reflected by the absence of the word *law*, and of cognate terms as well, from this work's detailed index. *Id.* at 369-82.

[19] In the view of at least one scholar, however, such an ordinance might have been intra vires the Prime Minister or "an appropriate minister." *See*, E. Chen, *The Attempt to Integrate the Empire: Legal Perspectives*, in R. MYERS, M. PEATTIE & C. CHEN, THE JAPANESE COLONIAL EMPIRE, 1895-1945 240, 255 (1984).

[20] These courts were to be comprised of either one or three "officers of the armed forces of the United States or its allies." Military Government of the Marianas, Proclamation No. 3.

establishing tribunals specifically empowered to exercise jurisdiction over the indigenous population. These tribunals were staffed either by officers of the naval administration, or by local persons elected under procedures set down by the naval administration.[21] The guiding policy consistently followed by the interim Allied naval administration[22] of Micronesia was to abrogate all provisions of Japanese or German law, and to attempt to reënforce traditional customs, private rights and social values in each part of Micronesia through judicial structures modelled upon those of the United States.[23]

Upon the establishment of civilian government, this formal abrogation of all prior laws was confirmed. This very provision, or a provision similar in its effect, continues in the legislation currently in effect throughout independent Micronesia.[24]

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[21] E.g., Ordinance No. 2 of the Marshall Islands Naval Administration, Part III, established a court of three to five members for each atoll, whose judgments were subject to review by the military government. Very similar systems were established throughout the entire area of naval administration. MARSHALL ISLANDS NAVAL ADMIN., Ordinance 2.

[22] The exhaustive treatment of the U.S. War Department's Civil Affairs Division's policies for the administration of occupied territory, as they developed in the early years of American involvement in World War II, is the thousand-page work of H. COLES AND A. WEINBERG, CIVIL AFFAIRS: SOLDIERS BECOME GOVERNORS (1964). These early U.S. Army experiences, analyzed therein, allow one to gain an understanding of the general administrative policies firmly established by the time of the American Navy's occupation of Micronesia later in the war.

[23] STANFORD UNIVERSITY, SCHOOL OF NAVAL ADMINISTRATION, HANDBOOK ON THE TRUST TERRITORY OF THE PACIFIC ISLANDS: A HANDBOOK FOR USE IN TRAINING AND ADMINISTRATION 110-26 (1948).

[24] *See*, FEDERATED STATES OF MICRONESIA CODE, tit. 1, § 204 (1982), as amended [hereinafter F.S.M.C.], which continues the provision in the prior T.T.C., purporting to repeal in its totality all Spanish, German and Japanese law. By virtue of F.S.M.C. tit. 1, § 203, "U.S. common law" is continued, and is to govern in the absence of any written *or customary law* of the Federated States. (Interestingly, as there is, of course, no such thing as a common law *of the United States*, F.S.M.C. tit. 1, § 203 identifies the provisions of the *Restatement* as defining the content of U.S. common law.)

The REPUBLIC OF PALAU NATIONAL CODE (1986) [hereinafter P.N.C.] merely continues the laws of the T.T.C. and of the subordinate PALAU DISTRICT CODE as in effect in March of 1971. P.N.C. § 303.

The M.I.R.C. is the first codification of the laws of the Republic of the Marshall Islands following independence on 1 May 1979. While avowedly English in its "format," the Office of the Legislative Counsel drew heavily upon the substantive provisions of the 1980 edition of the T.T.C. The rationale for this decision was that although the 1980 T.T.C. "was neither adopted as positive law of the Republic of the Marshall Islands nor the Trust Territory Government . . ." it "represented the most current statement of the statutory law applicable to the Marshall Islands . . . at the time that the Constitution of the Marshall Islands took effect." (M.I.R.C., introduction). The Constitution of the Marshall Islands also includes provisions perpetuating those provisions in the T.T.C. and antecedent U.S. legislation which abrogated the laws of all prior colonial régimes. It states, simply, "Subject to this Constitution the existing law shall . . . continue in force on and after the effective date of this Constitution . . . ." *Id.*, art. XII, § 1(1)(a).

III. LINGERING INFLUENCES OF GERMAN AND JAPANESE LAW IN MICRONESIA

The views which follow are advanced somewhat tentatively, in that they have been based upon examination only of the published literature available in research collections. One is forced to draw conclusions and inferences regarding Micronesian legal history from a pool of limited published primary materials, supplemented only by a secondary literature to which no legal historians have yet contributed.[25]

Even so — and even prior to anticipated archival research within Micronesia[26] — one is able to perceive certain enduring influences of German and Japanese law and administration[27] in independent Micronesia.

At the level of substantive law regulating foreign investment and non-traditional forms of commerce, one would have expected the abrogation of laws provision of the *Trust Territory Code* and of its several successor national codes to have had total effect. Yet such does not definitely appear to be the case.

Specifically, a scheme of law was promulgated by the Department of Resources and Development of the Trust Territory Government, pursuant to American enabling legislation,[28] which had the effect of strictly limiting foreign (i.e., non-U.S.) investment in Micronesia and establishing administrative guidelines for the application of discretionary provisions.[29] These provisions have, in the main, been retained and developed in independent Micronesia.[30] These

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[25] Professor Chen's article, *The Attempt to Integrate the Empire: Legal Perspectives* refers only to constitutional status of the Mandate Territory vis-à-vis Imperial Japan. CHEN, *supra* note 19.

[26] Most especially in the archives of the former Trust Territory of the Pacific at Saipan, as well as in the registries of the several courts and in the records of the several legislatures of independent Micronesia.

[27] While essentially an administrative rather than a legal matter, one must note (at least in passing) that the political sub-divisions first delineated in Micronesia during the German period have remained essentially unchanged to this day. Seats of government also have remained generally fixed, save for the transfer of government in the Marshall Islands to an unscathed Majuro atoll from Jaluit following World War II. (The effect of these decisions well may have been to reënforce many traditional patterns of inter-island trade, duties, loyalties, and suzerainty throughout the pre-independence era.) Compare, for example, the maps of the major territorial divisions within Micronesia during the German, Japanese, American, and post-independence régimes in (respectively), L. FRIEDERICHSON, DEUTSCHE SEEWARTE, STILLER HOSEAN, EIN ATLAS (1896), 31 plates; T. YANAIHARA, *supra* note 15, fold-out "Map of South Sea Islands," scale 1:8,600,000; R. FORCE, LEADERSHIP AND CULTURAL CHANGE IN PALAU 22 (1960) (map reproduced from the 1956 U.S. report to the U.N. Trusteeship Council); and the various maps throughout G. BENDURE & N. FRIARY, MICRONESIA: A TRAVEL SURVIVAL KIT (1988).

[28] Pub. L. No. 3C-50.

[29] TRUST TERRITORY OF THE PACIFIC ISLANDS, GUIDELINES FOR DOING BUSINESS IN THE TRUST TERRITORY OF THE PACIFIC ISLANDS 14-16 (1973), presents a summary of these provisions.

[30] *See*, in comparison with the two antecedent colonial régimes, the schemes for scrutiny of proposals for foreign investment, the statements of criteria to be applied in such scrutiny, and the

schemes of economic administration and legal regulations in support thereof bear some resemblance to legally sanctioned, de facto Japanese practices throughout their League of Nations sanctioned administration of Micronesia[31] — practices which effectively excluded non-Japanese concerns from Micronesian trade and commerce.[32]

Commercial regulation is a field in which one might have expected little if any continuity between the laws of the Japanese and the American administrations. However the U.S. Trusteeship Administration's policies of legally-sanctioned restriction upon foreign economic activity bear more than a superficial resemblance to those practised by the Japanese régime — both under the Mandate proper, and, later, after Japan refused to continue to supply reports on its superintendence of the South Seas Islands to the League, and, ultimately, resigned from the League of Nations in 1936.[33]

The patterns of pre-colonial land tenure rules vary widely throughout Micronesia. Put simply, the policy of German and Japanese administrators was to leave intact the quite disparate land tenure rules of Micronesia's many peoples. With precious few administrators, initial German policy was, in essence, one of absolute indifference to such matters.[34] Late in its period of administration, and

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criteria for the regulation of foreign enterprises once established, set out in 1 M.I.R.C., tit. 10, ch. 5, "Foreign Investments Advisory Board" and in 32 F.S.M.C. §§ 201-32, "Foreign Investment."

[31] *Cf., e.g.*, South Seas Bureau Ordinance 20, Rules Concerning Aid to Trades (September 1, 1923). SOUTH SEA ISLANDS CODIFICATION, 1930, tit. III, ch. VI.

[32] M. PEATTIE, NAN'YO, *supra* note 14, at 152, 236.

[33] Upon Japan's serving of the required two years' notice in February 1931 of its intention to resign from the League of Nations, following League condemnation of the Japanese invasion of Manchuria, the future of Japan's Mandate over the Pacific islands came into question. Notwithstanding consideration in the interim period of, among other options, the possible transfer by the League of the Mandate to some other member-state (*see*, Williams, *Japan's Mandate in the Pacific*, 27 AM. J. INT'L L. 429 (1933)), in the end the League did nothing. Japan ceased reporting to the League regarding its administration of the South Seas Islands Mandate, and later in that decade proceeded selectively to fortify the islands (in direct violation of Article 4 of its Mandate). It then also began to far more fully integrate the economy and, it would appear, the legal system of Micronesia into that of the expanded Japanese Empire. For an extended first-hand account of the situation in much of Micronesia on the eve of war in the Pacific, and Japan's actual treatment of foreigners therein, *see*, W. PRICE, JAPAN'S ISLANDS OF MYSTERY (1944).

[34] This, of course, was in keeping with the fundamental policy of early indirect German administration in Micronesia, through private trading overseas companies vested only with necessary and pertinent quasi-governmental powers at German law. See the excellent general description (albeit one directed more towards particular administrative practices in German New Guinea proper than in its Micronesian appendage) which is offered in P. Hempenstell, *The Neglected Empire: The Superstructure of the Colonial State in German Melanesia*, in GERMANS IN THE TROPICS: ESSAYS IN GERMAN COLONIAL HISTORY 93 (A. KNOLL & L. GANN, eds. 1987).

A nearly contemporary view of the "Company government" of the Marshall Islands by the Jaluit Gesellschaft (which, in 1887, amalgamated two earlier German trading companies) comments succinctly: "A very simple administration was set up, with a Commissioner at the head

with a greater will shown by some subordinate administrators than by others,[35] the German régime apparently began to study the various land tenure systems with a view toward compilation of registers of land ownership and of subordinate rights in land.[36] With respect to land law, as well as most other "legal" matters touching the Micronesians peoples' daily lives, traditional customary law remained essentially unchanged throughout the German administration.[37]

While details varied from island to island, at least in certain places the German codifications attempted slight modifications to local inheritance rules. This was done either to achieve what might "theoretically" have been deemed "more just" by subordinate administrators,[38] or to achieve goals of the German administration. Such goals included affording marginally more authority to German administrators at the expense of certain prerogatives of traditional

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. . . . The arrangements worked well . . . the Company, confining itself chiefly to the copra trade, made good profits." GREAT BRITAIN, FOREIGN OFFICE, HISTORICAL SECTION, *supra* note 10, at 25.

[35] For example, in Truk, which experienced no real outside control until "pacified" by force of German arms in 1903, and where later Japanese administrators were preoccupied largely with maritime matters, traditional land tenure patterns remained essentially unchanged down to the era of American administration. *See*, W. GOODENOUGH, PROPERTY, KIN AND COMMUNITY ON TRUK (Yale University Publications in Anthropology No. 46, 1951). Perhaps, then, it ought to come as no surprise to observe that Truk continues to the present day, as one of the constituent States of the Federated States of Micronesia, to exhibit strong political structures of indigenous origins, and to resist perhaps more staunchly than any other Micronesian jurisdiction, any outside economic or social influences. This was evident as early as the late 1960's, during the first serious discussions of the political entity (or entities) to be established following the termination of the U.N. Trusteeship. *See*, C. HEINE, MICRONESIA AT THE CROSSROADS: A REAPPRAISAL OF THE MICRONESIAN POLITICAL DILEMMA 122-23 (1974). *See also*, N. MELLER, THE CONGRESS OF MICRONESIA: DEVELOPMENT OF THE LEGISLATIVE PROCESS IN THE TRUST TERRITORY OF THE PACIFIC ISLANDS 120-22 (1969).

[36] Citation cannot here be offered to pertinent, unpublished primary source materials in support of this assertion. Only those portions of the annual reports of the German colonial government pertaining to New Guinea proper have been published; the portions of each annual report relating to its Micronesia dependency were excluded from the published editions in the interests of economy, and as the translators' primary concern was with the history of Papua New Guinea. *See*, GERMAN NEW GUINEA: THE ANNUAL REPORTS (P. Sack & D. Clark trans. 1979). *See also*, GERMAN NEW GUINEA: THE DRAFT ANNUAL REPORT FOR 1913-1914 (P. Sack & D. Clark trans. 1980). A copy of the full German-language original reports is said, however, to reside in the Australian National Library.

[37] For example, adoptions and adoption laws were a matter of disinterest to the German administration. *See*, Pelipe v. Pelipe, 3 T.T.R. 133, 135 (Trial Div., Ponape Dist. 1966). However, customary rights of "chiefs" to wage war, or to deal arbitrarily with their subjects, were curbed. Buelele v. Loeak, 4 T.T.R. 5, 17 (Trial Div., Marshall Islands Dist. 1968).

[38] *See*, Fischer, *Contemporary Ponape Island Land Tenure*, in PACIFIC ISLANDS (TRUST TERRITORY) HIGH COMMISSIONERS, LAND TENURE PATTERNS: TRUST TERRITORY OF THE PACIFIC ISLANDS, 92, 95 (1958).

chiefs,[39] and encouraging land clearing and thereby additional agricultural production.[40] At least in instances in which fixed rights accrued to individuals or to family groups under German-influenced law during the pre-1914 era, such rights survived and continued to be heritable throughout successor régimes.[41]

Japanese administrators and legislators continued and built upon these German initiatives of codification. The Japanese South Seas Bureau not only wished to perpetuate the traditional and varied land tenure laws of Micronesia, the Japanese administrators — among whom numbered many graduates of Tokyo University's Law Faculty[42] — also were determined to render them more certain through registration. Specifically, applicable Ordinances and Rules promulgated by the Bureau, under authority of Imperial Japanese law, provided for: systematic surveys to be carried out; boundary posts to be erected by the traditional owners; hearings to be held; traditional leaders to play a role in the delineation of traditional rights; and, finally, for "land-ledgers" and cadastral maps to be compiled.[43] By all accounts this work was effected most punctiliously by local Japanese administrators — notwithstanding the absence of long-standing colonial services or schools of colonial administration, as existed in Britain or France.[44]

Notwithstanding Japanese introduction of significant plantation agriculture into certain parts of Micronesia,[45] and Japan's expansion of existing German

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[39] *Id.* at 92-94.

[40] *Id.* at 93. Albert Hahl, the German Governor throughout most of that nation's direct rule over Micronesia, is seen by certain contemporary historians to have sought to reduce social conflict on Ponape through feeble attempts to minimize the emphasis upon matrilineal succession to land, and the powers of each district's high chief vis-à-vis his subjects. P. HEMPENSTALL, PACIFIC ISLANDERS UNDER GERMAN RULE: A STUDY IN THE MEANING OF COLONIAL RESISTANCE 81, 87-88 (1978).

As to the relative insignificance of German law and administration upon the lives of their Pacific colonies' peoples — especially those in Micronesia, as contrasted with Melanesia — *see* P. HEMPENSTALL, *supra* note 34, especially at 112.

[41] Kilara v. Alexander, 1 T.T.R. 3 (Dist. Ct for Ponape Dist. 1951).

[42] M. PEATTIE, *supra* note 14, at 71.

[43] South Seas Bureau, Ordinance 12 (October 23, 1925) (as amended), in SOUTH SEA ISLANDS CODIFICATION, 1930, ch. VIII, pt. II, at 223-24. Such records later were deemed presumptive evidence of the interests recorded therein, "unless the contrary is clearly shown." Belimina v. Pelimo, 1 T.T.R. 210, 213 (Trial Div., Ponape Dist. 1954). The proposition was upheld so often during the Trusteeship era as to be spoken of, ultimately, as one for which "citation [to precedent] is scarcely necessary." Ngirudelsang v. Etibek, 6 T.T.R. 235, 237 (Trial Div., Palau Dist. 1973).

[44] M. PEATTIE, NAN'YO, *supra* note 14, at 71-74.

[45] Particularly the production of sugar and copra, as anticipated by various of the ordinances in Chapter IX, "Industry," of the South Sea Islands Codification, 1930. However, most such plantation agriculture was introduced on the larger and more fertile islands of the Mariana group, not now a part of independent Micronesia. M. PEATTIE, *supra* note 14, at 123-32. The Eastern Carolines and the Marshall Islands, comprising in the main small coral atolls, simply could not

phosphate mines on Palau,[46] contemporary commentators and more recent secondary sources suggest that this essentially *laissez-faire* land law policy with respect to substantive rules of land law was, indeed, given significant effect in many regions of Micronesia.[47] Instances of alienation of lands to Japanese did result in a certain degree of "dispossession of Micronesians of their land and its acquisition by Japanese individuals and corporations in the last decades of Japanese rule."[48] However, the conclusion does appear justified that, on balance, Japanese efforts to record and to map — and thus to perpetuate — traditional interests in land were, "undertaken with painstaking care and scrupulous honesty."[49] Indeed, on certain of the islands this Japanese policy of perpetuating customary land laws went so far as the enactment of prohibitions against a Japanese person owning land, unless married to a native of the island.[50] The only significant attempt to settle Japanese farmers, on Babelthaup Island in Palau, was but half-hearted; it had faltered completely by 1940.[51]

Japanese influences certainly were not all-pervasive. Significant species of customary rights in land remained totally unchanged down to the Trusteeship period.[52] Conversely, during the Trusteeship era any specific legal ascriptions of interests in land made by the Spanish,[53] German,[54] or Japanese[55] régimes, even

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sustain plantation agriculture. Palau, however, had a flourishing export trade in the produce of its pineapple cannery by 1940. *Id.* at 136.

[46] Purcell, *The Economics of Exploitation: The Japanese in the Mariana, Caroline and Marshall Islands*, 11 J. PAC. HIST. 189 (1976).

[47] *See, e.g.*, T. YANAIHARA, *supra* note 15, at 121-47; and P. Clyde, *supra* note 15, at 96-100. Fischer, *supra* note 38, at 96-100, supports this general conclusion with respect to Japanese law and administration on Ponape.

[48] M. PEATTIE, *supra* note 14, at 97.

[49] *Id.* at 98.

[50] *See*, Caipot v. Narruhn, 3 T.T.R. 18 (Trial Div., Truk Dist. 1965); and Osawa v. Ludwig, 3 T.T.R. 594 (App. Div. 1966). Non-Micronesians continued to suffer this legal disability under the American administration. *See*, T.T.C. § 900. The disqualification remains in many jurisdictions: *see, e.g.*, M.I.R.C., tit. 24, ch. 1, § 13; and F.S.M. CONST. art. XIII, § 4.

[51] M. PEATTIE, *supra* note 14, at 170-74.

[52] *See, e.g.*, Filimew v. Pong, 1 T.T.R. 11 (Dist. Ct. for Yap Dist. 1951) (rights in "chief's land" on Yap); Gibbons v. Kisal, 1 T.T.R. 219 (Trial Div. Palau Dist. 1955) (rights in "chief's land" on Koror Island in Palau); Limine v. Lainej, 1 T.T.R. 231 (Trial Div. Marshall Islands Dist. 1955) (rules pertaining to transmission of rights in land in the Marshall Islands); Jatios v. Levi, 1 T.T.R. 578 (App. Div. 1954).

[53] Raimato v. Trust Territory of the Pacific Islands, 3 T.T.R. 269 (Trial Div. Truk Dist. 1967). The Spanish grant of 1886 conveyed title to the island of Ulul, in what is now the State of Truk, F.S.M.

[54] Ladore v. Salpatierre, 1 T.T.R. 18, 20 (Trial Div. Ponape Dist. 1952).

[55] Wasisang v. Trust Territory of the Pacific Islands, 1 T.T.R. 14 (Trial Div. Palau Dist. 1952). This Palauan precedent is cited repeatedly in succeeding decisions of the Court; *see e.g.*, Lazarus S. v. Tomijwa, 1 T.T.R. 123 (Trial Div. Marshall Islands Dist. 1954), with respect to rights in land on Majuro in the Marshall Islands. It was upheld by the Appellate Division in

if contrary to local custom and later deemed unjust, continued to be of legal effect, unless reversed by later legislation. Even de facto interests in land, apparent under the Japanese administration and not brought to their attention for redress by parties adverse in interest, survived the change to United States administration.[56]

United States law and administrative policy continued this attitude of deference toward the varied and traditional Micronesian patterns of land holding, while making interests in land more certain (more certain, at least, to the foreign administrators). Non-Micronesians were uniformly barred from acquiring long-term legal interests in land.[57] The official study of customary tenure was resumed in the American era, but it was suspended by the United States Trust Territory Administration following its publication of an incomplete handbook in 1958.[58]

This theme of doing the utmost to preserve the substance of traditional real property systems through affording them many of the formalities afforded to land rights in modern Western law has figured large in the debates that shaped the nature of post-independence Micronesia.[59] It continues in many of the current legal compilations.[60] While isolated post-independence enactments have attempted to reintroduce norms of customary land law that were abrogated under

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Aneten v. Olaf, 1 T.T.R. 606, 607 (App. Div. 1954) with respect to land rights on Truk.

[56] A doctrine of laches was found to apply. Elisa v. Kejerak, 1 T.T.R. 121 (Trial Div. Marshall Islands Dist. 1954). (Pre-1941 abrogations of customary land law are specifically continued by 1 F.S.M.C. § 205.)

[57] T.T.C. § 900.

[58] See the reference in GUIDELINES FOR DOING BUSINESS IN THE TRUST TERRITORY OF THE PACIFIC ISLANDS, *supra* note 29, at 16. The terminal official work is LAND TENURE PATTERNS: TRUST TERRITORY OF THE PACIFIC ISLANDS (J. DE YOUNG, ed. 1958).

Private studies progressed throughout the American period. *E.g.*, H. BARNETT, PALAUAN SOCIETY: A STUDY OF CONTEMPORARY LIFE IN THE PALAU ISLANDS (1949) (mimeographed, available from University of Oregon Publications), which makes pertinent observations throughout the 240-page work; the chapter "Property" in W. GOODENOUGH, PROPERTY, KIN AND COMMUNITY ON TRUK 29-64 (1966); H. LUNDSGAARDE, LAND TENURE IN OCEANIA chs. 2-5 (1974).

[59] There is no specifically legal study to which one might refer. However much pertinent information does appear in many of the better works on the political history of Micronesia during the late American period. These include: N. MELLER, THE CONGRESS OF MICRONESIA: DEVELOPMENT OF THE LEGISLATIVE PROCESS IN THE TRUST TERRITORY OF THE PACIFIC (1961), N. MELLER, CONSTITUTIONALISM IN MICRONESIA (1986), and C. HEINE, *supra* note 35.

[60] By contrast, in the Marshall Islands, a nation of atolls and of a traditional society rooted to the sea rather than to the soil, the post-independence statutes merely restrict land ownership to "citizens of the Republic or corporations wholly owned by citizens of the Republic . . ." or to the Republic itself: M.I.R.C., tit. 24, ch. 1, § 13. (This virtually replicates the German law applicable to the Marshall Islands, as contrasted with the German land tenure régime in other of its former Micronesian and Melanesian territories: see Great Britain Foreign Office, Historical Section, *supra* note 10, especially at 60.

prior régimes, such enactments are noteworthy for their sparsity.[61]

A highly significant departure from this general pattern of perpetuating traditional land tenure laws occurred during the German administration of Ponape, and continued throughout all successor colonial[62] régimes. Perhaps two millennia of civilization culminated in the establishment of an indigenous and highly organized social, economic and political system on Ponape prior to the arrival of the first European navigators.[63] Seeking to further Ponape's agricultural economy in accordance with their own goals, German administrators drastically curtailed the prerogatives of indigenous chiefs. Following the assassination of the local German administrator, open warfare erupted in October 1910.[64] This rebellion was suppressed by a German punitive expedition, sent from New Guinea, that included five warships and 300 marines. By late February the leaders of the uprising had surrendered, had been court-martialled, and had been either executed or exiled to slave in the phosphate mines on Palau.[65]

With German authority perhaps now more firmly established than elsewhere in Micronesia, the local administrator, Kersting, proceeded swiftly to survey all lands on Ponape, which hitherto had been "owned" collectively under customary law, and to issue to individuals certificates of private title to these lands in freehold tenure. By the end of 1911 Ponape's traditional system of matrilineal inheritance had been replaced by a new legal structure, entailing descent of land to the eldest male heir of a deceased, together with certain newly-created rights therein being vested in any landless members of an extended family.[66] The native chiefs' prerogatives also were altered significantly in local German ordinances of that year.[67] By the time of the termination of its administration of Ponape in 1914, German law was well entrenched in both the definition of the

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[61] One noteworthy example is the CUSTOMARY LAW (RESTORATION) ACT, 1986, Pub. L. No. 1986-20, M.I.R.C. tit. 39, ch. 2, § 2(1), invalidating a specific decision of the High Court of the former Trust Territory of the Pacific and substituting in its stead "the rules of customary law." *Id.* at § 2(2). That decision, L. Levi v. Kumtak, 1 T.T.R. 36 (Trial Div. Marshall Islands Dist. 1953), had affirmed the continuing validity during the American régime of a specific Japanese ruling made in 1919, which had abrogated the customary land laws of certain islands of Majuro Atoll.

[62] For ease of reference, and notwithstanding its inexactness of description, the term *colonial* is used in this article to describe all administrative régimes which have existed in Micronesia, save for régimes established following ascertainment of "the freely expressed wishes of the peoples concerned . . . ." *See*, U. N. CHARTER ART. 76(b). *See also*, the express reference to Trust Territories in Declaration on the Granting of Independence to Colonial Countries and Peoples. G.A. Res. 1514, 15 U.N. GAOR. Supp. (No. 16) at 66, U.N. Doc. A/4684 art. 5 (1960).

[63] See D. HANLON, UPON A STONE ALTAR: A HISTORY OF THE ISLAND OF POHNPEI FROM THE BEGINNINGS OF FOREIGN CONTACT TO 1890 3-25 (1988).

[64] *Id.* at 206.

[65] *See*, P. HEMPENSTALL, *supra* note 10, at 108-12.

[66] *Id.* at 114.

[67] *Id.* at 114-15.

chiefly role and the ascription of new rules of land tenure and inheritence.

The years of Japanese administration of Ponape saw a perpetuation of the German laws of 1911. Native officials were charged by law with the duty to assure obedience to law.[68] The chiefs' "spheres of jurisdiction" were said in Japanese law to be "determined in accordance with long-established usage."[69] However, these texts were construed during the Japanese era so as to merely perpetuate the German laws of 1911, and not to reintroduce pre-1910 Ponapean customary law.[70] Under Japanese administration the chiefs were further reduced from figures of real authority to mere figureheads.[71] Similarly, Japanese laws merely solidified the land law reforms of 1911.[72] Customary Ponapean land law was not reintroduced in the 30 years prior to the American conquest of the Eastern Caroline Islands.

While Ponape was never the site of successful plantation agriculture, such as was introduced by the Japanese administration in the larger, western islands of Micronesia, agricultural experimentation proceeded under Japanese rule.[73] The insistence of the expatriate Japanese community on eating imported processed Japanese foodstuffs, to the near-total exclusion of locally available fresh fish or produce,[74] gave the Japanese administration little motivation to seek greater agricultural output on Ponape. Thus, it is likely that this added to its reluctance to alter land tenure laws. The German land tenure rules of 1911, therefore, continued to be given full force of law during the Trusteeship era.[75] Still, it should be noted that Ponape's Japanese community kept to itself, and hence did not significantly influence the day-to-day affairs of the indigenous

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[68] *South Seas Bureau Instruction No. 49*,(October 11, 1922); *South Seas Islands Codification, 1930, supra* note 17, ch.II, tit. II, art. I(1).

[69] *South Seas Bureau Order No. 34*, (October 11, 1922); *South Seas Island Codification, 1930*, ch. II, tit. I, art. I, ¶ 2.

[70] *See, e.g.*, Jonathan v. Jonathan, 6 T.T.R. 100, 103-04 (Trial Div. Ponape Dist. 1972).

[71] "One chief on Ponape, recalling his subordination to Japanese authority, put it succinctly at the end of Japanese rule: 'The Japanese policeman gave the orders; I was forced to see that they were carried out.' " M. PEATTIE, *supra* note 18, at 28.

[72] *South Seas Bureau Ordinance No. 12*, (October 23, 1925, as amended); *South Seas Islands Codification, 1930, supra* note 17, ch. VIII, tit. II, especially arts. III, V, and IX.

[73] The natural fertility of the island struck an American visitor arriving immediately prior to the outbreak of World War II. *See*, W. PRICE, *supra* note 33, at 181. It has been observed by a contemporary historian that, "by the 1930s the finest research work was being done at the Ponape station, largely through the efforts of one man, the distinguished agronomist Hoshino Shutaro, who came to the island in 1927 and set about making Ponape the center of Japanese agricultural research in Micronesia." M. PEATTIE, *supra* note 18, at 135.

[74] *See*, M. PEATTIE, *supra* note 14, at 205-06.

[75] *E.g.*, Jonathan v. Jonathan, 6 T.T.R. 100 (Trial Div. Ponape Dist. 1972); Hadley v. Hadley, 7 T.T.R. 164 (Trial Div. Ponape Dist. 1975). The first reported decision of a Trusteeship-era court so ruling is Kilara v. Alexander, 1 T.T.R. 3, 5 (Dist. Ct. for Ponape Dist. 1951).

community.[76]

In the field of domestic relations it appears that both the German and Japanese administrations made little effort to change local customary laws. The Japanese law code of 1930 is silent upon the entire matter, save perhaps for the statement that "[t]he spheres of jurisdiction of the Village Chiefs and District Chiefs or the Village Headmen and the Deputy Village Headmen are determined in accordance with long-established usage."[77] Customary divorce laws, including those which permitted divorce at will by either spouse "throwing away" the other, remained unaltered throughout the European and Japanese legal régimes.[78] Customary divorce laws were further perpetuated under provisions of the Trust Territory Code,[79] which generally have been incorporated into the several post-independence legal codifications.[80] Customary laws pertaining to matrimonial property rights,[81] alienation of affections,[82] adoption,[83] and child support obligations similarly remained unaffected by colonial legal influences.[84]

In addition to the areas of land tenure and domestic relations, a third area has been influenced by colonialism. There have been specific Japanese, American, and post-independence statutes regulating the migration of foreign labour. While the texts of these laws have varied greatly over time and between régimes, all have afforded significant statutory attention to this matter, in order to achieve one end or another.

Laws encouraging, prohibiting or regulating the movement of labour (depending upon the exigencies of specific islands) were enacted by the German

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[76] M. PEATTIE, *supra* note 14, at 203, citing a 1944 Japanese account of pre-War colonial life on Ponape.

[77] *Regulations Concerning Native Village Officials in the South Sea Islands, South Sea Bureau Order No. 34*, (October 11, 1922); *South Sea Islands Codification, 1930, supra* note 17, ch. II, tit. I, art. I, ¶ 2.

[78] As on Truk. Aisea v. Trust Territory of the Pacific Islands, 1 T.T.R. 245 (Trial Div. Truk Dist. 1955). The accused appealed successfully against a conviction for the crime of "violation of native custom," per T.T.C. § 434.

[79] T.T.C. § 714.

[80] *E.g.*, M.I.R.C., tit. 26, ch. 1, § 5 (although §§ 8 and 15 thereof give a concurrent jurisdiction to the Republic's courts to grant divorces and annulments upon fault-based grounds traditional to Anglo-American family law). 6 F.S.M.C. §§ 1611 and 1614, and 21 P.N.C §§ 103 and 301 are to the same effect.

[81] Ngimgerak v. Ngirangerang, 2 T.T.R. 182 (Trial Div. Palau Dist. 1961).

[82] Miko v. Keit, 2 T.T.R. 582 (Trial Div. Truk Dist. 1964).

[83] Olekeriil v. Basilius, 2 T.T.R. 198 (Trial Div. Palau Dist. 1961).

[84] Ymesei v. Ringang, 1 T.T.R. 421 (Trial Div. Palau Dist. 1958); Orak v. Ngiraukloi, 1 T.T.R. 454 (Trial Div. Palau Dist. 1958), both applying Palauan customary law. Also, in Imeong v. Ebau, 3 T.T.R. 144 (Trial Div. Palau Dist. 1966), the Court enforced extant Palauan customary obligations of support between more distant relatives, in circumstances having their roots during the Japanese period.

administration.[85] Relatively detailed rules relating to immigrant labour,[86] and to the regulation of foreign visitors,[87] loomed large in the pre-World War II Japanese era.[88] The control of non-Micronesian visitors was also a preoccupation of the Trust Territory Government,[89] whose enactments (if not the practices these enactments sanctioned) continue in certain of the states of independent Micronesia.[90] Other jurisdictions have enacted quite detailed and extensive immigration and emigration laws in response to particular local circumstances, following independence.[91]

A prominent feature of Japanese society, during the period of Japan's League of Nations Mandate over Micronesia, as well as today, is its high reliance upon extra-legal techniques of dispute resolution. Law quite simply does not loom nearly so large as a technique of social control in Japan as it does in Western societies.[92] Similarly, at least in many of the Micronesian cultures, firmly established patterns of amicable dispute resolution existed prior to the arrival of colonizers.[93]

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[85] GREAT BRITAIN FOREIGN OFFICE, HISTORICAL SECTION, *supra* note 10, at 42-45.

[86] *South Sea Islands Codification, 1930*, *supra* note 17, ch. V, tit. X (*Civil Administration Ordinance No. 4*, December 27, 1918).

[87] *Id.* at ch. V, tit. XI (*South Seas Bureau Ordinance No. 1*, February 2, 1925).

[88] From December of 1939, the use of forced labour to build military facilities and fortifications — by Micronesians, Japanese, and by persons brought from conquered Asian nations — occurred under authority of martial law. *See*, M. PEATTIE, *supra* note 18, at 252-53, 297-98.

[89] Indeed, during the earlier years of the Trusteeship this policy went to such extremes as to be characterized by one author as an attempt at "maintaining an anthropological zoo." D. MCHENRY, MICRONESIA: TRUST BETRAYED: ALTRUISM VS. SELF INTEREST IN AMERICAN FOREIGN POLICY 6 (1975). Another scholar writes,

> Micronesia until 1960 was virtually closed to outside news media. The territory had been a sort of government 'museum' in which only authorized persons were allowed to make visitations and tours. Those allowed to visit were usually anthropologists or nuclear scientists. The anthropologists came to study the customs and culture, the scientists to conduct research and atomic tests. As a result, little was known of Micronesia in the outside world.

C. HEINE, *supra* note 35, at 20-21.

[90] While policies underlying their administration may well have changed, the provisions of the Trust Territory Code remain virtually unaltered, as 50 F.S.M.C. §§ 101-112.

[91] *E.g.*, *Immigration and Emigration Act*, Marshall Islands Pub. L. No. 1986-16 and Pub. L. No. 1987-27; M.I.R.C., tit. 43, ch. I.

[92] *See*, *e.g.*, the fundamental comparison in R. DAVID, MAJOR LEGAL SYSTEMS OF THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 534-46 (J. Brierley trans. 3d ed.). Note also the bibliographic references at 604-05.

[93] This clearly appears to be the case in Palau, for example. While no work treats dispute resolution *per se*, this feature of Palauan culture jumps to the comparative lawyer's eye when reading the sociological literature. *See*, *e.g.*, H. BARNETT, *supra* note 58, and H. BARNETT, BEING A PALAUAN (1960). Other sociologists note this phenomenon as well. R. FORCE, LEADERSHIP AND CULTURAL CHANGE IN PALAU 59-65 (1960).

Whereas German colonial law and government merely abstained, by and large, from interfering with such established socio-legal norms — due largely perhaps to the dearth of "men . . . [and] actual machinery of coercion at their disposal"[94] — Japanese policy apparently was both to appreciate fully[95] and, also, to actively encourage non-litigious and traditional dispute resolution mechanisms.[96]

This legal tradition survives, in different forms, in post-independence Micronesia. Community courts of the Federated States of Micronesia are specifically empowered to apply "generally recognized local customs" to matters within their jurisdiction.[97] Its Supreme Court judges have the specific power to, "appoint one or more assessors to advise him at the trial of any case with respect to local law or custom . . . ." [98]

In the Republic of the Marshall Islands statutory provisions also exist to permit and encourage non-litigious and customary dispute resolution mechanisms. Special tribunals of "suitably qualified persons" have been constituted to determine traditional rights, especially with respect "to land rights or to other legal interests depending wholly or partly on customary law and the traditional practices of the Marshall Islands."[99] Furthermore, the Republic's inferior courts are directed, at the behest of any party to a civil matter, to exercise a special "con-

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[94] Hempenstall, *supra* note 34, at 111.

[95] *See, e.g.*, the description — again, one following from the observations and studies of a non-lawyer — in T. YANAIHARA, *supra* note 15, particularly ch. IX, "Society," at 161-258. Study of the descriptive analyses and extensive statistical data contained in each of the annual reports of Japan to the League of Nations Mandates Commission also demonstrates the official recognition that there was but a minimal need for, and little apparent desire by Japan to impose external law upon Micronesian society.

[96] Indeed, Japanese legislation specifically reënforced the authority of traditional Micronesian social leaders. *E.g.*, *South Sea Islands Codification, 1930*, *supra* note 17, ch. II, "Local Administration." Interestingly too, subordinate legislation introduced Japanese non-litigious commercial dispute resolution techniques into Micronesia. *See, South Seas Bureau, Instruction No. 10*, (February 7, 1923), in *South Sea Islands Codification, 1930*, *supra* note 17, at 220-22. However, the anonymous translator's rendering of the Japanese socio-legal concept into English as "procedure for transacting affairs concerning Arbitration in civil disputes" appears to this author to be a translation likely to mislead the Western lawyer. The statistical reports, which were referred to in the immediately preceding footnote, show that these procedures were used infrequently during the Japanese régime — in all likelihood due to the small numbers of resident Japanese merchants having need to settle their disputes in Micronesia, rather than in Japan. Most major enterprises operating in Micronesia, such as the fishing and fish processing industries, remained dominated by Japanese-based companies through the boom years of the 1930's. M. PEATTIE, *supra* note 14, at 138-41.

[97] 5 F.S.M.C. § 401.

[98] 4 F.S.M.C. § 113.

[99] MARSHALL ISLANDS CONST. art. VI, § 4. *See also*, supplemental provisions in Pub. L. No. 1986-1, now M.I.R.C., tit. 27, ch. 3.

ciliatory jurisdiction."[100] Similar provisions, continued from the Trust Territory Code of 1980,[101] also are found in the laws of the Federated States of Micronesia.[102] Independent Micronesia thus retains a rich heritage of traditional law upon which to build its seven emerging and distinctive legal systems.[103]

Despite the deliberate desire in independent Micronesia to examine and, where desirable, to borrow from various foreign legal traditions rather than to retain uncritically the legal institutions introduced during the period of American Trusteeship,[104] its several jurisdictions retain a rich indigenous heritage upon which to continue to build their respective legal systems.

Put simply, statutory provisions may abrogate the legislation of prior colonizers. However no simple act of legislation can abrogate a people's conception of law, or their appreciation of the rôle of law in society. Both are derived from their experiences both witnessed and, often, internalized over a period of some 80 years.

In the fullness of time, when a distinctive jurisprudence of the Pacific or of Oceania comes to be documented, at least a footnote must be afforded to the influences of German and Japanese legal and administrative institutions. These institutions have been transmitted through history to the legal systems now developing in independent Micronesia.

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[100] M.I.R.C., tit. 27, ch. 2, § 61(2). The concept of "arbitration" has been restricted in the Marshall Islands' statutes to arbitral procedures generally akin to those of common law jurisdictions. *See*, M.I.R.C., tit. 30, ch. 2. It would appear, however, that only jurisprudence construing § 17(4) will indicate whether Marshall Islands arbitration law will emerge in the American tradition, or in the tradition of other common law countries such as England, New Zealand and Australia.

The latest available supplement (F.S.M.C., 1987 Supp.) reveals the absence of any arbitration statute in the laws of the Federated States of Micronesia. The Republic of Palau National Code (as set out inclusive of its latest (undated) Supplement Two) includes a similar omission.

[101] 9 T.T.C. § 51.

[102] 6 F.S.M.C. § 1502.

[103] That is, those of the Republics of Palau and of the Marshall Islands, and those of the four States of the Federated States of Micronesia, plus the latter's own federal legal system.

[104] Obvious examples from the Marshall Islands alone include the deliberate choice of a quasi-Westminster-style system of government, and the selection of an eminent Sri Lankan jurist to serve as Chief Justice of its High Court.

Comment on "The Future of New Zealand's Accident Compensation Scheme" by Richard S. Miller

The New Zealand Law Commission's Report *Personal Injury: Prevention and Recovery*[1] appears to be a stimulus for Mr Miller's article "The Future of New Zealand's Accident Compensation Scheme."[2] There are numerous points we could comment on, but the Law Commission wishes to continue the debate by making two main comments.

The first relates to Mr Miller's argument on which his thesis and proposal are based. We do not think the argument is supported by the facts. Secondly, we will clarify the role of safety and prevention in the ACC system and, in particular, the discussion of safety in our Report.

Put simply, Mr Miller's proposition is that in substituting the no fault Accident Compensation Scheme (ACC) for the tort action for the purposes of compensation, New Zealand also removed a more effective deterrent to accidental injury. He continues that the advent of ACC has led to an increase in accidents and accident rates which in turn has probably contributed to the sharp increase in costs.[3] In the course of his paper, Mr Miller attempts to demonstrate this position by starting with the increased costs and working back to his main point about the relative effectiveness of tort as a deterrent.

The claim that there has been an increase in accidents or their severity is pivotal to the argument, yet, as Mr Miller acknowledges, direct data about the incidence and severity of injury are not available to support or refute it.[4] Mr Miller argues that it must be the case because the cost of compensating accidents has increased over the years well beyond the cost of inflation. He apparently discounts documented reasons for the increase in costs, such as increased amounts of awards for non-economic loss, increased health care costs, hidden

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[1] LAW COMMISSION, REPORT NO. 4: PERSONAL INJURY: PREVENTION AND RECOVERY, REPORT ON THE ACCIDENT COMPENSATION SCHEME (1988) [hereinafter Law Commission Report].

[2] Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U.Haw.L.Rev. 3 (1989).

[3] *Id.* at 7, 71.

[4] *Id.* at 49, 65.

unemployment, abuse of the scheme, maturation[5] and arrives at the position that the increase must therefore be attributable to increased incidence and severity of the injury. The empirical basis for his proposition that tort is a more effective deterrent rests on this unsubstantiated premise.

More recent data and analysis have become available since the Law Commission's Report and since Mr Miller's article which reinforce our view that the basic proposition is not tenable. It is particularly relevant to note the decrease in ACC claims since 1987. There was an 11% drop from 180,000 claims in 1987 to 160,000 in 1988 which in turn dropped another 11% to 143,000 in 1989. The important point is that there has been no let-up in ACC costs at the same time. Compensation expenditure increased by 20% from $531 million in 1987 to $619 million in 1988 and by 25% to $777 million in 1989. We conclude that Mr Miller's argument[6] cannot rely on a greater incidence of injury (as evidenced by claims to ACC) in recent years. Consequently, it is not an increase in claims that is contributing to the increased costs.

In our Report we raised questions about whether the length of time people are staying on compensation is increasing and if so, for what reasons.[7] Mr Miller acknowledges but dismisses this.[8] Recent work suggests this is where the explanation for "cost creep" lies and it applies to "prior year" claims as well as "new accidents."[9] For example, whereas in 1984 2.4% of cases were on compensation for more than one year, this had increased to 4.7% of 1988 cases. This could be because of increased severity of the injury but there is no evidence to suggest this.

More compelling is the conclusion of recent work that it is a consequence of the rapid and significant increase in unemployment in New Zealand.[10] The argument is that because the ACC earnings related benefit is a more generous benefit than the flat rate social welfare unemployment benefit, and when no work is available, recipients remain on compensation longer than they would in times of a buoyant job market. A parallel phenomenon is occurring within the social welfare system where sickness benefits are more generous than the unemployment benefit: the cost and time on the sickness benefit are also increasing significantly (34 weeks on average in 1988 compared with 39 weeks in 1989). There seems no reason for arguing that illness is becoming more serious.

In short, we have found no basis for the claim that injuries have increased in

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[5] *Id.* at 35.

[6] *Id.* at 35.

[7] Law Commission Report, *supra* note 1 at ¶¶ 89-93.

[8] Miller, *supra* note 2, at 35-36.

[9] Cumpston and Madden, *Cost Estimates for an Integrated Incapacity Compensation Scheme*, June, 1989.

[10] *Id.* at 37. Number of people registered as unemployed in New Zealand: 68,252 in March 1984, 101,770 in 1988, 146,808 in 1989.

number or severity since ACC replaced tort and therefore that tort has greater deterrent value than ACC.

To the question of safety. The article tends to give the impression that the Law Commission did not seriously address the issue of prevention of injury in its Report. This is not the case and in particular we do not accept Mr Miller's conclusion[11] that the Law Commission approach to safety is to leave it to others to do.

The Law Commission considered safety an important topic and one to be dealt with early in the discussion on the basis that to prevent injury is better than to compensate for it. The Commission devoted a significant portion of the report to it, said that there is a need to do more about it than there has been done,[12] and recommended that there be ministerial responsibility for it.[13] None of this precludes the Accident Compensation scheme itself exercising responsibility in this field. But what we also did was to show that the empirical evidence suggests that financial incentives through the *levy system* (not the scheme), either through occupational classification or experience rating, do not work or cannot work fairly in reducing accidents.[14] As we said at para 132, the present scheme already has financial incentives in favour of safety and minimising injury of employers and workers — the employer or the worker has to meet the cost of the first week and the worker does not receive full earnings related compensation.

The Law Commission also discussed at length the various strategies outside the compensation scheme for preventing injury which Mr Miller set out in his article but which he does not really discuss the merits of except to comment on what he sees as inconsistent remarks.[15] Our statements are not inconsistent in that we do not claim as much as Mr Miller suggests. We say that to the extent that insurance or civil action for the loss of or damage to property may act as a deterrent, it is there. We do not say that such financial incentives are more effective than other incentives.

In conclusion, we agree and have said that more must be done to prevent injury. And although the purpose and design of the current scheme is compensation, safety must not be neglected and should be incorporated into the scheme if effective and appropriate. Other effective methods should also be used. We cannot agree with Mr Miller's statement that the "only system which has a

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[11] Miller, *supra* note 2, at 72.

[12] Law Commission Report, *supra* note 1, at ¶¶ 103-04.

[13] *Id.* at ¶ 128.

[14] *See also* Campbell, *Experience rating for accident compensation. A necessity or wishful thinking*, Department of Management Systems, Massey University, Occupational papers: 1989 No. 4 and *The economics of safety*, Department of Management Systems, Massey University, Occupational papers: 1989 No. 3.

[15] Miller, *supra* note 2, at 67-69.

chance of restoring effective deterrence" is the tort liability system.[16] Mr Miller has not demonstrated to us that tort liability was, in the days before ACC, an effective deterrent, nor that there are more or more severe injuries now that tort has gone, and so reach that point by implication.

As well as effectiveness, there is the question of cost. A supplementary tort liability scheme could duplicate the costs of compensating injury. There is a very large question whether the insurance premiums would respond sufficiently with injury experience to act as an incentive to the extent that injury and consequently costs would be reduced by the amount of extra costs.

Finally, to bring your readers up to date, we note the recent budget developments in New Zealand[17] and the healthy future for the concepts embodied in New Zealand's Accident Compensation Scheme. The Government has announced its intention to provide a general scheme of assistance for incapacity which will provide equal benefits regardless of whether the cause is injury or illness. The scheme will extend earnings related benefits to the ill, thus enabling more equitable use of the funds currently meeting ACC costs and the costs of social welfare benefits for people who are ill.

New Zealand Law Commission

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[16] *Id.* at 73.

[17] Hon. David Caygill, Minister of Finance, *Securing economic recovery. Budget speech*, 27 July 1989, p.12.

Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After *Skinner v. Railway Labor Executives' Association*?

Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After *Skinner v. Railway Labor Executives' Association*?

I. INTRODUCTION

The problem of drug and alcohol abuse is a paramount concern of American society and government. As the "disease" escalates to epidemic proportions, it affects each member of every community. Those directly "infected" by the disease show the most obvious effects. Ramifications of the problem, however, percolate to all levels of society resulting from the actions or inactions of drug and alcohol abusers. Of particular concern are physical dangers to innocent persons created by those mentally impaired who perform especially vital functions that require the capacity for unimpaired judgment and speedy decisions.

The railroad industry is a prime example of a function of society that has come under increasing scrutiny in the past ten years due to a substantial number of accidents whose causes have been linked to drug or alcohol abuse. These accidents have cost many lives and billions of dollars in property damage.[1] As such accidents have the potential to harm many people and receive great media attention, society and its lawmakers have quickly responded by initiating private programs[2] and supporting federal regulations.[3]

In *Skinner v. Railway Labor Executives' Association*[4] (*RLEA*), the United States Supreme Court strengthened efforts to control the drug and alcohol prob-

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[1] 50 Fed. Reg. 31,508, 31,517 (1985). For example, on January 4, 1987, a string of Conrail locomotives went through a warning signal near Chase, Maryland and collided with a high speed Amtrak passenger train carrying more than 600 people. Stuart, *Amtrak Wreck Kills 12, Scores Injured*, N.Y. Times, Jan. 5, 1987, at A1, col. 2. Sixteen people were killed and 175 others were injured in what is considered the worst train wreck in Amtrak history. *Engineer Is Indicted on 16 Counts of Manslaughter in Amtrak Crash*, N.Y. Times, May 5, 1987, at A1, col. 2. Post-accident drug tests administered by the Federal Railroad Administration revealed marijuana usage by both the Conrail engineer and a brakeman. McGinley, *Conrail Crewman Tested Positive for Marijuana*, Wall St. J., Jan. 15, 1987, at 2, col. 2. Authorities subsequently determined that the engineer was smoking marijuana while in control of the train. Sanders, *A Boost for Drug Testing*, TIME, Apr. 3, 1989, at 62.

[2] *See infra* notes 35-46 and accompanying text.

[3] *See infra* notes 47-64 and accompanying text.

[4] 109 S.Ct. 1402 (1989), *rev'g*, Railway Labor Executives' Association v. Burnley, 839 F.2d 575 (9th Cir. 1988).

lem by holding that post-accident drug testing of railroad employees, pursuant to regulations adopted by the Federal Railroad Administration (FRA), does not violate constitutionally guaranteed protections.[5] *RLEA* resolves several constitutional concerns raised by post-accident drug testing, however, numerous other issues remain unresolved.

Section II of this comment explains the central issue in *RLEA* and the lower court decisions. Section III provides an overview of the drug and alcohol problem that exists in American society, approaches taken to control the problem in the railway industry, and the federal constitutional protections that employees have invoked to challenge drug-testing programs.[6] Section IV assesses the Supreme Court's ruling on post-accident drug testing in light of legal precedents and suggests that *RLEA* conforms to the established law in the area of drug testing generally. Finally, Section V highlights the legal and practical implications of *RLEA*.

II. PROCEDURAL HISTORY OF *Skinner v. Railway Labor Executives' Association*

The central controversy of *RLEA*[7] involved a constitutional challenge brought by the Railway Labor Executives' Association[8] and constituent labor organizations to enjoin FRA regulations[9] mandating blood, breath, and urine testing of railroad employees after certain train accidents and incidents.[10] The major issue was whether a regulatory requirement mandating testing of all employees on duty at the time of a train accident without a warrant or individualized suspicion meets the fourth amendment's reasonableness requirement.[11]

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[5] *Id.*

[6] These protections include the fourth amendment prohibition against unreasonable searches and seizures, the fifth amendment privilege against self-incrimination, the fifth and fourteenth amendments protections of due process, the fourteenth amendment right of equal protection, and the penumbral right of privacy.

[7] 109 S.Ct. 1402.

[8] The Railway Labor Executives' Association is an unincorporated association, *RLEA*, 839 F.2d at 577 n.1, representing a large majority of railroad employees in the United States. 50 Fed. Reg. 31,508.

[9] The FRA regulations authorizing post-accident testing were issued following extensive investigations, public hearings, and written comments, and a technical conference on post-accident drug testing. 50 Fed. Reg. 31,508. *See infra* notes 47-64 and accompanying text.

[10] 49 C.F.R. §§ 219.201-.309 (1986).

[11] *See RLEA*, 109 S.Ct. 1402. The Railway Labor Executives's Association advanced arguments that the regulations violate the fourth amendment protection against unreasonable searches and seizures, *RLEA*, 109 S.Ct. 1402, that they impinge upon railroad employees' rights of equal protection and privacy, and that they violate provisions of the Federal Rehabilitation Act, 29 U.S.C. §§ 701-796 (1973), the Federal Railroad Safety Act, 45 U.S.C. §§ 421-437 (1982), and

The District Court for the Northern District of California found that the regulations were constitutional and granted summary judgment for the United States.[12] In a two-to-one decision, the Court of Appeals for the Ninth Circuit (Ninth Circuit) reversed the district court's decision and invalidated the regulations.[13] The Ninth Circuit held that drug and alcohol tests constitute fourth amendment searches and found the searches unreasonable absent particularized suspicion.[14] The United States Supreme Court granted the government's petition for writ of certiorari, and the Supreme Court decided the issue presented in *RLEA* in tandem with a similar issue in *National Treasury Employees Union v.*

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the Railway Labor Act, 45 U.S.C. §§ 151-188. *RLEA*, 839 F.2d at 575-93. The United States Supreme Court considered only the fourth amendment challenge.

[12] In an unpublished opinion, the court explained that railroad employees have a fourth amendment interest " 'in the integrity of their own bodies,' but there is also a competing 'public and governmental interest in the . . . promotion of . . . railway safety, safety for employees, and safety for the general public,' " and that "objective events" serve to trigger the testing. Brief for the Petitioners, (LEXIS before n. 20), *RLEA*, 109 S.Ct. 1402 (No. 87-1555) (quoting Pet.App. 52a-53a). The court emphasized "that the railroad industry is one of the most extensively regulated industries that we have in interstate commerce, and that the regulation[s] extend [ ] not just to the railroads themselves, but a certain amount of regulation of the employees." *Id.*

[13] *RLEA*, 839 F.2d 575.

[14] *Id.* at 587. The court elaborated on the requirement of "particularized suspicion", emphasizing that "[a]ccidents, incidents or rule violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire train crew." *Id.* Furthermore, the court was concerned that "the state of the art drug tests currently used can discover only the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after ingestion of the drug." *Id.* at 589. The court thought that the requirement of particularized suspicion would "alleviate some of the harsh consequences of exclusive reliance on test results" and "impose no insuperable burden on the government." *Id.* at 588-89. In reversing the district court, the Ninth Circuit concluded that "intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment." *Id.* at 592. The court rejected RLEA's statutory, privacy, and due process claims. *Id.* at 590-92.

The dissent focused on the government's compelling need to assure railroad safety, which it felt outweighed the need to protect workers' privacy. *Id.* at 596 (Alarcon J., dissenting). The dissent believed that railroad employees have a diminished expectation of privacy since there are numerous safety restrictions imposed on their actions and a high degree of regulation in the railway industry in general. *Id.* According to the dissent, the majority's opinion conflicted with decisions of other circuits. *Id.* at 593, 595 (citing National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S.Ct. 1384 (1989); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.) *cert. denied*, 429 U.S. 1029 (1976); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986); Jones v. Mckenzie, 833 F.2d 335 (D.C. Cir. 1987), *vacated*, Jenkins v. Jones, 109 S.Ct. 1633 (1989), *amended*, Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989)).

Von Raab.[15]

III. History of the Drug and Alcohol Problem

A. General Overview

Drug and alcohol misuse is pervasive in American society. In 1985 the National Institute on Drug Abuse reported marijuana use by twenty million Americans and cocaine use by four million Americans.[16] The costs of such abuse have had a dramatic effect on industry.[17] One study prepared for the House Subcommittee on Health and Safety for the Committee on Education and Labor estimated that employee drug and alcohol use accounts for $76.5 billion per year in lost productivity and $4.4 billion in lost employment costs.[18] Specifically, an illicit drug user functions at sixty-seven percent of the work potential of an unimpaired employee, requires three times the average health care benefits,[19] and has almost four times the number of accidents as does an unimpaired employee.[20]

In an attempt to control the now undeniable epidemic, public and private employers nationwide have acted to prevent employee drug use. In 1986, President Reagan issued an Executive Order authorizing drug testing throughout the federal government.[21] More than fifty federal government agencies have since initiated pre-employment drug screens and random testing of employees,[22] affecting more than 400,000 workers.[23] According to recent statistics, private em-

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[15] 109 S.Ct. 1384 (1989), *aff'g in part, vacating in part*, 816 F.2d 170 (5th Cir. 1987) (where the Supreme Court considered a pre-promotion drug-testing program not requiring individualized suspicion prior to testing).

[16] *OSHA Oversight Hearings on the Impact of Alcohol and Drug Abuse on Worker Health and Safety: Hearings of the House Subcommittee on Health and Safety of the Committee on Education and Labor*, 99th Cong., 1st Sess. 5 (1985) [hereinafter *OSHA Oversight Hearings*] at 24 (statement of Elaine M. Johnson, Acting Deputy Director, National Institute on Drug Abuse).

[17] Development in the Law, *Jar Wars: Drug Testing in the Workplace*, 23 Willamette L. Rev. 529 (1987).

[18] The 1984 study, conducted by the National Institute on Drug Abuse, estimated that employee drug use resulted in $25.9 billion of lost productivity and $312 million in lost employment costs. Employee alcohol use resulted in $50.6 billion of lost productivity and $4.1 billion in lost employment costs. *OSHA Oversight Hearings*, *supra* note 16, at 6 (statement of Robert L. Dupont, M.D., Vice President, Bensinger, DuPont & Associates, and President, Center for Behavioral Medicine).

[19] *Id.* at 39 (statement of J. Ronald Blount, Associated General Contractors of America).

[20] *Alcohol and Drugs in the Workplace*, Lab. Special Projects (BNA) 1, 1, 16-17 (1986).

[21] Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

[22] Sanders, *supra* note 1.

[23] Havemann, *Rulings Force Agencies to Reevaluate Test Policies*, Washington Post, Mar. 22, 1989, at A14, col. 1.

ployers have joined the federal government's crusade. In 1987, one-third of all Fortune 500 companies tested job applicants for drugs, and more than one-fourth tested employees.[24] The numbers continue to increase as evidenced by a 1988 report by the U.S. Department of Labor's Bureau of Labor Statistics which reveals that 59.8 percent of businesses with 5000 or more employees test for drugs.[25]

With regard to the railway industry, the results of an FRA investigation of railroad accidents from 1975 to 1984 revealed the need for further standards to address the growing drug and alcohol problem in the railroad industry.[26] During the period of the study, drug or alcohol impairment was responsible for twenty-eight train accidents[27] and twenty fatal train incidents.[28] Combined, these accidents and incidents accounted for thirty-seven fatalities, eighty nonfatal injuries, and $20.4 million in railroad property damage.[29] Recent catastrophes have significantly increased these figures.[30] One official estimate presented

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[24] Wermeil & Barrett, *Justices Allow Some U.S. Use of Drug Tests*, Wall St. J. (Western Ed.), Mar. 22, 1989, at A3, col. 1.

[25] Additional statistics reveal that only 2.7 percent of businesses with fewer than 100 employees screen for drugs. For further discussion of the Bureau of Labor Statistics' report, *see* Anderson, *Drug Screening*, A.B.A. J., June, 1989, at 38.

[26] 50 Fed. Reg. 31,508, 31,518.

[27] A "major train accident" is defined by the FRA regulations as "any train accident that involves one or more of the following:

(i) A fatality;

(ii) Release of a hazardous material accompanied by—

(A) An evacuation, or

(B) A reportable injury resulting from the hazardous material release . . . .; or

(iii) Damage to railroad property of $500,000 or more."

Id. § 219.201(a)(1).

An "impact accident" is defined by the FRA regulations as "[a]n impact accident resulting in—

(i) A reportable injury; or

(ii) Damage to railroad property of $50,000 or more."

Id. § 219.201(a)(2).

[28] A "fatal train incident" is defined by the FRA regulations as "[a]ny train incident that involves a fatality to any on-duty railroad employee." *Id.* § 219.201(a)(3).

[29] 50 Fed. Reg. 31,508, 31,517. These figures do not reflect environmental clean-up costs, damage to lading, damage to other non-railroad property, public response costs, or monetary consequences resulting from fatalities and injuries. *Id.* The FRA has recognized that this data is not entirely accurate because many drug and alcohol-related accidents and incidents are not reported as such. The FRA found that it is highly probable that railroads either fail to detect or fail to report drug and alcohol involvement because of the latitude inherent in the reporting system. Of the fifteen significant train accidents identified by the National Transportation Safety Board and FRA investigations as involving drugs or alcohol, only six were reported by the railroads. There are even more accidents that do not warrant federal investigation in which drug or alcohol involvement was likely. 49 Fed. Reg. 24,252, 24,254 (1984).

[30] *See* Sanders, *supra* note 1.

to the United States Senate revealed that during a thirteen-month period from January, 1987 through February, 1988 forty-one railroad accidents were linked to drug or alcohol abuse, amounting to an additional twenty-nine deaths, 341 injuries, and $28 million in property damage.[31] The FRA has estimated that 150 to 200 combined accidents and incidents occur annually and should be subject to testing.[32]

B. The Railway Industry's Approach to the Drug and Alcohol Problem

Initially, the FRA worked with labor groups and management to improve carrier rules and encouraged voluntary efforts on the part of the railroad industry to check the growing danger of employee drug and alcohol use. Although voluntary efforts are still an important measure used to combat drug and alcohol use, these efforts have generally failed for a number of reasons,[33] requiring the FRA to promulgate specific federal regulations governing the use of drugs and alcohol.[34]

1. Rule G

Prior to the promulgation of federal regulations, Rule G of the Association of American Railroads' Standard Code of Operating Rules was the standard approach to prevention of drug and alcohol use by on-duty railroad employees. The rule prohibits use or possession of alcohol or drugs by on-duty employees.[35] Virtually all railroads have adopted a form of Rule G. In recent years, Rule G formulations have been amended to more explicitly address specific problems of drug use.[36]

On an industry-wide basis, relatively few Rule G violations are detected, indicating that the railway industry does not comply with enforcement and record-keeping procedures.[37] Although the FRA believes that the majority of employees abide by Rule G, the administration holds that a minority of employees

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[31] *Pot, Pills and Coke Ride the Rails*, U.S. NEWS & WORLD REPORT, Mar. 7, 1988, at 12.

[32] 50 Fed. Reg. 31,508, 31,543.

[33] *See infra* notes 35-46 and accompanying text.

[34] The federal regulations governing the use of drugs and alcohol by railroad employees are set forth in 49 C.F.R. § 219. *See infra* notes 47-64 and accompanying text.

[35] Rule G of the Standard Code of Operating Rules provides:

> The use of alcoholic beverages or narcotics by employees subject to duty is prohibited. Being under the influence of alcoholic beverages or narcotics while on duty, or their possession while on duty, is prohibited.

48 Fed. Reg. 30,723, 30,732 (1983).

[36] *Id.* at 30,724.

[37] 49 Fed. Reg. 24,252, 24,267.

engage in a "conspiracy of silence."[38] Fearing dismissal, the usual punishment for offenders, employees are reluctant to report rule violations.[39] Thus, it appears that "Rule G is only as effective as the moral force that it causes and the program of supervisory observations designed to prevent and detect violations."[40] Due to the wide variability of enforcement, the FRA concluded that further measures were necessary to address the drug and alcohol problem in the railway industry.

2. *Employee rehabilitation programs*

Drug and alcohol use is costly to employers in terms of decreased productivity, frequent absences, and strained working relationships. Most railroad employers have implemented employee assistance programs (EAPs) to address their concerns and the needs of employees.[41] EAPs consist primarily of counseling services aimed at eliminating drug and alcohol use in the workplace and serve two specific functions: (1) they foster prevention of Rule G violations by helping employees identify their problems and modify their behavior before they commit a Rule G violation, and (2) they encourage employees who have violated Rule G to participate in counseling, even if they have been dismissed from employment.[42]

Data analyzing the effectiveness of EAPs in the railroad industry show that although most railroads provide EAPs, only a minority of needy employees have utilized the programs.[43] The FRA has voiced concern over the continuing problem of substance abuse and has expressed the need for an alternative course of action.

3. *Other programs*

Railroad employers have instituted a number of other programs to address the problem of substance abuse, but for the most part, these programs have also proved unsuccessful in curtailing the problem. A number of railroads use bypass agreements.[44] Bypass agreements are collective bargaining agreements that en-

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[38] The FRA believes that the "conspiracy of silence" is the single most substantial obstacle to solving the drug and alcohol problem. 48 Fed. Reg. 30,723, 30,724.

[39] 49 Fed. Reg. 24,252, 24,266.

[40] *Id.*

[41] *Jar Wars, supra* note 17, at 549.

[42] 49 Fed. Reg. 24,252, 24,268.

[43] *Id.* at 24,270. Collected data suggest that EAPs have received support from management and labor organizations and have made significant progress. The success, however, is not universal and is the source of concern for the FRA. *Id.* at 24,269.

[44] *Id.* at 24,270.

courage employee support of Rule G through substitution of rehabilitation for punishment.[45] Railroad employers have also instituted informational and educational campaigns to provide redress. These programs, however, like the bypass agreements, fail to prevent Rule G violations because they are usually instituted only after a violation has occurred.[46]

4. *Control of alcohol and drug use in railroad operations: 49 C.F.R. § 219*

In 1985, after considering the results of the escalating drug problem and the ineffectiveness of voluntary programs to control abuse in the railway industry, the FRA promulgated "Regulations for the Control of Alcohol and Drug Use in Railroad Operations."[47] The regulations consist of six subparts.[48] Only Subparts C and D were at issue in *RLEA*.

Subpart C, "Post-Accident Toxicological Testing",[49] provides that railroads "shall take all practical steps to assure that all covered employees of the railroad directly involved in an accident or incident provide blood and urine samples for

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[45] *Id.*

[46] *Id.*

[47] 49 C.F.R. § 219.

The FRA considered a number of alternatives prior to promulgating the regulations for control of alcohol and drug use. Considered options included the following: (1) a "Federal Rule G"; (2) mandatory testing programs in the form of either: (a) random testing, (b) testing upon "reasonable suspicion," (c) operational testing to measure employee performance, or (d) post-accident testing; (3) supervisory observations based on approved criteria; (4) co-worker certification programs requiring affirmation that crew members are not violating Rule G; (5) improved accident reporting designed to more accurately measure the involvement of alcohol and drugs; and (6) greater promotion of voluntary efforts directed towards reduction of alcohol and drug misuse. 48 Fed. Reg. 30,723, 30,726-730.

The FRA announced several justifications to support 49 C.F.R. § 219. The administration found that conventional methods of controlling the alcohol and drug problem, including Rule G and employer assistance programs, were, by themselves, inadequate to control the escalating drug and alcohol problem. The FRA also found that exclusive reliance on voluntary programs was not yet warranted since such programs were not uniform and had not yet proved effective or durable. Furthermore, absent federal regulations, the industry was reluctant to implement new techniques to address the problem since these techniques consequently posed collective bargaining obstacles. Finally, the FRA found that the issuance of federal regulations was required to ensure prompt action, national implementation, and uniformity. 50 Fed. Reg. 31,508, 31,527-528.

[48] Subpart A discusses general provisions of the regulation (49 C.F.R. §§ 219.1-219.21). Subpart B states a general prohibition of alcohol and drug use (49 C.F.R. §§ 219.101-219.103). Subpart C details post-accident toxicological testing (49 C.F.R. §§ 219.201-219.213). Subpart D explains the authorization to test for cause (49 C.F.R. §§ 219.301-219.309). Subpart E provides policies for identification of troubled employees (49 C.F.R. §§ 219.401-219.407). Subpart F establishes a system for pre-employment drug screens (49 C.F.R. §§ 219.501-219.505).

[49] 49 C.F.R. §§ 219.201-219.213.

toxicological testing by the FRA."[50] The post-accident regulations in Subpart C apply only to employees who have "been assigned to perform service subject to the Hours of Service Act,"[51] essentially including train and engine crews, yard crews, hostlers, train order and block operators, dispatchers, and signalmen.[52] Accidents or incidents requiring submission of blood and urine samples include major train accidents,[53] impact accidents,[54] and fatal train incidents.[55]

Subpart C also requires railroads to test every crew member of any train involved in an accident or incident unless a railroad representative can immediately determine that the employee had no role in the cause of an impact accident or fatal train incident.[56] Employees who refuse to provide blood or urine samples are entitled to a hearing concerning their refusal to submit samples, but in any event, they are disqualified from performing covered service for a nine month period.[57]

The provisions of Subpart D, "Authorization to Test for Cause",[58] authorize railroads to require covered employees to cooperate in breath or urine testing under specified circumstances.[59] Such circumstances include the following: (1) when a supervisor "has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol, or . . . controlled substance, based upon specific, personal observations";[60] (2) when a supervisor "has a reasonable suspicion that the employee's acts or omissions contributed to" a reportable accident or incident;[61] or (3) when the employee was directly involved in a rule violation.[62] Specifically, urine testing may be ordered under the cir-

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[50] *Id.* § 219.203(a)(1).

[51] *Id.* § 219.5(d). The Hours of Service Act places limitations on the working hours of employees of common carriers engaged in interstate or foreign commerce by railroad. 45 U.S.C. 61-64b.

[52] 50 Fed. Reg. 31,508, 31,530.

[53] *See supra* note 27.

[54] *See supra* note 27.

[55] *See supra* note 28.

[56] 48 C.F.R. § 219.203.

[57] *Id.* § 219.213. " 'Covered Service' means service for a railroad that is subject to the Hours of Service Act [citation omitted], but does not include any period the employee is relieved of all responsibilities and is free to come and go without restriction." *Id.* § 219.5(e).

[58] *Id.* §§ 219.301-219.309.

[59] *Id.* § 219.301.

[60] *Id.* § 219.301(b)(1).

[61] *Id.* § 219.301(b)(2).

[62]

A "rule violation" is defined by the FRA regulations as:

(i) Noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves—

(A) Occupancy of a block or other segment of track to which entry was not

cumstances described in (2) or (3) above[63] and when two supervisors (at least one of whom is trained in recognizing drug use) have reasonable suspicion that an employee is using drugs.[64]

C. Drug-Testing Precedents

Employee drug testing is a volatile issue for the judicial system. Nine federal judicial circuits have decided employee drug-testing cases.[65]

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authorized;

(B) Failure to clear a track to permit opposing or following movement to pass;

(C) Moving across a railroad crossing at grade without authorization; or

(D) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required);

(ii) Failure to protect a train as required by a rule consist[ent] with § 218.37 of this title;

(iii) Operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less;

(iv) Alignment of a switch in violation of a railroad rule or operation of a switch under a train;

(v) Failure to apply or stop short of derail as required;

(vi) Failure to secure a hand brake or failure to secure sufficient hand brakes; or

(vii) In the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

Id. § 219.301(b)(3).

[63] *Id.* § 219.301(c)(1).

[64] *Id.* § 219.301(c)(2).

[65] *See RLEA*, 839 F.2d 575, *rev'd*, 109 S.Ct. 1402 (upholding regulations for post-accident testing of railroad employees without particularized suspicion); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S.Ct. 1384 (1989) (allowing testing of candidates for promotion to sensitive jobs); Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transp. Auth., 863 F.2d 1110 (3d Cir. 1988), *vacated*, Southeastern Pennsylvania Transp. Auth. v. Transport Workers' Union, Local 234, 109 S.Ct. 3208 (1989) and United Transp. Union v. Southeastern Pennsylvania Transp. Auth., 109 S.Ct. 3209 (1989) (allowing random drug testing for public employees with safety sensitive positions but prohibiting return-to-work testing); Policemen's Benevolent Ass'n Local 318 v. Township of Washington, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1637 (1989) (allowing random testing of police officers); Copeland v. Philadelphia Police Dept., 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1636 (1989) (upholding reasonable suspicion testing of police officers); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986) (allowing random testing of jockeys); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (allowing post-accident testing of bus drivers without reasonable suspicion); Jones v. Mckenzie, 833 F.2d 335 (D.C. Cir. 1987), *vacated*, Jenkins v. Jones, 109 S.Ct. 1633 (1989), *amended*, Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989) (allowing random testing of school bus attendants); Rushton v. Nebraska

RLEA raised several drug-testing issues, some of which had been developed by earlier case law. Yet despite the prevalence of drug-testing cases, only one federal circuit decision other than *RLEA* has specifically addressed issues arising from post-accident testing.[66] Also, in contrast to *RLEA*, which involved drug testing of private-sector employees, the majority of cases reaching the federal circuits have addressed public-employee drug testing. Although most drug-testing cases are distinguishable from *RLEA* and from those involving post-accident drug testing by private-sector employers,[67] many identical issues are involved.[68]

D. Constitutional Issues Raised by Drug Testing

With the recent deluge of drug-testing litigation,[69] many courts are faced with determining the constitutionality of drug-testing programs.[70] Employees subject to drug testing challenge these programs primarily under the fourth amendment protection against unreasonable searches and seizures, but also under the fifth amendment protection against self-incrimination, the fifth and fourteenth amendments guarantees of due process, the fourteenth amendment right of equal protection, and the penumbral right of privacy.

Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (allowing random testing of nuclear power plant employees); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (allowing random testing of correctional officers); Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988), *vacated*, 861 F.2d 1388 (1988) (prohibiting random testing of firefighters); Penny v. Kennedy, 846 F.2d 1563 (6th Cir. 1988), *vacated*, 862 F.2d 567 (1988) (prohibiting random testing of police officers); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987) (allowing reasonable suspicion testing of a firefighter); Mark v. United States, 814 F.2d 120 (2d Cir. 1987) (allowing reasonable suspicion testing of an FBI agent).

[66] *Suscy*, 538 F.2d 1264. *See infra* notes 116-19 and accompanying text.

[67] In the private sector, employees are entitled to challenge the programs on constitutional grounds only if a sufficient nexus exists between the government and the employer. *See infra* notes 71-73 and accompanying text.

[68] *See infra* notes 69-159 and accompanying text. *See also* Todd, *Employee Drug Testing - Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832 (1987) (discussing federal constitutional protections as applied to private employees as well as private rights of action); O'Donnell, *Employee Drug Testing — Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969 (1988) ("[E]ven in unquestionably private employment cases, broad constitutional values may affect the resolution of disputes over drug-testing." *Id.* at 973.)

[69] At the time of the *RLEA* decision, more than forty drug-testing cases were pending before the federal courts. Kamen, *Split Court Upholds 2 Drug-Testing Plans*, Washington Post, Mar. 22, 1989, at A1, col. 5.

[70] *Jar Wars*, *supra* note 17, at 553.

1. Applicability of the United States Constitution to private employers

Protections of individual rights and liberties contained in the United States Constitution and its amendments ordinarily apply only to actions of the federal and state governments.[71] Unless government action is involved, an employee is not protected by either federal or state constitutions against the drug-testing program of his employer.[72] Courts have found, however, that in rare instances an individual may enforce constitutional limitations against the actions of a private employer "if a sufficient nexus exists between the actions of the private employer and a governmental entity."[73]

2. Fourth amendment protection against unreasonable searches and seizures

An employee subject to drug testing, whether it be pre-employment testing, random testing, or post-accident testing, invariably challenges the program under the fourth amendment. The fourth amendment guarantees an individual freedom from unreasonable searches and seizures.[74] Opponents of mandatory

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[71] Shelley v. Kraemer, 334 U.S. 1 (1948).

[72] *Id.*

[73] *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 567 (1988) [hereinafter *Survey*] (citing *Shelley*, 334 U.S. at 20). During the 1960's, the United States Supreme Court began to examine the sufficient nexus standard. In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), the Court found the determinative factor to be whether the activity of the government and the private actor are so intertwined for their mutual benefit that the private actor should be subjected to constitutional limitations. *Id.* at 724 (holding that a privately owned restaurant that leased space in a government parking facility could not refuse service to racial minorities).

In Evans v. Newton, 382 U.S. 296 (1966), the Supreme Court articulated several influential factors in its decision to impose constitutional limitations on trustees of a private park. Those factors included the appearance of government approval, past and present aid given by the government, and the public nature of the facilities. The Court concluded that because the stances of the government and the private party were so intertwined, the operation of the park could not be considered truly private or beyond the reach of the Constitution. *Id.* at 302 (holding that the existence of a racially segregated park devised by a Senator to a Georgia town violated the fourteenth amendment).

More recently, in Rendell-Baker v. Kohn, 457 U.S. 830 (1982), the Supreme Court found that important considerations include: (1) whether the income of the private employer is derived from government funding; (2) whether regulation of the employer is extensive and detailed; (3) whether the services provided by the private employer are traditionally the exclusive prerogative of the government; and (4) whether the relationship between the private employer and the government can be characterized as symbiotic. *Id.* at 839-43 (holding that where private school employment practices were not influenced by state regulations or government funding, the relationship between the school and its teachers was not subject to constitutional limitations merely because the state paid the tuition of most of the students).

[74] U.S. CONST. amend. IV provides:

drug-testing programs have implicated the search and seizure provision to challenge blood and urine testing.[75]

When determining whether the means used for drug or alcohol detection violate fourth amendment rights, a court must examine two factors. First, the court must determine whether the testing constitutes a search.[76] If the testing is a fourth amendment search, the court must then determine whether the search is reasonable.[77]

a. Blood and urine testing as a fourth amendment search

More than two decades ago, in the landmark decision of *Schmerber v. California*,[78] the United States Supreme Court determined that blood tests are searches for fourth amendment purposes.[79] The question posed to the Court in *Schmerber* was whether withdrawal of blood for the purpose of determining blood-alcohol content in connection with a charge of driving under the influence of intoxicating liquor constituted a fourth amendment search. The Court answered the question in the affirmative, relying heavily on the fact that blood tests intrude "beyond the body's surface."[80]

Prior to *RLEA*, the United States Supreme Court had not addressed the issue of whether urine testing constitutes a fourth amendment search. Most lower courts faced with the question concluded that urinalysis constitutes a search by analogizing urinalysis to the blood testing at issue in *Schmerber*.[81] Although the collection of urine, unlike blood, does not require a physical intrusion into the body, courts have found two compelling reasons to justify urine collection as a fourth amendment search. The primary reason is that urine is "normally discharged and disposed of under circumstances that merit protection from arbitrary interference."[82] Second, urine, as a bodily fluid, is capable of medical anal-

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[75] *See, e.g., RLEA*, 109 S.Ct. 1402.

[76] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[77] O'Connor v. Ortega, 480 U.S. 709, 719 (1987).

[78] 384 U.S. 757 (1966).

[79] "[C]ompulsory administration of a blood test plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." *Id.* at 767.

[80] *Id.* at 769. "Because we are dealing with intrusions into the human body rather than state interferences with property relationships or private papers — 'houses, papers, and effects' — we write on a clean slate." *Id.* at 767-68.

[81] *Survey, supra* note 73, at 573.

[82] *Id.* (quoting Capua v. City of Plainfield, 643 F.Supp. 1507, 1513 (D.N.J. 1986). "A number of variables, including the employee's sex, religion, age, cultural background, or the

ysis which can lead to the discovery of personal data about the donor.[83] Based upon these justifications, courts have concluded that urine testing, like blood testing, constitutes a fourth amendment search.[84]

b. Reasonableness

After determining that the fourth amendment applies to the removal of blood and urine for testing, a court must determine whether the drug-testing regulations meet the "reasonableness" requirement of the fourth amendment. The test of reasonableness, though, is neither exact nor "capable of precise definition,"[85] but ordinarily, in assessing the reasonableness of a search, courts balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[86]

Generally, "except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable, unless it has been authorized by a valid search warrant."[87] Courts have, however, created two categories of warrantless searches that satisfy the reasonableness standard: (1) searches based upon reasonable suspicion that conform to one of the warrant exceptions articulated by the United States Supreme Court,[88] and (2) searches based upon individualized suspicion.[89]

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presence of private medical conditions, disabilities, or disorders, can dramatically increase the intrusiveness of urine sampling. In the case of a female, it may depend upon the time of the month a sample is required." Brief for Respondents, n. 13, *RLEA*, 109 S.Ct. 1402 (No. 87-1555) (quoting Petitioners Brief at 21, *Von Raab*, 816 F.2d 170 (86-1879)).

[83] *Survey, supra* note 73, at 574 (citing *Capua*, 643 F.Supp. at 1508).

[84] *See, e.g.*, Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987); Jones v. Mckenzie, 833 F.2d 335, 338 (D.C. Cir. 1987), *vacated*, Jenkins v. Jones, 109 S.Ct. 1633 (1989), *amended*, Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989); National Federation of Federal Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 173 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S.Ct. 1384 (1989); McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266-67 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

[85] Bell v. Wolfish, 441 U.S. 520, 559 (1979). To define the parameters of a reasonable search and seizure, the United States Supreme Court has stated that "the specific content and incidents [of the fourth amendment] must be shaped by the content in which it is asserted." Wyman v. James, 400 U.S. 309, 318 (1971) (quoting Terry v. Ohio, 392 U.S. 1, 9 (1968)). More recently, the Court has said that "what is reasonable depends upon the context within which a search takes place." New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

[86] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 719 (1987).

[87] *O'Connor*, 480 U.S. at 720 (quoting Mancusi v. DeForte, 392 U.S. 364 (1968)).

[88] *See infra* notes 90-105 and accompanying text.

[89] *See infra* notes 106-26 and accompanying text.

(i) Exceptions to the warrant requirement

The fourth amendment usually requires that a search be conducted pursuant to a warrant issued upon probable cause,[90] yet courts have recognized several contexts where warrantless searches are permitted based upon reasonable suspicion that does not rise to the level of probable cause.[91] Courts have sanctioned warrantless searches when the delay inherent in seeking a warrant might lead to the loss of evidence,[92] or when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[93]

Recognizing certain carefully defined circumstances which involve the compelling need to waive the warrant requirement, the United States Supreme Court has created a narrow class of exceptions to the warrant requirement where a search may be reasonable even though it is not conducted pursuant to a probable cause determination.[94] Recently, the warrant exception was extended to include searches of closely regulated businesses.[95]

The Supreme Court allows warrantless searches of closely regulated industries as reasonable if three criteria are satisfied: (1) "there must be 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made;" (2) "the warrantless inspections must be 'necessary to further [the] regulatory scheme;' " and (3) "the statute's inspection program, in terms

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[90] *Katz*, 389 U.S. at 357.

[91] *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (customs officials may perform border searches on the basis of mere suspicion); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973) (airport pre-boarding security searches may be conducted on mere suspicion).

[92] *See, e.g., Schmerber*, 384 U.S. 757 (upholding compelled, warrantless blood test, reasoning that the rapid dissipation of alcohol in the blood was tantamount to a threatened destruction of evidence).

[93] *Id.* at 770-71.

[94] *See* Weeks v. United States, 232 U.S. 383 (1914) (exception for searches incident to a lawful arrest) (overruled by Elkins v. United States, 364 U.S. 206 (1960)); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception) (overruled by Chambers v. Maroney, 399 U.S. 42 (1970)); Warden v. Hayden, 387 U.S. 294 (1967) (exception for hot pursuit); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk exception); Collidge v. New Hampshire, 403 U.S. 443 (1971) (plain view exception) (overruled by Washington v. Chrisman, 455 U.S. 1 (1984) and Texas v. Brown, 460 U.S. 730 (1983)); United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (border searches); Illinois v. LaFayette, 462 U.S. 640 (1983) (inventory searches); New Jersey v. T.L.O., 469 U.S. 325 (1985) (searches of school-children's possessions at school); United States v. Mendenhall, 446 U.S. 544 (1980) (consent).

[95] Donovan v. Dewey, 452 U.S. 594, 601 (1981). In New York v. Burger, 482 U.S. 691 (1987), the Supreme Court applied the closely regulated industry exception because it found that the owner of commercial premises in a " 'closely regulated' industry has a reduced expectation of privacy, [and] the warrant and probable cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness . . . have lessened application in this context." *Id.* at 702 (citing O'Connor v. Ortega, 480 U.S. 709 (1987)).

of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant."[96]

In 1986, the closely regulated industry exception to the warrant requirement was applied to the context of drug testing for the first time.[97] In *Shoemaker v. Handel*,[98] the Court of Appeals for the Third Circuit (Third Circuit) applied the exception to allow random breath and urine testing of jockeys pursuant to state racing commission regulations. The court condensed the United States Supreme Court's test[99] and found that two interrelated requirements justified waiving the need for a warrant. First, there was a "strong state interest in conducting an unannounced search,"[100] and second, "the pervasive regulation of the industry reduced the justifiable privacy expectation of the subject of the search."[101] Because the drug-testing statute at issue in *Shoemaker* satisfied both of these requirements, the testing was permitted.

Two years after its decision in *Shoemaker*, the Third Circuit again considered the application of the closely regulated industry exception to the context of drug testing. In *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*,[102] the Third Circuit held that the exception was inapplicable to random urinalysis testing of public transportation operating engineers in safety sensitive positions.[103] The court distinguished its earlier decision in

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[96] *Burger*, 482 U.S. at 703 (quoting *Donovan*, 452 U.S. at 601-03). Courts have applied the closely regulated industry exception primarily to property searches. *See, e.g.*, Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (warrantless search of liquor store approved because of history of Congressional regulation of the industry); United States v. Biswell, 406 U.S. 311 (1972) (upholding warrantless search of pawn shop licensed to sell sporting weapons conducted pursuant to Gun Control Act because business owners know that they are subject to inspection if they engage in a pervasively regulated business); *Donovan*, 452 U.S. 594 (upholding search because owner of commercial property has knowledge that if he engages in a business such as mining, his property is subject to search); Balelo v. Baldrige, 724 F.2d 753 (9th Cir.) (en banc), *cert. denied*, 467 U.S. 1252 (1984) (approving inspection of fishing vessels because of pervasive regulation of the salmon-fishing industry).

Recently, in *O'Connor*, 480 U.S. 709, the Supreme Court stated that "[t]he operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable . . . . [E]xpectations of privacy . . . may be reduced by virtue of . . . practices and procedures, or by legitimate regulation . . . . The employee's expectation of privacy must be assessed in the context of the employment relationship." *Id.* at 717 (finding the search of a government employee's office was justified because of diminished privacy interests in the workplace).

[97] Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

[98] *Id.*

[99] *See supra* note 96 and accompanying text.

[100] *Shoemaker*, 795 F.2d at 1142 (citing *Donovan*, 452 U.S. at 600).

[101] *Id.*

[102] 863 F.2d 1110 (3d Cir. 1988), *vacated and amended on other grounds*, Southeastern Pennsylvania Transp. Auth. v. Transport Workers' Union, Local 234, 109 S.Ct. 3208 (1989) and United Transp. Union v. Southeastern Pennsylvania Transp. Auth., 109 S.Ct. 3209 (1989).

[103] *Id.* at 1117.

Shoemaker as involving an industry subject to more extensive regulation than public transportation and found that regulation of the transportation industry had not reduced the privacy expectations of industry employees.[104] As such, the testing was not upheld as a closely regulated industry exception to the warrant requirement.[105]

(ii) Individualized suspicion

A search, regardless of whether a warrant is required, must be reasonable to satisfy the fourth amendment.[106] "[T]o accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . [b]ut the Fourth Amendment imposes no irreducible requirement of such suspicion."[107] In fact, prior to *RLEA*, the United States Supreme Court had neither determined whether a showing of "individualized" (or "particularized") suspicion was necessary to satisfy the fourth amendment reasonableness requirement nor whether such a showing creates an additional exception to the warrant requirement.

In both *O'Connor v. Ortega*[108] and *New Jersey v. T.L.O.*,[109] the United States Supreme Court flirted with the individualized suspicion concept but expressly bypassed the question of whether individualized suspicion is an essential element of the fourth amendment reasonableness standard since individualized suspicion existed in each case.[110] Instead, the Supreme Court established a two-

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[104] *Id.* In an attempt to dismiss the effect of the FRA regulations at issue in *RLEA* (where the United States Supreme Court held that post-accident drug testing of railroad employees without a warrant or individualized suspicion does not offend the fourth amendment's reasonableness requirement), the Third Circuit stated that the transportation authority in this case had not relied on the regulations, nor were they in effect at the time of the trial. *Id.* at n. 3.

[105] *Id.* However, the testing was upheld on other fourth amendment grounds. *See infra* notes 113-15 and accompanying text.

[106] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 719 (1987).

[107] United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976) (citing Terry v. Ohio, 392 U.S. at 21).

[108] 480 U.S. 709 (1987).

[109] 469 U.S. 325 (1985).

[110] *O'Connor*, 480 U.S. at 726; New Jersey v. T.L.O., 469 U.S. at 342. In *T.L.O.*, the Court held that the warrant requirement is unsuited to a school environment. *T.L.O.*, 469 U.S. at 340. Instead, the Court determined that the search of a student's possessions after she was caught smoking was justified at its inception because school officials had reasonable grounds for suspecting that the search would turn up evidence that the student violated school rules. The search was also permissible in its scope since the search of the student's purse was reasonably related to the objective of obtaining evidence and was not excessively intrusive. *Id.* at 342.

The Court found it particularly noteworthy that the standard would neither unduly burden efforts to maintain order nor authorize unrestrained intrusions upon privacy. *Id.* at 342-43. The focus of the Court was on reasonableness and common sense, rather than on probable cause. *Id.* at

pronged balancing test to determine whether a search is reasonable. The balancing test considers whether the search is "justified at its inception," and whether the search is "reasonably related in scope to the circumstances which justified the interference in the first place."[111]

Despite the lack of any clear guidance from the Supreme Court, circuit courts addressing toxicological-testing issues remain concerned with the role individualized suspicion plays in the balance between private interests and governmental objectives.[112] In *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*,[113] the Third Circuit applied the *O'Connor* two-pronged balancing test and upheld random urinalysis testing of public transportation operating engineers in safety sensitive positions, despite the lack of an individualized suspicion requirement. The Third Circuit held that documentation of the drug use problem among the workforce, evidence of the effects of drug use, and positive test results for drugs or alcohol by operating employees at fault in accidents provided a justification for the testing program at its inception.[114] Furthermore, the court found that the drug-testing plan safeguards to maintain confidentiality, protect the chain of custody of samples, and provide for verification and random selection procedures were sufficient to satisfy the reasonableness requirement.[115] The Third Circuit therefore upheld random urinalysis testing, even though the program lacked an individualized suspicion requirement.

In *Division 241 Amalgamated Transit Union v. Suscy*,[116] the Court of Appeals for the Seventh Circuit (Seventh Circuit) considered the constitutionality of rules requiring toxicological testing of bus drivers directly involved in bus accidents. Employees who refused to submit to blood testing, urinalysis, or

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The Supreme Court articulated the same standard in *O'Connor*, but avoided its application. *O'Connor*, 480 U.S. at 726. In determining whether hospital officials could reasonably search a physician's office, the Court quoted *T.L.O.* and concluded that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.* at 722 (quoting *T.L.O.*, 469 U.S. at 341). In this case, the Court found that requiring an employer to obtain a warrant "would seriously disrupt the routine conduct of business and would be unduly burdensome." *Id.* at 722.

[111] *O'Connor*, 480 U.S. at 726; *T.L.O.*, 469 U.S. at 341.

[112] *See, e.g., RLEA*, 839 F.2d at 587-89; National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S.Ct. 1384 (1989), and *infra* notes 113-26 and accompanying text.

[113] 863 F.2d 1110 (3d Cir. 1988), *vacated and amended on other grounds*, Southeastern Pennsylvania Transp. Auth. v. Transport Workers' Union, Local 234, 109 S.Ct. 3208 (1989) and United Transp. Union v. Southeastern Pennsylvania Transp. Auth., 109 S.Ct. 3209 (1989).

[114] 863 F.2d at 1121.

[115] *Id.* at 1122.

[116] 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

physical examinations were subject to dismissal.[117] The court held that the rules were reasonable in view of the diminished expectation of employee privacy.[118] The analysis of the Seventh Circuit is wanting, but the court appears to allow the testing because "a valid public interest justifies the intrusion."[119]

Similarly, in *Jones v. McKenzie*,[120] the Court of Appeals for the District of Columbia (District of Columbia Circuit) considered a mandatory urine testing program designed to address the drug-related problems of school bus drivers and attendants while on duty.[121] The court held that the urinalysis requirements were justified at inception since the safety of school children is dependent on drug-free drivers and attendants.[122] The court concluded that although urine tests impinge on employee privacy interests, the government's safety concerns were compelling. The court therefore upheld the drug-testing program.[123]

In *McDonell v. Hunter*,[124] a state prison requested a correctional officer to undergo urinalysis after he was seen with individuals under investigation for drug-related activities. After the officer refused, his employment was terminated. The Court of Appeals for the Eighth Circuit (Eighth Circuit) analyzed both strip body searches and urinalysis and held that individualized suspicion is a necessary requirement for strip searches[125] but not for less intrusive random urinalysis.[126]

In summary, prior to *RLEA*, the United States Supreme Court had neither determined whether individualized suspicion is a prerequisite to a reasonable search nor whether a showing of individualized suspicion creates an exception to

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[117] *Id.* at 1266.

[118] *Id.* at 1267.

[119] *Id.*

[120] 833 F.2d 335 (D.C. Cir. 1987), *vacated*, Jenkins v. Jones, 109 S.Ct. 1633 (1989), *amended* (on grounds not affecting this analysis), Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989).

[121] 833 F.2d at 336.

[122] *Id.* at 340.

[123] *Id.*

[124] 809 F.2d 1302 (8th Cir. 1987).

[125] The court found that searches are permissible if "reasonable, articulable grounds" for suspecting an employee of secreting contraband on his person are given. *Id.* at 1307.

[126] Although the Eighth Circuit found individualized suspicion not necessary for random testing, it did find individualized suspicion necessary for testing if done in any manner other than randomly. *Id.* at 1308. The court stated that the selection must be based on "specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of drugs or alcohol . . . ." *Id.*

For further discussion of random drug testing in the public sector, *See* Comment, *Random Drug Testing in the Government Sector: A Violation of Fourth Amendment Rights?*, 62 TUL. L. REV. 1373 (1988) (concluding that random testing is permitted when the employee's expectation of privacy is diminished by government regulation of the industry, and the government's interest is compelling).

the warrant requirement. Lower courts likewise have avoided the individualized suspicion issue and have focused instead on balancing individual privacy interests against governmental interests in determining whether drug-testing programs satisfy the fourth amendment reasonableness requirement. Courts have found, almost without exception, that governmental interests justify drug testing as a reasonable search, regardless of whether there is individualized suspicion.

3. *Fifth amendment protection against self-incrimination*

Opponents of drug testing occasionally assert their privilege against self-incrimination under the fifth amendment.[127] Although the fifth amendment usually protects persons in criminal contexts, it may be invoked in any circumstance in which the government seeks to compel a person to testify in such a manner that may subsequently subject him to criminal liability.[128] The progress of fifth amendment challenges to drug testing has met with little success primarily due to the effects of two United States Supreme Court decisions: *Schmerber v. California*[129] and *California v. Byers*.[130]

In *Schmerber*,[131] the United States Supreme Court held that the privilege against self-incrimination protects an accused "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis . . . [does] not involve compulsion to these ends."[132] The Court found that evidence obtained by blood analysis constitutes only physical evidence. Because the amendment protects only testimony or communicative acts, the Court was unable to find fifth amendment protection against blood testing.[133] In *Byers*,[134] the Supreme Court added to its earlier decision in *Schmerber* and set forth a requirement of showing "substantial hazards of self-incrimination" in order to prevent mandatory disclosure.[135]

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[127] U.S. CONST. amend. V provides, in part that "[no person] shall be compelled in any criminal case to be a Witness against himself . . . ."

[128] *Survey*, *supra* note 73, at 583 (citing McCarthy v. Arndstein, 266 U.S. 34, 40 (1924)).

[129] 384 U.S. 757 (1966).

[130] 402 U.S. 424 (1971).

[131] 384 U.S. 757.

[132] *Id.* at 761.

[133] *Id.* at 766.

[134] 402 U.S. 424.

[135] *Id.* at 429. Interpreting the *Byers* decision, a California district court refused to apply fifth amendment privileges to prevent drug testing of transportation workers. Amalgamated Transit Union v. Sunline Transit Agency, 663 F.Supp. 1560 (C.D. Cal. 1987). That court concluded that "a penalty for compel[ling] disclosure short of criminal sanction . . . does not implicate the Self-Incrimination Clause." *Sunline*, 663 F.Supp. at 1571.

Customs workers were unable to overcome these hurdles to fifth amendment protection in *National Treasury Employees Union v. Von Raab*.[136] In *Von Raab*, the Court of Appeals for the Fifth Circuit (Fifth Circuit) sustained a requirement that employees complete forms requesting detailed information on illicit drug and legitimate medication usage. The court reasoned that the fifth amendment prohibits disclosure only of incriminating information and "not information that is merely private."[137] Since the questionnaire was designed to discover information that might help explain positive test results, its purpose was exculpatory rather than incriminatory. Any incriminating information collected would be incidental to the questionnaire's purpose. The Fifth Circuit therefore refused to strike the pre-test forms as self-incriminating.[138]

Schmerber and *Byers* require a substantial foundation before an individual can successfully employ the fifth amendment to prevent blood and urine testing. As such, employees have been unsuccessful in convincing courts that blood and urine samples constitute anything other than physical evidence, thereby preventing a successful invocation of the fifth amendment.[139]

4. *Due process: the fifth and the fourteenth amendments*

Employees also invoke the due process clauses of the fifth[140] and the fourteenth[141] amendments to challenge drug-testing programs. Procedural due process guarantees provide that every person be accorded certain procedures before he is deprived of life, liberty, or property. Due process concerns are usually implicated either after an employer tests an employee for drug use and subsequently terminates that employee's employment without a hearing, or when an employer requires an employee to submit to toxicological testing without providing adequate notice prior to the event.[142]

When analyzing whether an employee is deprived of due process, the court must initially determine whether there is a property interest at stake. If a property interest is established, a court must then determine what process is due before that employee can constitutionally be deprived of his property.[143]

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[136] 816 F.2d 170, *aff'd in part, vacated in part*, 109 S.Ct. 1384.

[137] 816 F.2d at 181 (citing United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).

[138] *Id.*

[139] *See, e.g.*, National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S.Ct. 1384 (1989).

[140] U.S. CONST. amend. V provides, in part that "[no person shall] be deprived of life, liberty, or property, without due process of law . . . ."

[141] U.S. CONST. amend. XIV, § 1, provides, in part that no state shall "deprive any person of life, liberty, or property, without due process of law."

[142] *Jar Wars, supra* note 17, at 569.

[143] Board of Regents v. Roth, 408 U.S. 564, 576 (1972) (holding that nonrenewal of a

In *Von Raab*, the Fifth Circuit found that drug-testing procedures were sufficiently reliable to satisfy due process rights of customs officials.[144] The court found that even though an initial screening test is subject to a high rate of false-positives, the required follow-up test accurately detects true drug use.[145] Elaborate chain-of-custody and quality assurance procedures also prevent incorrect testing results. Additionally, if an employee contests a discrepancy, he may resubmit a specimen to a laboratory of his choosing.[146] The Fifth Circuit concluded that the testing provisions at issue in *Von Raab* satisfy due process requirements by providing an opportunity to respond to charges leading to termination.[147]

Inevitably, the success of due process challenges will depend upon the specific procedures of each program. Programs requiring accurate testing methods, chain-of-custody measures, and procedures allowing an employee to contest test results will likely withstand due process challenges.

5. *Equal protection: the fourteenth amendment*

Challengers of drug-testing procedures have also relied on the equal protection clause of the fourteenth amendment[148] to strike down selective enforcement of drug-testing regulations aimed at particular classes of employees. Equal pro-

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nontenured state teacher's contract without a prior opportunity for a hearing does not constitute a deprivation of "liberty" and the teacher possesses no "property" interest protected by due process).

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) the United States Supreme Court found that a government employee who had entitlement to his employment position could not be dismissed from that position without an opportunity to respond to charges that would form the basis of his job termination. The Supreme Court held that an employee is not constitutionally entitled to a pre-termination hearing, but only to an opportunity to respond to charges against him prior to his job termination. *Id.*

[144] *Von Raab*, 816 F.2d 170, *aff'd in part, vacated in part*, 109 S.Ct. 1384.

[145] For a comprehensive description of drug testing methodology and the reliability of testing, *See* Neal, *Drug Testing in the Workplace: The Need for Quality Assurance Legislation*, 48 OHIO ST. L.J. 877 (1987). For a thorough analysis of the costs and accuracy of drug-testing methods, *See Jar Wars, supra* note 17 at 540-45.

[146] *Von Raab*, 816 F.2d at 181-82, *aff'd in part, vacated in part*, 109 S.Ct. 1384.

[147] *Id. See also* Mazo, *Yellow Rows of Test Tubes: Due Process Constraints on Discharges of Public Employees Based on Drug Urinalysis Testing*, 135 U. PA. L. REV. 1623, 1655 (1987) for a discussion of property and liberty interests that are at stake when a public agency takes actions against its employees on the basis of a drug test. Mazo concludes that "[w]hile the rulings of various courts differ as to the circumstances under which public employers may and may not test their employees, it is likely that many categories of public employees, especially those whose jobs directly affect public safety, will remain subject to drug urinalysis testing." *Id.* at 1655.

[148] U.S. CONST. amend. XIV, § 1, provides, in part that no state shall "deny to any person within its jurisdiction equal protection of the laws."

tection challenges in this context are generally unsuccessful because courts typically defer to legislative judgments on the rationality of economic and social legislation.[149]

In *Shoemaker v. Handel*,[150] jockeys subject to daily random drug testing challenged New Jersey Racing Commission regulations on equal protection grounds. The jockeys contended that while they were subject to testing, other officials, trainers, and groomers were not.[151] The Third Circuit was not persuaded by the argument and upheld the regulations, relying on the fact that jockeys are the most visible participants in the sport.[152] Since the purpose of the regulations was to guarantee the integrity of the sport, the court allowed reform to "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[153]

Shoemaker illustrates the deference courts pay to legislative judgments in upholding legislation when a rational basis exists between the regulatory classification and the legitimate governmental interest. Based on the low level of scrutiny applied by courts to equal protection challenges of economic and social legislation, drug-testing legislation and regulations are likely to withstand equal protection challenges.

6. *The penumbral right of privacy*

Another basis for challenges to drug testing stems from the penumbral right of privacy. The United States Constitution does not explicitly mention a right

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[149] Absent a suspect classification or a fundamental right, equal protection requires only that there be a rational relationship between a classification and the legitimate government objective it purports to further. Plyler v. Doe, 457 U.S. 202, 216-18 (1982) (holding that a Texas statute which withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorized local school districts to deny enrollment to such children, violates the equal protection clause of the fourteenth amendment). The legislation at issue need not in fact have an actual link to the objective. As long as it is conceivable that the legislature could have rationally believed that a link exists, the requirements of the equal protection clause are satisfied. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (holding that a state ban on plastic nonrefundable milk containers bears a rational relation to state governmental objectives and must be sustained under the equal protection clause). Furthermore, the low level of scrutiny applied to economic and social classifications permits legislation to eradicate problems "one step at a time." Williamson v. Lee Optical, 348 U.S. 483, 489 (1955) (holding that provisions of an Oklahoma statute making it unlawful for any person not licensed as an optometrist or ophthalmologist to fit, duplicate, or replace lenses except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist, are not invalid under the due process clause of the fourteenth amendment).

[150] 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

[151] *Id.* at 1143.

[152] *Id.* at 1144.

[153] *Shoemaker*, 795 F.2d at 1144 (quoting *Lee Optical*, 348 U.S. at 489).

to privacy, but the United States Supreme Court has determined that two types of privacy are inherent in other constitutional protections: (1) individual autonomy for important personal decisions,[154] and (2) individual "interest in avoiding disclosure of personal matters."[155]

The United States Supreme Court has not held that the right to privacy limits governmental authority to collect personal data concerning individuals. In fact, it appears that the Supreme Court is willing to find that governmental interests outweigh threats of potential disclosure to individuals.[156] Therefore, few drug-testing challenges have invoked the right to privacy.

In *Von Raab*, the Fifth Circuit mentioned a right to privacy, but specifically expressed no opinion on the issue except to note that privacy rights are limited by countervailing state interests.[157] Likewise, the Third Circuit also mentioned the right of privacy in *Shoemaker* but found the issue not ripe for review.[158] A successful challenge to drug testing based on the right of privacy will require a strong showing of employee privacy interests and a substantial risk of harm from public disclosure that outweighs the public need to enhance occupational safety.[159]

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[154] *See* Griswold v. Connecticut, 381 U.S. 479 (1985) (holding that a Connecticut statute forbidding the use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights).

[155] *See* Whalen v. Roe, 429 U.S. 589 (1973).

[156] In *Whalen*, 429 U.S. 589, a state statute required physicians and pharmacists to provide the state with copies of narcotic prescriptions. The Court held that the statute was valid even though the right to privacy imposes some restriction on the ability of the government to collect personal data. The statute was based upon the legitimate goal of preventing stolen and improper prescriptions. The Court noted that normally the collection of such data would be limited by a duty to avoid unwarranted disclosure of the collected information, but because the risk of public disclosure was minimal, the harm of disclosure was outweighed by the state's purpose of preventing the distribution of dangerous drugs. *Id.* at 598.

The Third Circuit explored the issue further in United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980). The National Institute for Occupational Safety and Health subpoenaed employee medical records to conduct a health hazard investigation of the Westinghouse Plant. The Third Circuit weighed the employees' rights of privacy concerning personal information contained in company medical records with the state's occupational health and safety interest. *Id.* at 573. The court ordered Westinghouse to release the records because it found that medical records contain private information that is of a "special character," *Id.* at 577, but not necessarily "sensitive." *Id.* at 579. The court reasoned that privacy interests were satisfied since security measures were provided to minimize subsequent public disclosure of the information. *Id.* at 580.

[157] *Von Raab*, 816 F.2d at 181, *aff'd in part, vacated in part*, 109 S.Ct. 1384 (citing Roe v. Wade, 410 U.S. 113, 153-54 (1973)).

[158] The Third Circuit did recognize that the racing commission's interest in maintaining integrity justified its access to breath and urine test results, but highlighted its duty to comply with confidentiality rules. *Shoemaker*, 795 F.2d at 1144.

[159] *See, e.g., Whalen*, 429 U.S. 589; *Westinghouse*, 638 F.2d 570.

IV. ANALYSIS OF *RLEA*

A. *The Supreme Court's Opinion*

The major issue before the United States Supreme Court in *RLEA* was whether regulations authorizing testing of all employees on duty at the time of a railway accident for drug and alcohol use without a warrant or individualized suspicion satisfy the fourth amendment's reasonableness requirement. The Supreme Court agreed with the Ninth Circuit's conclusion that drug and alcohol tests constitute fourth amendment searches,[160] but, in a seven-to-two decision, the Court reversed the Ninth Circuit's requirement of individualized suspicion prior to post-accident drug testing.[161]

Justice Kennedy, writing for the majority of the Court, found that railroad employees participate in a highly regulated industry and ordinarily consent to employer-imposed restrictions on their freedom. He concluded, therefore, that employee privacy interests are minimal.[162] In addition, the Court determined that blood, breath, and urine testing do not unduly burden an individual's privacy and bodily integrity.[163]

In contrast to minimal employee privacy interests, the Court found that the government demonstrated a compelling interest in testing employees, even absent a showing of individualized suspicion.[164] The Court noted that because there is potential for tremendous damage to life and property before any indications of impairment are noticeable, the regulations effectively deter employee drug use by putting employees on notice that they may be tested. Further, the regulations enhance the railroad's ability to obtain valuable information about the causes of accidents.[165]

Justice Marshall, joined by Justice Brennan, sharply dissented from the majority. Justice Marshall, relying on language from landmark opinions, accused the majority of ignoring the constitutional requirement of probable cause and "succumb[ing] to popular pressure" to stop the use of illegal drugs.[166] Justice Marshall warned that "grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure," and "once [constitutional rights are] bent, [they] do not snap back easily."[167] Justice Marshall

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[160] *RLEA*, 109 S.Ct. at 1413.

[161] *Id.* at 1411.

[162] *Id.*at 1418.

[163] *Id.* at 1417.

[164] *Id.* at 1419.

[165] *Id.*

[166] *Id.* at 1433 (Marshall J., dissenting) (relying on Northern Sec. Co. v. United States, 193 U.S. 197, 400-01, (Oliver Wendell Holmes, dissenting) (1904)).

[167] *Id.* at 1422.

would have affirmed the Ninth Circuit's requirement of individualized suspicion, reasoning that employee privacy interests in this situation are not minimal. The dissent also found the majority's deterrent rationale suspect in the absence of any concrete evidence supporting it and concluded that the interest in diagnosing causes of accidents is not sufficiently important to override employee privacy interests.[168]

B. Analysis

In *RLEA*, the United States Supreme Court, for the first time, specifically addressed constitutional issues relating to post-accident drug testing. This section explores the constitutional issues settled by *RLEA* and identifies those issues left unanswered.

1. Applicability of the Constitution to railroad employees

Courts have primarily addressed constitutional issues surrounding drug testing in the context of public employment.[169] *RLEA* examines constitutional issues as they affect private-sector railroad employees subject to post-accident drug testing. Although railroads are technically private employers, their activities and policies are so intertwined with governmental regulations for their mutual benefit that railroads, as employers, are subject to constitutional limitations.[170]

Indeed, as the United States Supreme Court noted, federal drug-testing regulations for railroad employees pre-empt state laws, rules, and regulations; supercede collective bargaining agreement provisions;[171] and may not be compromised by private contracts.[172] "These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate" constitutional guarantees for private employees.[173] The Court therefore concluded

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[168] *Id.* at 1431.

[169] *See, e.g., Von Raab*, 109 S.Ct. 1384 (federal employees challenging United States Customs Service pre-promotion testing); McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) (prison guards challenging Department of Corrections random testing); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (bus drivers challenging Chicago Transit Authority regulations requiring post-accident testing). *See supra* note 67 and accompanying text.

[170] *See supra* note 73 and accompanying text.

[171] For a discussion of issues confronting drug testing in the context of collective bargaining, *See* Casey, *Drug Testing in a Unionized Environment*, 13 EMPLOYEE RELATIONS L.J. 599 (Spring 1988).

[172] *RLEA*, 109 S.Ct. at 1411.

[173] *Id.* at 1412. *See supra* notes 71-73 and accompanying text.

that constitutional protections apply to federal post-accident drug-testing programs for railroad employees.[174]

2. *The fourth amendment*

In *RLEA*, railroad employees, who are protected by the fourth amendment against unreasonable searches and seizures, challenged the FRA drug-testing regulation primarily on fourth amendment grounds. The Court noted that the process for obtaining the blood, breath, and urine samples necessary for post-accident testing involves essentially the same procedures as the collection of blood and urine, which, in other contexts, had been held to constitute a search.[175] The Court therefore found that the procedures at issue in *RLEA* constitute fourth amendment searches.[176]

The Supreme Court then found that the FRA regulations are exempt from the warrant requirement. Although the Court did not expressly apply the closely regulated industry exception, it did base its rationale on the policies supporting the exception.[177] The Court stated that as applied to post-accident testing, "imposing a warrant requirement would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating the objectives of the government's testing program."[178] As post-accident testing applies to railroad employees and employees of other closely regulated industries, the Court held that a warrant is unnecessary in order to initiate a drug search.[179]

More importantly, *RLEA* resolved the question of whether railroads could require employees to submit to post-accident drug and alcohol testing without a showing of individualized suspicion.[180] The Court reversed the Ninth Circuit's

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[174] *Id.*

[175] *See supra* notes 78-84 and accompanying text.

[176] *RLEA*, 109 S.Ct. at 1413.

[177] *See supra* notes 95-105 and accompanying text.

[178] *RLEA*, 109 S.Ct. at 1416. The FRA regulations specifically define the circumstances justifying toxicological testing. Certainty and regularity are assured by the standardized procedures and minimal discretion involved in administering the tests. Additionally, any delay incurred in obtaining a warrant may frustrate obtaining accurate readings of drug and alcohol since the bodily processes of breaking them down and eliminating them begin at ingestion or injection. *Id. See supra* notes 90-105 and accompanying text.

[179] *Id.* at 1416. *See supra* notes 95-105 and accompanying text.

[180] *See RLEA*, 109 S.Ct. 1402. In *Von Raab*, 109 S.Ct. 1384, the companion case to *RLEA*, the Supreme Court considered the question of whether the Customs Service could require urinalysis of employees seeking promotion to sensitive positions involving the interdiction of drugs, the carrying of firearms, and the handling of classified information. The Court affirmed the Fifth Circuit's abandonment of an individualized suspicion requirement, and the Court held that although the testing is a fourth amendment search, it is not unreasonable because of the limited

requirement of particularized suspicion and held that where a requirement of individualized suspicion would jeopardize an important governmental interest furthered by the intrusion, a search may be reasonable despite the absence of individualized suspicion.[181]

The Court reasoned that under the facts of *RLEA*, the regulatory threat to employee privacy expectations is minimal, particularly since railroad employees participate in an industry subject to pervasive safety regulation and ordinarily consent to employer-imposed restrictions on their freedom.[182] Furthermore, precedents establish that blood, breath, and urine testing do not unduly impose on an individual's privacy and bodily integrity.[183]

Balanced against minimal employee privacy interests, the Court found that the compelling governmental interest in preventing accidents resulting from employee impairment by intoxicants is jeopardized by a requirement of individualized suspicion.[184] The Court considered the fact that a railroad employee impaired by drugs or alcohol may cause tremendous damage before there is any noticeable sign of impairment and concluded that the regulations provide an effective deterrent by warning employees that they will be tested should an accident occur.[185] The Court also noted that imposing a requirement of individualized suspicion would impede railroad efforts of obtaining information about the causes of accidents in order to better protect the public.[186] Thus, it is clear that important governmental interests may justify a drug-testing "search" without a showing of individualized suspicion.

3. *Other constitutional protections*

Challengers to drug-testing programs invoke many other constitutional argu-

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intrusiveness of the search and the strong governmental interest. *Id.*

The *Von Raab* Court found that "in certain limited circumstances, the government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion of privacy entailed by conducting such searches without any measure of individualized suspicion." *Id.* at 1392. Testing of employees seeking promotions to positions directly involving the interdiction of narcotics or firearms without individualized suspicion is reasonable because the government's compelling interest in preserving the integrity of the Customs Service and the safety of the nation's citizenry outweigh individual privacy interests which are lessened by the physical and ethical demands of the positions they seek. *Id.* at 1397.

See supra notes 47-64 and accompanying text for a detailed account of specific instances requiring testing.

[181] *See RLEA*, 109 S.Ct. at 1417.

[182] *Id. See supra* note 51 and accompanying text.

[183] *Id. See supra* notes 81-84 and accompanying text.

[184] *RLEA*, 109 S.Ct. at 1417.

[185] *Id.* at 1419. *See supra* notes 49-64 and accompanying text.

[186] *Id.*

ments in their attempts to invalidate such programs.[187] *RLEA*, however, does not provide any definitive answers for challenges based on the fifth amendment,[188] due process,[189] equal protection,[190] or privacy[191] grounds.

C. *Commentary*

The following commentary focuses on whether the United States Supreme Court correctly relaxed the "individualized" (or "particularized") suspicion standard applied by the Ninth Circuit to determine the reasonableness of a fourth amendment search and whether it justifiably legitimized a more permissive standard applied by other circuit courts.[192] Two particular issues warrant consideration: (1) whether private-sector drug testing is sufficiently different from public-sector testing to justify an individualized suspicion standard for private-sector drug testing and (2) whether post-accident testing is sufficiently distinguishable from other types of drug testing to warrant special consideration.

1. *Private-sector testing versus public-sector testing*

An important distinction between *RLEA* and other cases that have addressed the drug-testing question is that *RLEA* focused on regulations affecting the pri-

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[187] *See supra* notes 127-59 and accompanying text.

[188] It is likely that a fifth amendment challenge will arise in this context only after an employee is prosecuted with evidence obtained from a drug test. *See supra* notes 127-39 and accompanying text.

[189] The FRA regulations provide for the implementation of procedural formalities prior to dismissal of any employee based on the results of post-accident testing. 49 C.F.R. § 219.213. Although the issue remains unresolved, the FRA regulations most likely satisfy due process regulations by providing an employee the opportunity to respond to charges prior to his dismissal. *See supra* notes 140-47 and accompanying text.

[190] The Ninth Circuit deferred to the legislative objective of railway safety as legitimately and rationally related to the goals of the testing program. *RLEA*, 839 F.2d at 592. Although the Supreme Court did not address the issue on appeal, it remains well settled in light of the Court's traditional deference to the legislature for economic and social legislation. *See supra* notes 148-53 and accompanying text.

[191] The Ninth Circuit found that the question of privacy was not ripe for review because there was no inappropriate breach of confidentiality. *RLEA*, 839 F.2d at 592. Unless an employee can show identifiable harm from post-accident data collection provisions resulting from inadequate security measures, his privacy challenge will most likely fail. *See supra* notes 154-59 and accompanying text.

[192] These courts have found, almost without exception, that governmental interests justify drug testing as a reasonable search, even in the absence of individualized suspicion. *See supra* notes 112-25 and accompanying text.

vate sector, while most other cases have ruled on regulations affecting public employees. The question is whether private-sector drug testing is sufficiently different from drug testing in the public sector to justify an individualized suspicion standard for private-sector drug testing. The United States Supreme Court could justify a dual standard only if there is a clear distinction between the fact situations and the supporting justifications in the two situations.

In *Von Raab*, decided in tandem with *RLEA*, the United States Supreme Court dispensed with the individualized suspicion requirement as a prerequisite for drug testing in the federal Customs Service.[193] The Supreme Court found that urine testing is an intrusive search when undertaken without individualized suspicion, but after weighing the diminished privacy expectations of employees against the government's need to maintain the integrity of the Customs Service, the Court found that the governmental interests were superior and upheld the urine-testing program absent individualized suspicion.[194]

Although *RLEA* pertained to private employees and *Von Raab* concerned public employees, the United States Supreme Court similarly stressed the strong governmental interests supporting drug testing. The Court found in *RLEA* that the government has a sufficient interest in maintaining the integrity of the railroad system to justify the search without individualized suspicion.[195] Railroads are subject to numerous federal safety regulations aimed at preserving the integrity of the industry, and because the employees subject to the FRA testing provisions are already subject to federal regulation pursuant to the Hours of Service Act,[196] their expectations of privacy are somewhat diminished.[197] In both *Von Raab* and *RLEA*, the government's interest in regulating employee drug and alcohol use was sufficiently compelling to dispense with the individualized suspicion requirement.

The *Von Raab* Court cited *Martinez-Fuerte* as authority to dispense with the individualized suspicion standard. In that opinion, which dealt with searches of private individuals at the Mexican border, the United States Supreme Court found that "[w]hile some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of such suspicion."[198] Although *Martinez-Fu-*

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[193] *See Von Raab*, 109 S.Ct. 1384.

[194] *Id.* at 1421. *See supra* note 180.

[195] *RLEA*, 109 S.Ct. at 1417. *See supra* notes 182-86 and accompanying text.

[196] *See supra* note 51 and accompanying text.

[197] *RLEA*, 109 S.Ct. at 1417.

[198] In *Martinez-Fuerte*, the Supreme Court held that vehicle stops at a fixed checkpoint for brief questioning of its passengers about transporting illegal aliens across the border are consistent with the fourth amendment even though there is no reason to believe the particular vehicle is transporting illegal aliens and the operation of a fixed checkpoint was not authorized in advance by a judicial warrant. 428 U.S. 543 (1976).

erte is distinguishable because it does not involve searches of employees or searches for drugs, it is persuasive authority that fourth amendment searches of private individuals do not require individualized suspicion.

Two other United States Supreme Court cases decided prior to *RLEA* had a bearing on the issue of individualized suspicion. In *O'Connor* and *T.L.O.*, both of which involved searches of private citizens, the Court specifically declined to decide whether individualized suspicion is an essential element of a reasonable search.[199] In both cases, the individualized suspicion standard was satisfied. The Court in *T.L.O.* articulated that at least one exception to the individualized suspicion standard exists when available safeguards assure that an individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."[200]

The FRA regulations in *RLEA* safeguard privacy interests of employees because they outline specific instances where drug testing is mandatory. Although the provisions of Subpart D allow some discretionary authority by the employee's supervisor, this discretion is subject to the articulated confines of the regulatory provisions, and in some instances, at least two supervisory personnel must determine whether sufficient factors exist to warrant testing.[201]

The decisions of *Von Raab, Martinez-Fuerte*, and *T.L.O.* suggest that individualized suspicion is not a prerequisite to fourth amendment searches of private employees. Most federal circuits addressing drug-testing issues cite these cases as authority, but only as they apply to government employees. *Martinez-Fuerte* and *T.L.O.* are even more persuasive in the context of private-sector testing because it was in the context of the private sector that these cases were decided.

Thus in *RLEA*, the Supreme Court has continued to follow the line of Supreme Court precedent in this area and declined to apply the individualized suspicion standard to private employees. Private-sector employee drug testing in industries where privacy interests are minimal[202] is not sufficiently different from drug testing in the public sector to justify a dual standard. Indeed, both the public and the private sectors rely on a compelling governmental interest to justify testing based on a standard less than individualized suspicion.[203]

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[199] *See supra* note 110 and accompanying text.

[200] *T.L.O.*, 469 U.S. at 342 n.8 (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979) (holding that random checks for drivers licenses and vehicle registration are not permitted on less than articulable reasonable suspicion)).

[201] *See supra* note 64 and accompanying text.

[202] *See supra* notes 162-63 and accompanying text.

[203] *See supra* notes 107-26 and accompanying text.

2. Post-accident drug testing versus other forms of drug testing

A second important distinction between *RLEA* and other cases that have addressed the drug-testing question is that *RLEA* focuses on post-accident testing, while other cases have considered pre-employment and random drug testing. The issue is whether post-accident drug testing is sufficiently different from pre-employment and random drug testing to warrant an individualized suspicion standard.

a. Pre-employment testing

Post-accident drug testing is analogous to pre-employment drug testing. In *Von Raab*, the United States Supreme Court upheld a pre-promotion drug-testing program absent individualized suspicion. Several factors persuaded the Supreme Court that the Customs Service's drug-testing program is reasonable. Among those factors were the availability of notice prior to testing and the consensual nature of the testing.[204]

The FRA drug-testing regulations at issue in *RLEA*, like the formalized Customs Service drug-testing program, provide notice to railroad employees that they may be subject to drug testing upon the occurrence of specified events. Additionally, railroad employees are "deemed to have consented to testing as required in Subpart C and D . . . . [C]onsent is implied by performance of . . . service."[205] Therefore, the same justifications that the United States Supreme Court used to uphold drug testing absent individualized suspicion in *Von Raab* exist in *RLEA*.

b. Random testing

Post-accident drug testing is also analogous to random drug testing. In *Shoemaker*, the Third Circuit upheld random drug-testing regulations against challenges that testing is permissible only upon individualized suspicion.[206] The Third Circuit relied on the promotion of integrity within the horse racing industry and found that drug testing provides public assurance of a drug-free industry.[207] The Third Circuit further found that the regulations gave the jock-

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[204] 109 S.Ct. at 1394 n.2.

[205] 49 C.F.R. § 219.11(c).

[206] *Shoemaker*, 795 F.2d 1136. *See supra* notes 98-101 and accompanying text.

[207] "Frequent alcohol and drug testing is an effective means of demonstrating that persons engaged in the . . . industry are not subject to certain outside influences. It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing." *Id.* at 1142.

eys notice of impending testing, thereby eliminating the need for individualized suspicion.[208]

The stance of railroad employees in *RLEA* is analogous to that of the jockeys in *Shoemaker*. Both resisted drug testing absent individualized suspicion. The railway industry, like the racing industry, is dependent upon public confidence. The federal regulations maintain the safety and the integrity of the railroad industry by deterring drug and alcohol use by on-duty employees.[209] The FRA, like the New Jersey State Racing Commission, has a strong interest in conducting warrantless testing to maintain that integrity. Despite the mandatory nature of post-accident drug testing, railroad employees, like the jockeys in *Shoemaker*, are notified of impending testing by the regulations.[210] Therefore, the need for individualized suspicion is eliminated.

In *Transport Workers' Union of Philadelphia*, the Third Circuit similarly upheld random drug-testing regulations affecting public transportation operating engineers in safety sensitive positions against challenges that testing be permitted only upon individualized suspicion.[211] The court found that the drug-testing plan contained sufficient safeguards to protect individual privacy interests. Evidence demonstrating the threat posed to transit safety by drug users also weighed heavily in the court's conclusion.[212]

The FRA regulations, like the regulations at issue in *Transport Workers' Union of Philadelphia*, provide safeguards to maintain confidentiality, protect the chain of custody of test samples, and provide for verification of drug-testing results.[213] Additionally, the threat posed to railway safety by impaired employees is as great as the threat posed to mass transit safety by impaired employees. Finally, accidents occur somewhat randomly, so that in effect, post-accident testing is a variation of random drug testing and is likewise properly upheld absent individualized suspicion.

c. Post-accident testing

Turning to post-accident testing, in *Suscy*, the Seventh Circuit upheld post-

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[208] *Id.*

[209] *See supra* note 165 and accompanying text.

[210] *See supra* note 205 and accompanying text.

[211] *See* Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transp. Auth., 863 F.2d 1110 (3d Cir. 1988), *vacated*, Southeastern Pennsylvania Transp. Auth. v. Transport Workers' Union, Local 234, 109 S.Ct. 3208 (1989) and United Transp. Union v. Southeastern Pennsylvania Transp. Auth., 109 S.Ct. 3209 (1989). *See supra* notes 113-15 and accompanying text.

[212] *Id.* at 1120.

[213] *See supra* note 57 and accompanying text.

accident drug testing of bus and train drivers.[214] Blood and urine tests are required by the Chicago Transit Authority following any serious accident or suspected intoxication.[215] The court found that public interest in the safety of mass transit outweighed any privacy interest in disclosing physical evidence of alcohol or drug use and justified the search without individualized suspicion.[216]

The context of drug testing in *Suscy* is essentially identical to that in *RLEA*. Certainly the public interest in the safety of national railroad transportation is at least as great as the public interest in the safety of the Chicago Transit System. That interest likewise warrants disclosure of alcohol or drug use by mandatory post-accident blood and urine testing despite the lack of individualized suspicion.

d. Summary

The United States Supreme Court apparently concluded that the justifications for post-accident drug testing are not sufficiently different from the justifications given by nine federal judicial circuits[217] for other types of drug testing to warrant a standard of individualized suspicion prior to testing. The Supreme Court considered the paramount safety concerns and the industry integrity at stake in the railroad industry and the Court found a compelling governmental interest in promoting those objectives. Blood tests can unquestionably identify recent drug use while also deterring impairment.[218] The Court has seemingly found that the justifications for all types of drug testing are sufficiently similar to eliminate the need for a dual standard. As such, there is no need for an individualized suspicion requirement for any drug testing, provided the governmental interest is sufficiently compelling.

3. Commentary summary

Prior Supreme Court cases including *Martinez-Fuerte* and *T.L.O.* have established that sufficient differences do not exist between private-sector drug testing and public-sector drug testing to justify an individualized suspicion standard for private-sector drug testing. Both private and public-sector searches are reasonable if the government has a compelling interest to test employees,[219] employee

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[214] *See Suscy*, 538 F.2d 1264. *See supra* notes 116-19 and accompanying text.

[215] *Id.* at 1266.

[216] *Id.* at 1267.

[217] *See supra* note 65 and accompanying text.

[218] *See supra* notes 145 and 165 and accompanying text.

[219] *See supra* notes 112-26 and 164 and accompanying text.

privacy interests are minimal,[220] and safeguards exist to assure an individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."[221]

Furthermore, although the mechanics of post-accident testing and other forms of drug testing differ, the justifications underlying the testing remain the same. Based on the analysis of *Von Raab, Shoemaker, Transport Workers' Union of Philadelphia*, and *Suscy*, post-accident drug testing is not sufficiently distinguishable from other types of drug testing to warrant special consideration. There is an adequate public interest in both the integrity and the safety of railroad transportation to uphold post-accident testing absent individualized suspicion.

V. IMPACT

In its first ruling on the constitutionality of post-accident drug testing, the United States Supreme Court has provided several definitive answers. The *RLEA* ruling clearly holds that individualized suspicion is not a fourth amendment prerequisite for post-accident drug or alcohol testing when such testing is performed pursuant to comprehensive federal regulations. Despite the detailed analysis provided by the Supreme Court, however, many drug-testing issues remain unanswered. The answers and remaining questions contribute to both legal and practical implications for the railway industry and the future of drug testing in the workplace.

A. Legal Implications

Although the United States Supreme Court's recent rulings in *RLEA* and *Von Raab* give the federal government broad discretion in its campaign against drug use in the workplace, the rulings are limited to the testing of workers in sensitive or safety related jobs.[222] The question still remains whether random-testing programs, such as those proposed by the government for its 400,000 federal employees,[223] and testing programs aimed at private-sector employees who are not closely regulated by the government,[224] are constitutional, particularly when such programs do not involve safety related or sensitive positions.

Some experts interpret the *RLEA* and *Von Raab* rulings as a "move away from requiring a reason for searching a particular individual" and a move to-

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[220] *See supra* notes 112-26 and 162 and accompanying text.

[221] *See supra* note 200 and accompanying text.

[222] *RLEA*, 109 S.Ct. 1402; *Von Raab*, 109 S.Ct. 1384.

[223] *See supra* notes 21-23 and accompanying text.

[224] *See supra* notes 24-25 and accompanying text.

ward the creation of additional "approved categories of searches" not subject to the warrant requirement.[225] Indeed, throughout the twentieth century, the Supreme Court has defined numerous exceptions to the warrant requirement[226] when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[227] *RLEA* and *Von Raab* in essence continue the Court's "erosion of the fourth amendment"[228] by creating a "drug-testing exception" to the warrant requirement.[229]

This newly created exception to the warrant requirement will most likely encourage future drug-testing programs, especially if their justifications lie within the ambit of securing public safety. In fact, the federal government has already enacted extensive drug-testing regulations in the guise of furthering public safety.[230] Until now, private industry has lagged behind the federal government's zealous campaign for drug testing,[231] but private employers may now read the Court's opinions as official endorsements of drug and alcohol testing and institute further measures to address what has become a paramount concern of society.[232]

The Court-approved regulations in *RLEA* and *Von Raab* may now serve as models for subsequent programs by both the public and private sectors. Yet it is not clear that the Court will uphold such expanded testing. Justice Scalia, joined by Justice Stevens, voted to uphold post-accident testing for the railway industry in *RLEA* while dissenting from the majority's holding in *Von Raab* which allows pre-promotion testing for Customs Service employees. Scalia found post-accident searches of railroad workers justified because of the demonstrated frequency of drug and alcohol use by workers involved in accidents and the demonstrated connection between such use and the resulting harm, whereas he found no indication of a "real problem" that needed to be solved by urine testing of Customs Service employees.[233] This pattern of dissents in *RLEA* and *Von Raab* indicates that the further toxicological testing is removed from safety sensitive positions and the fewer statistics available to prove drug use in a particular industry, the more likely the Court is to apply greater scrutiny to that particular drug-testing program.

With more than forty drug-testing cases pending before the federal courts,[234]

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[225] *See, e.g.*, Stewart, *Slouching Toward Orwell*, A.B.A. J., June, 1989, at 49.

[226] *See supra* note 94.

[227] *See supra* note 93 and accompanying text.

[228] Stewart, *supra* note 225.

[229] *Id.*

[230] *See supra* notes 22-24 and accompanying text.

[231] *See supra* notes 25-26 and accompanying text.

[232] *See supra* notes 17-21 and accompanying text.

[233] *Von Raab*, 109 S.Ct. at 1398 (Scalia J., dissenting).

[234] *See supra* note 69.

there will likely be a range of interpretations of the Court's rulings as applied to other toxicological-testing programs. Undoubtedly the question of whether private and random testing are constitutionally permissible will remain unresolved until future rulings by the Supreme Court.

B. *Practical Implications*

The FRA has estimated that 150 to 200 accidents or incidents subject to the testing provisions occur annually.[235] Although exact cost estimates are not available, testing large train crews as often as 200 times annually will amount to a significant expense, in terms of costs for the tests,[236] as well as lost productivity time.

As employers in other public and private industries attempt to control escalating losses of productivity secondary to employee drug and alcohol abuse, they too will continue to implement various drug-testing programs. The cost of such testing will vary according to the testing methods and numbers of employees tested, but assuredly will be quite high as well.[237]

Such expenditures, however, are arguably nominal in comparison with the value of future human lives and property which may be saved as the deterrent effect of testing is realized. Enforcement of drug-testing programs will also provide safer workplaces by discouraging employees from using drugs or alcohol and will allow for the collection of more accurate accident causation data for employers to use in designing programs to prevent future accidents.

VI. CONCLUSION

In *Skinner v. Railway Labor Executives' Association*, the United States Supreme Court upheld Federal Railroad Administration regulations mandating post-accident drug testing of railway workers despite allegations that such testing violated the constitutional protection against unreasonable searches and seizures. The most notable aspect of the decision is the Supreme Court's grant of broad discretion to the government in its war on drugs, not only by holding that individualized suspicion is not a prerequisite to a reasonable search and seizure, but also by effectively creating a drug-testing exception to the fourth amendment warrant requirement.

While the decision is specifically limited to post-accident drug testing of rail-

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[235] *See supra* note 32 and accompanying text.

[236] Basic sensitive screens may cost as little as five dollars per test, while more specific screens can amount to eighty dollars per test. *Jar Wars, supra* note 17, at 541 n.112 and 543 n.124 (citing *Timber Operations Council, Alcohol/Drug Abuse and Aids in the Workplace* II-24 (1986)).

[237] *See supra* note 225.

way workers, future federal and state cases addressing the legality of employee drug testing will consider the Supreme Court's analysis in *RLEA*. The broad scope of the Court's analysis will significantly impact future litigation involving other methods of drug testing in other employment contexts.

Susan Haberberger

National Collegiate Athletic Association v. Tarkanian: The End of Judicial Review of the NCAA

I. INTRODUCTION

The general theme underlying title 42, section 1983 (Section 1983) of the United States Code is to insure that an injured party will have an enforceable right in the federal courts when state laws or their enforcement are not adequate to uphold that person's rights, privileges, and immunities guaranteed by the fourteenth amendment.[1]

Section 1983 creates, under certain circumstances, a civil cause of action against a private party for violating the constitutional rights of an individual:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[2]

To bring a cause of action under Section 1983, the complaining party must satisfy two conditions. First, the "conduct complained of [must have been] committed by a person acting under color of state law". Second, this "conduct [must have] deprived a person of [his/her] rights, privileges, or immunities

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[1] *See* Monroe v. Pape, 365 U.S. 167 (1961), *rev'd on other grounds*, 436 U.S. 658 (1978) (Chicago police detained a black man for ten hours, never taking him before a magistrate or allowing him to contact his family or lawyer and later released him without levying any charges); Mitchum v. Foster, 407 U.S. 225 (1972) (finding that Section 1983 was an "expressly authorized" exception to the federal anti-injunction statute prohibiting a federal court from enjoining a state court proceeding except as expressly authorized by congress); McNeese v. Bd. of Educ., 373 U.S. 668 (1963) (finding federal jurisdiction over students seeking equitable relief from school segregation under Section 1983, regardless of whether the defendant's actions were illegal).

[2] 42 U.S.C. § 1983 (1979).

secured by the constitution or laws of the United States."[3] This paper focuses on the first condition which is commonly referred to as the "state action" requirement. This threshold requirement serves to limit actions under Section 1983 to situations where the party who undertook the challenged action has such a connection with the state that it is deemed to be acting under a state right.

This paper addresses the potential ramifications of the United States Supreme Court's decision in *National Collegiate Athletic Association v. Tarkanian*,[4] which held that actions taken by the National Collegiate Athletic Association ("NCAA") were not sufficiently connected to a state action to be challenged under Section 1983.[5] The potential result of *NCAA v. Tarkanian* is that the NCAA will be allowed to implement policy without any judicial review and could lead to a situation in which the NCAA has unchecked influence over the policies governing collegiate educational institutions, both public and private, through the control of their athletic programs. It is the contention of this paper that the NCAA may act under color of state law; therefore, allegations that the NCAA is violating the rights of a person or group should be subject to judicial review under Section 1983.

This paper examines the background of Section 1983 and the role of the NCAA in amateur athletics, including cases finding that the NCAA's actions satisfied Section 1983's state action requirement. Next this paper discusses *NCAA v. Tarkanian* and the troublesome aspects of the decision. Finally, this paper asserts that the NCAA can be found to be a state actor under the traditional judicial tests and that there is a need for judicial review of the NCAA.

II. Historical Development of Section 1983

The following section provides a background of Section 1983 by examining its history and purpose and the two judicial tests used to determine its applicability to the acts of private parties.

A. *Legislative History and Purpose of the Act*

The origin of Section 1983 is found in section 1 of the Ku Klux Act of April 20, 1871.[6] Congress enacted the Ku Klux Act in response to incidents of lawlessness directed at blacks and their supporters. Its purpose was to enforce the

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[3] Parrat v. Taylor, 451 U.S. 527, 535 (1981).

[4] 109 S.Ct. 454 (1988), *reversing and remanding* 741 P.2d 1345 (Nev. 1987).

[5] *Id.* at 457.

[6] *Monroe*, 365 U.S. at 171.

provisions of the fourteenth amendment of the United States Constitution.[7] The enactment came at a time when "state legal institutions not only failed to protect blacks from violence and abuse but seemed to aggravate the problem."[8] To insure its efficacy, Congress intended Section 1983 to be "an intentionally broad statute" which "create[s] a private cause of action for deprivation of civil rights."[9]

A commentator has observed that "[the Ku Klux Act] was the indignant reaction of Congress to conditions in the southern states wherein the Klan and other lawless elements were rendering life and property insecure."[10] The situation at that time was described in a statement to the House of Representatives by Representative Beatty from Ohio who stated that "certain States have denied to persons within their jurisdiction the equal protection of the laws" and went on to paint a picture of lynchings, rapings and other atrocities occurring without adequate response by the states.[11]

"In interpreting Section 1983 today, the courts . . . [recognize] that Congress intended the statute as an extraordinary, broad-sweeping, and remedial one."[12] Mindful of the intent that the statute be "broad-sweeping and remedial", the United States Supreme Court has interpreted the three main aims of the statute to be: (1) to override certain kinds of state laws,[13] (2) to provide a remedy where state law was inadequate,[14] and (3) to provide a remedy where the state remedy, while adequate in theory, was not available in practice.[15] The Court then stated that a situation in which Section 1983 would apply is when, "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the fourteenth amendment might be denied by the state agencies."[16]

The litigation arising under Section 1983 is changing and "many of the recent cases involve claims which do not fit in our traditional concept of civil rights."[17] For instance, claims under Section 1983 have arisen over a denial of a business license,[18] a dispute over tax assessment,[19] objection to a towing ordi-

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[7] *Id.* at 171, 178 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871)).

[8] T. EISENBERG, CIVIL RIGHTS LEGISLATION 55 (1987).

[9] Hong, *Practitioner's Guide To Recent Developments In Section 1983 Litigation*, 17 HAW. B.J. 41, 42 (1982).

[10] T. EISENBERG, *supra* note 8, at 20.

[11] *Monroe*, 365 U.S. at 175 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 428 (1871).

[12] Hong, *supra* note 9, at 42.

[13] *Monroe*, 365 U.S. at 173.

[14] *Id.*

[15] *Id.* at 174.

[16] *Id.* at 180.

[17] Hong, *supra* note 9, at 48.

[18] Sawmill Products, Inc. v. Town of Cicero, 477 F. Supp. 636 (N.D. Ill. 1979).

nance[20] and termination of a golf course concession.[21]

A general theme running through these decisions is that Section 1983 was intended to insure that the federal courts will protect the rights of citizens of the United States from being abridged by laws and actions of the states. This theme is consistent with the intent of Section 1983 to insure that the states cannot act in a way which would violate the fourteenth amendment of the United States Constitution.

This broad application of Section 1983 is consistent with the intent of the statute. Also consistent with the statute's intent are the following tests which courts have used to apply Section 1983 to the acts of private citizens.

B. *Judicial Tests for Determining Whether the Acts of a Private Party Satisfy the State Action Requirement of Section 1983*

In order to bring an action under Section 1983 against a private party, the court must determine that the action being challenged qualifies as a state action. The United States Supreme Court has stated that determining whether a state action existed can be accomplished "[o]nly by sifting facts and weighing circumstances."[22] This call for a case by case analysis of the existence of a state action has led to the promulgation by the Supreme Court of two main tests.

1. *Close nexus test*

One of the tests established by the United States Supreme Court, in *Jackson v. Metropolitan Edison Co.*,[23] to determine the existence of a state action is whether there is a sufficiently close nexus between the state and the challenged action of the private party so that the action of the latter may be fairly attributable as that of the state itself. In *Jackson* the Court addressed whether there was state action under Section 1983 when the plaintiff's power was cut-off by a privately owned and operated utility company which was regulated by the state.[24] The Court found that there was an insufficient relationship between the

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[19] North Am. Cold Storage Co. v. County of Cook, 468 F. Supp. 424 (N.D. Ill. 1979).

[20] Huemmer v. Mayor and City Council of Ocean City, 474 F. Supp. 704 (D. Md. 1979).

[21] Kurek v. Pleasure Driveway and Park Dist. of Peoria, 583 F.2d 378 (7th Cir. 1978).

[22] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (State action existed where the defendant, a private corporation, leased space for its restaurant from a state agency and refused to serve plaintiff solely on the grounds that he was black).

[23] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972) (The state liquor licensing scheme did not sufficiently implicate the state with the discriminatory practices of a club so as to make the club's practices state action).

[24] *Jackson*, 419 U.S. at 350.

state's granting the utility company a monopoly to operate and the company's disconnecting the plaintiff's power to find a state action.[25] The Court determined that the state's approval of the utility company's procedure for terminating service did not constitute state action.[26] It was indicated, however, that the result may have differed if the state had ordered the termination procedure to be followed rather than simply approving the proposal made by the company.[27]

2. Government entanglement test

A second test developed by the United States Supreme Court to determine whether a state action exists is the government entanglement test: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[28] *In Burton v. Wilmington Parking Authority*[29] the Court found that there was state action for purposes of Section 1983 where a lessee of state owned public property refused to serve the plaintiff because he was black.[30] The Court began its analysis by stating that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations has been found to have become involved in [the private conduct]."[31] The Court considered that the land and building were publicly owned and were purchased with public funds.[32] Furthermore, the state created Parking Authority was responsible for the maintenance and repair of the building and used public funds for these purposes.[33] The Court further asserted that having the restaurant in the parking structure created a mutually beneficial situation where patrons of either establishment could easily patronize the other.[34] Upon consideration of all these factors the Court determined that the state had "so far insinuated itself into a position of interdependence" with the restaurant lessee

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[25] *Id.* at 352. The Court also found that the electric company was not performing a public function because the furnishing of utilities was not a state function or a municipal duty. *Id.* at 353.

[26] *Id.* at 357.

[27] *Id.*

[28] Evans v. Newton, 382 U.S. 296, 299 (1966) (where the city of Macon, Georgia was a trustee of and maintained a racially segregated park, the mere act of appointing private parties as trustees did not authorize segregation of the park).

[29] 365 U.S. 715 (1961).

[30] *Burton*, 365 U.S. at 716.

[31] *Id.* at 722.

[32] *Id.* at 723.

[33] *Id.* at 724.

[34] *Id.*

that "it must be recognized as a joint participant" in the discrimination.[35]

Lower courts have applied the close nexus and government entanglement tests to the NCAA and have found that it is a state actor whose actions may be challenged under Section 1983. To better understand the lower court findings, it is necessary to have a basic understanding of the NCAA.

III. The National Collegiate Athletic Association

A. *The Role of the NCAA in Amateur Athletics*

The NCAA is "a voluntary association of more than 860 schools, conferences and organizations . . . responsible for the administration of intercollegiate athletics in all of its phases."[36] The NCAA's fundamental policy "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and, by doing so, retain a clear line of demarcation between college athletics and professional sports."[37]

The following section examines judicial decisions finding that the NCAA was a state actor for purposes of Section 1983.

B. *Cases Holding that the NCAA's Actions Satisfied the State Action Requirement*

In *Parish v. NCAA*,[38] the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) applied the government entanglement test and concluded that the NCAA was a state actor.[39] In *Parish*, basketball players from Centenary College sought injunctive relief to prevent the NCAA from enforcing a ruling declaring the players ineligible to compete in NCAA sponsored tournaments and televised games.[40] The court noted that state-supported educational institutions play a substantial role in the NCAA and stated that "[s]tate participation in or support of nominally private activity is a well recognized basis for a finding of state action."[41] The court further noted the interest of the states and the federal government in all aspects of education. The court stated that athletics have a substantial role in higher education and that modern transportation

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[35] *Id.* at 725.

[36] Note, *The NCAA, Amateurism, and the Student-Athlete's Constitutional Rights Upon Ineligibility*, 15 New Eng. L. Rev. 597, 598 (1979-1980).

[37] *Id.* (citing NCAA Const. art. 2, § 2(a)).

[38] 506 F.2d 1028 (5th Cir. 1975).

[39] *Id.* at 1032.

[40] *Id.* at 1031.

[41] *Id.* at 1032.

made "meaningful regulation of this aspect of education . . . beyond the effective reach of any one state."[42] The court, therefore, found that the NCAA was taking on a "traditional government function" when it took "upon itself the role of coordinator and overseer of college athletics - in the interest both of the individual student and of the institution he attends."[43]

In *Howard University v. NCAA*,[44] the United States Court of Appeals for the District of Columbia found that the NCAA was a state actor based on the court's determination that the degree of public participation and entanglement in the NCAA was substantial and persuasive.[45] In *Howard University* the university and one of its student athletes challenged a NCAA finding that the schools soccer team had participated in the NCAA championship tournament while the player was ineligible to participate under NCAA eligibility rules.[46] Based on these violations Howard University's soccer team was given a one-year probation during which it could not participate in NCAA post-season competition.[47] The court initially addressed the issue of whether the actions of the NCAA constituted state action. The court considered that a vast majority of the NCAA's capital comes from public institutions and that representatives of public institutions "traditionally provided the majority of the members of the governing Council and the various committees [of the NCAA]."[48] The court found that "the state instrumentalities are a dominant force in determining NCAA policy and in dictating NCAA actions"[49] and cited approvingly to the Fifth Circuit's comment in *Parish* that "it would be strange doctrine indeed to hold that the states could avoid the [constitutional] restrictions placed upon them by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power."[50] After finding state action, the court reviewed the challenged NCAA eligibility rules. The court found that the "foreign-athlete rule"[51] failed to survive constitutional review because it arbitrarily discriminated against aliens.[52] The court, however, upheld the NCAA's sanctions based on other eligibility rules which survived

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[42] *Id.*

[43] *Id.* at 1032-1033 (citing Evans v. Newton, 382 U.S. 296 (1966)). After finding the state action requirement satisfied, the court upheld the NCAA's eligibility rule under the minimum rationality standard. The court also found that the plaintiff's due process rights were not violated because there was no liberty or property interest involved. *Id.*

[44] 510 F.2d 213 (D.C. Cir. 1975).

[45] *Id.* at 220.

[46] *Id.* at 216.

[47] *Id.*

[48] *Id.* at 219.

[49] *Id.*

[50] *Id.* at 220 (citing *Parish*, 506 F.2d. at 1033).

[51] *See infra* notes 105-117 and accompanying text.

[52] *Howard Univ.*, 510 F.2d at 222.

constitutional analysis.[53]

Despite these findings that the NCAA is a state actor for purposes of applying Section 1983, the United States Supreme Court reached the opposite result when it applied the state action tests to the facts of *NCAA v. Tarkanian*.

IV. NCAA v. TARKANIAN

A. Background of the Case

In November, 1972, the NCAA Committee on Infractions instigated an investigation of the basketball program at the University of Nevada, Las Vegas (UNLV) for alleged recruiting violations.[54] The Committee found thirty-eight violations of NCAA rules by UNLV and its basketball coach, Jerry Tarkanian.[55] Based on these findings, the NCAA placed UNLV's basketball program on a two-year probation during which the basketball team could not participate in post-season games or appear on television.[56] In addition, the NCAA "requested UNLV to show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the probation period."[57] UNLV appealed the Committee's findings, but the NCAA approved the findings and adopted the recommended discipline.[58]

The vice president of UNLV then presented the University's president with the options available to the school, the only realistic option being to "recognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters, thus reassigning Mr. Tarkanian from his present position — though tenured and without adequate notice — even while believing that the NCAA was wrong."[59] Thereafter, Tarkanian was informed that he was to "be severed of any and all relations, formal or informal, with [UNLV's] intercollegiate athletic program during the period of [UNLV's] NCAA probation."[60]

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[53] *Id.*

[54] *Tarkanian*, 109 S.Ct. at 458.

[55] *Id.* at 456. Ironically, the most serious charge — that Tarkanian violated UNLV's obligation to provide full cooperation with the NCAA investigation — had nothing to do with the NCAA investigation.

[56] *Id.* at 459.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 459. The other two options were:

(1) to reject the sanction requiring disassociation of Tarkanian from the athletic program and incur the risk of still heavier sanctions, e.g., possible extra years of probation; or

(2) to pull out of the NCAA completely on the grounds that UNLV will not execute a judgment of the NCAA which UNLV perceived to be "unjust".

[60] *Id.*

One day prior to his suspension becoming effective, Tarkanian brought an action against UNLV and a number of its officers alleging that they had, "in violation of Section 1983, deprived him of property and liberty without [the] due process of law guaranteed [to him] by the fourteenth amendment of the United States Constitution."[61] The trial court enjoined Tarkanian's suspension. UNLV appealed to the Nevada Supreme Court, where it was determined that the NCAA was a necessary party to the litigation. Accordingly, the Nevada Supreme Court reversed and remanded the case to allow for the joinder of the NCAA.[62]

Tarkanian filed an amended complaint adding the NCAA as a party and after a four-year wait, the trial court again found in Tarkanian's favor.[63] The court concluded that the NCAA's action constituted state action and that its action in influencing the suspension of Tarkanian violated his due process rights.[64] On appeal, the Nevada Supreme Court affirmed, finding that "Tarkanian had been deprived of both property and liberty protected by the Constitution and that he was not afforded due process before suspension."[65] UNLV appealed this decision to the United States Supreme Court.

B. The Supreme Court's Analysis

The United States Supreme Court[66] reversed the Nevada Supreme Court and found that the NCAA was not acting under color of state law when it influenced the suspension of Tarkanian. The NCAA's actions, therefore, did not come within the protection of Section 1983.[67]

The Court began its analysis by stating that this was a unique case because Section 1983 is usually applied where a private party has taken the action and it is alleged that the action was taken under color of state law. In this case, however, Tarkanian was suspended by UNLV, a state institution, which was influenced by the NCAA. In this case, therefore, the analysis was not whether

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[61] *Id.*

[62] *Id.* at 460.

[63] *Id.* The court affirmed its earlier injunction barring UNLV from disciplining Tarkanian. The court also enjoined the NCAA "from conducting 'any further proceedings against [UNLV]', from enforcing its show-cause order, and from taking any other action against [UNLV] that had been recommended by the [Committee] report."

[64] *Id.*

[65] *Id.*

[66] The majority opinion was written by Justice Stevens and was joined by Chief Justice Rehnquist and Justices Blackmun, Scalia, and Kennedy. The effect of this decision is consistent with the view of Justice Powell who had "serious concern that an unprecedented growth of often frivolous Section 1983 litigation will unduly burden the federal courts and government defendants." *See* Hong, *supra* note 9, at 49.

[67] *Tarkanian*, 109 S.Ct. at 465.

the state participated in the activities of a private party; but rather, whether the private party had participated in the state's action so that the private party became a state actor.[68] The Court's finding that this case did not fit into the traditional Section 1983 analysis would have been a sufficient basis to support its holding that the NCAA was not a state actor in this case. The Court, however, continued its analysis with a broad examination of the NCAA in general.

The Court's broad analysis of the NCAA began by addressing whether the rules of the NCAA became transformed into rules of the state by UNLV joining the NCAA and thereby adopting its rules.[69] Noting that UNLV had the option to withdraw from the NCAA and to promulgate its own standards, the Court held that "[n]either UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law when it promulgated standards . . . ."[70]

The Supreme Court then considered whether Nevada, through UNLV, had delegated sufficient authority to the NCAA to make the NCAA a state actor. Three factors influenced the Court's analysis and finding that there was no such delegation of authority. The first factor was that UNLV never delegated to the NCAA the power to take specific action against any of its employees.[71] Indeed, although the NCAA had proposed a threat of further sanctions, the suspension of Tarkanian was made by UNLV itself.

The second factor was whether UNLV's agreement to cooperate with the NCAA's proceedings was tantamount to a partnership agreement in which state powers were transferred to the NCAA.[72] The facts of the case indicated that the interests of the NCAA and UNLV were in opposition, making such a partnership unlikely. The NCAA wanted to ascertain whether there were violations of its rules which warranted punishment, whereas UNLV wanted to retain Tarkanian as its basketball coach.[73] The adverse alignment of the parties in this case supported the Court's finding that there was no partnership.

The final factor influencing the Court's finding of a lack of delegation of authority to the NCAA was that the NCAA did not have any governmental

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[68] *Id.* at 462.

[69] *Id.*

[70] *Id.* at 463.

[71] *Id.* at 464.

[72] *Id.*

[73] *Id.* Tarkanian enjoyed popularity in Las Vegas:

> "In a city that worships winners, 'Tark the Shark' Tarkanian is a patron saint, with the highest winning percentage (82%) in [college basketball]. Along with that comes use of a Cadillac, a base salary of $173,855 and a percentage of postseason revenues that could reach $80,000."

Gup, *Playing to Win in Vegas*, TIME, April 3, 1989, at 57.

powers to facilitate its investigation.[74] The Court explained that the only power the NCAA could exercise during its investigation was the threat of sanctions, the most extreme being expulsion from the NCAA.[75]

The Court utilized facets of both the "close nexus"[76] and "governmental entanglement"[77] analyses to address the state action issue. The Court's finding that there was no state action is inconsistent with (1) lower court decisions applying the same tests to the NCAA, and (2) the realities of the relationship between the NCAA and its members.

V. Analysis of NCAA v. Tarkanian

In *Tarkanian*, the United States Supreme Court failed to recognize the realities of the relationship between the NCAA and its members. Furthermore, the Court's unnecessarily broad analysis has the potential of insulating the NCAA from any challenge that it is a state actor, regardless of the circumstances.

A. *The Supreme Court's Analysis Disregards the Economic Impact of NCAA Membership*

It appears from the analysis of *Tarkanian* that the Court was content to examine the theoretical relationship between the NCAA and its members, rather than recognizing their actual relationship. The basic premise on which the Court relied is that the NCAA is a voluntary organization from which a member institution is free to disassociate itself if it desires.[78] The economic reality of college athletics, however, renders this premise false.

While the NCAA is a voluntary institution in theory, membership in the NCAA gives a school the opportunity to reap large financial benefits through its athletic program. Perhaps the most lucrative perquisite that comes with a successful athletic program is participation in NCAA post-season tournaments. In 1983, for example, the sixteen college football teams that participated in NCAA post-season bowl games shared thirty-five million dollars.[79]

In college basketball, the NCAA post-season tournament period is described

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[74] *Tarkanian*, 109 S.Ct. at 465.

[75] *Id.* at 4055.

[76] *See supra* notes 23-27 and accompanying text.

[77] *See supra* notes 28-35 and accompanying text.

[78] *Tarkanian*, 109 S.Ct. at 463.

[79] *NCAA Eligibility Regulations and the Fourteenth Amendment — Where is the State Action?*, 13 Ohio N.U.L. Rev. 433, 435 (1986) [hereinafter *NCAA Eligibility Regulations*] (citing *Oversight on College Athletic Programs: Hearings before the Subcommittee on Education, Arts, and Humanities of the Senate Committee on Labor and Human Resources*, 98th Cong., 2d Sess. 1 (1984)).

as "the season of 'March madness.'[80] It is a frenzied time when basketball rules the tube, millions pour into college coffers, and lanky young giants seem anointed with superhuman gifts of grace and courage."[81] Fifty-four teams were invited to participate in the NCAA's 1983 post-season tournament, and each of these teams was guaranteed $120,000.[82] The final sixteen teams were each guaranteed $290,000.[83] The reward for reaching the much coveted "final four" was a guarantee of $520,000.[84] By 1988, the NCAA basketball tournament earned participating schools a total of $68.2 million in gross receipts.[85] The four schools advancing to the "final four" each received $1.2 million.[86] These figures indicate the lucrative financial rewards which come with a membership in the NCAA. Upon examination of the magnitude of the dollars involved, it is apparent that although member institutions are theoretically free to disassociate themselves from the NCAA, they are, in a real sense, unable to "afford" to make such a break.

The Court overlooked the importance to the institution of NCAA membership in maintaining financially lucrative athletic programs. Had this factor been considered the Court's analysis would be based on the economic reality of the NCAA - member institution relationship, rather than on the theoretical basis of the relationship. Although the Court's analysis was too narrow in this aspect, other sections of its analysis were too broad.

B. The Supreme Court's Analysis was Unnecessarily Broad

Application of Section 1983 has long required a case by case analysis involving "sifting facts and weighing circumstances."[87] The United States Supreme Court, therefore, should have determined whether there was state action under the particular facts of *Tarkanian*.

The initial analysis of the Court was properly directed toward determining whether the unique set of facts justified a finding of state action. The Court noted that the facts of *Tarkanian* were unique in that they "mirrored the traditional state action case."[88] While the usual case arose where a private actor

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[80] The NCAA basketball tournament is referred to as "March madness" because it takes place in the month of March.

[81] Gup, *Foul!*, TIME, April 3, 1989, at 54.

[82] *NCAA Eligibility Regulations*, *supra* note 79, at 435.

[83] *Id.*

[84] *Id.*

[85] Gup, *supra* note 81, at 55.

[86] *Id.*

[87] Burton v. Wilmington Parking Auth., 365 U.S. at 722; *see also*, Evans v. Newton, 382 U.S. at 299.

[88] *Tarkanian*, 109 S.Ct. at 462.

committed an act under the influence of the government, the situation in *Tarkanian* was reversed. "Here the final act challenged by Tarkanian — his suspension — was committed by [the State]."[89] This distinction, standing alone, was enough to support the Court's ultimate finding that the actions taken by UNLV against Tarkanian did not make the NCAA a state actor. The Court, however, went further and examined the general characteristics of the NCAA. This unnecessary analysis may be considered dictum by lower courts; however, the extent of the Court's analysis suggests that this dictum will be considered very persuasive, if not controlling, by lower courts.

The Court first stated that UNLV's adoption of the NCAA's rules did not transform the NCAA into a state actor. The Court noted that if UNLV did not agree with the NCAA's rules, it was free to withdraw from the NCAA and promulgate its own rules.[90] The problems with this reasoning are discussed above.[91]

The Court then determined that although a private party could become a state actor due to a delegation of authority from a state, in this case, UNLV had not delegated any powers to the NCAA to take specific action against any of UNLV's employees.[92] The economic reality of the relationship between the NCAA and its members, however, indicates that UNLV could not "afford" to incur a sanction by the NCAA and that, in effect, UNLV became a mere conduit through which the NCAA enforced its decisions.[93]

The Supreme Court next determined that there was no partnership between UNLV and the NCAA which would lead to a finding of state action.[94] Finally, the Court addressed Tarkanian's contention that the overwhelming power of the NCAA forced UNLV to comply in suspending him. The Court stated that "[UNLV's] desire to remain a powerhouse among the nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal. But that UNLV's options were unpalatable does not mean that they were nonexistent."[95]

The Supreme Court's analysis focused on general characteristics of the NCAA which will remain constant from case to case. Lower courts will, thus, mechanically find, consistent with the Supreme Court's findings, that the NCAA is not a state actor. The broad, unnecessary determinations made by the Court are inconsistent with its history of addressing the issue of state action by examining the unique facts of each case. The relationship between the NCAA's governance

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[89] *Id.*

[90] *Id.* at 463.

[91] *See supra* notes 78-86 and accompanying text.

[92] *Tarkanian*, 109 S.Ct. at 454.

[93] *See supra* notes 78-86 and accompanying text.

[94] *See supra* notes 72-73 and accompanying text.

[95] *Tarkanian*, 109 S.Ct. at 465, n. 19.

of college athletics and the educational process should warrant review of its actions instead of a grant of unchecked power to influence collegiate institutions.

VI. The NCAA Can be Classified as a State Actor Under Both the Close Nexus and Government Entanglement Tests

The close nexus and government entanglement tests are used to determine whether a private entity has risen to the level of a state actor and may be sued under Section 1983. They are flexible tests allowing courts to consider the facts of individual cases and the social policies involved.[96] Several lower courts have applied these tests to determine that the NCAA is a state actor under the facts of those cases.[97] The NCAA may not be a state actor in every case which challenges its actions; however, there are circumstances in which the NCAA should be found to be a state actor. The following section discusses the application of the close nexus and government entanglement tests to the NCAA to illustrate that under certain circumstances, the NCAA should be considered a state actor.

The NCAA can be considered to be a state actor under the close nexus test which inquires "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action . . . may be treated as that of the State itself."[98] The regulation of an athletic program is an integral aspect of maintaining a college institution. A major goal, therefore, of the athletic program should be to ensure that it is acting in a manner which will allow both the academic and athletic aspects of the college to operate cohesively with each other. By taking on the role of regulating college athletics, the NCAA has also taken on the responsibility of instituting policies of its member institutions. If the NCAA had not taken on this role it would be up to each member school to regulate its own athletic program. In the case of state run schools, therefore, the NCAA is taking on duties which would otherwise be performed by the state. The necessity for consistency between a school's athletic and academic programs, as well as the realization that large funds can be raised through a successful athletic program, emphasize the importance of a successful relationship between the school and the NCAA. When considered together, these factors exhibit that in some situations, the actions of the NCAA "may be treated as that of the state itself."

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[96] *See supra* notes 22-35 and accompanying text.

[97] *See supra* notes 38-53 and accompanying text; *see also* Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973) (the NCAA was found to be a state actor where its supervision of intercollegiate athletics was determined to be a public function which became a state action when it received state support "through any arrangement, management, funds, or property") *Id.* at 1156.

[98] Jackson v. Metropolitan Edison Co., 419 U.S. at 351.

The NCAA can also be determined to be a state actor under the government entanglement test, which finds state action in cases where "conduct that is formally 'private' . . . become[s] so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[99] Public institutions play a substantial role in the governance and maintenance of the NCAA;[100] furthermore, through its rules and regulations such as those concerning athletic eligibility and eligibility for athletic scholarships, the NCAA is able to influence social policy concerning who can attend college.[101] Courts, therefore, have found that the NCAA satisfied the government entanglement test and was a state actor.[102] These findings are consistent with the Supreme Court's statement that "education is perhaps the most important function of state and local governments."[103] The NCAA's influence over publicly and privately operated collegiate institutions has led the United States Court of Appeals for the Fifth Circuit to hold that the NCAA was "performing a traditional governmental function" such that "were the NCAA to disappear tomorrow, government would soon step in to fill the void."[104]

The preceding discussion exhibits that there are circumstances under which the NCAA can be found to be a state actor. The following section discusses situations where it is proper to find state action and allow judicial review of the actions of the NCAA.

VII. The Need For Judicial Review of the NCAA

Inasmuch as the NCAA can be a state actor in certain situations, the court should be able to address constitutional challenges to the actions of the NCAA. The need for judicial review of the NCAA is exemplified by prior cases overturning two of the NCAA's "foreign athlete rules" and by the current dispute concerning freshman scholarship rules.

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[99] Evans v. Newton, 382 U.S. at 299.

[100] *See supra* note 48 and accompanying text.

[101] *See* Gup, *supra* note 73, at 58. Gup asserts that the big dollars attached to college athletics have created a situation where "players who can scarcely read or write are accepted by colleges and universities." *Id.*

[102] *See supra* notes 38-53 and accompanying text; *see also* Buckton v. NCAA, 366 F. Supp. 1156.

[103] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[104] Parish v. NCAA, 506 F.2d at 1033.

A. *Decisions Holding that the NCAA's Foreign Athlete Rules Were Unconstitutional*

On two separate occasions, courts have prevented the NCAA from enforcing rules that restricted foreign athletes from competing in NCAA controlled athletic competitions. In *Buckton v. NCAA*,[105] Canadian nationals attending Boston University sought to have the NCAA enjoined from declaring them ineligible for competition in inter-collegiate hockey for violating NCAA rules by participating in a Canadian junior hockey league before matriculating at Boston University.[106]

The court, applying the government entanglement test, determined that the NCAA was a state actor because its supervision of intercollegiate athletics was a public function which became a state action when the NCAA received state support "through any arrangement, management, funds, or property."[107] The regulations were subject to a strict scrutiny standard of review because the attempt to classify aliens differently from citizens was inherently suspect.[108] In order for the regulation to be upheld, the NCAA would have to demonstrate that the classification was justified by a compelling interest and that the classification was necessary to meet that interest.[109]

The NCAA's justification for the classification was that it furthered the interest of maintaining "the principles of 'amateurism' in intercollegiate sports."[110] The court was not persuaded that this was a compelling interest. The court observed that participating in the Canadian junior hockey league was equivalent to participating in American secondary school hockey leagues.[111] The court, therefore, granted the injunction sought by the plaintiffs on the ground that the classification seemed to discriminate irrationally against hockey players who were resident aliens.[112] By finding that there was state action by the NCAA, the court could determine that the Canadian athletes were unconstitutionally discriminated against by the NCAA solely because of their citizenship.

In *Howard University v. NCAA*,[113] Howard University and one of its athletes

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[105] 366 F. Supp. 1152 (D. Mass. 1973).

[106] *Id.* at 1154. The challenged NCAA by-law read:

> Any student-athlete who has participated as a member of the Canadian Amateur Hockey Association's major junior A hockey classification shall not be eligible for intercollegiate athletics.

N.C.A.A. CONST. art. 3, § 1, O.I.5 (1973-74).

[107] *Buckton*, 366 F. Supp. at 1156.

[108] *Id.* at 1157.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 1158.

[112] *Id.* at 1160.

[113] 510 F. 2d 213 (1975).

challenged the NCAA's foreign student rule.[114] The United States Court of Appeals for the District of Columbia determined that the NCAA was a state actor under the government entanglement test, where the state involvement, "while not exclusive, [was] 'significant', and all NCAA actions appear 'impregnated with a government character.' "[115] The court found that the foreign student rule created a classification based on alienage and was, thus, subject to close judicial scrutiny. In order to maintain the rule, the NCAA would have to show a compelling interest and that the classification was necessary for the attainment of this interest.[116] The NCAA's justification for the rule was that it prevented older players from dominating collegiate competition because of their age and experience. The court found that preventing the dominance of older players may have been compelling; however, the classification, as drawn, resulted in an arbitrary discrimination against foreign athletes.[117] As in *Buckton*, the court's finding of state action by the NCAA allowed it to reach the merits of the challenge and halt the NCAA's unconstitutional discrimination against foreign athletes.

The *Buckton* and *Howard University* cases indicate the necessity for and effectiveness of the courts' ability to protect against an NCAA violation of individual constitutional rights by using Section 1983 to review challenges against actions of the NCAA. The heavily debated issue of NCAA freshman eligibility requirements is an area where judicial review may be necessary in the near future.

B. The NCAA Freshman Eligibility Rules

The NCAA freshman eligibility rules are popularly known as Proposition 48 and Proposition 42.[118] These rules set the minimum standards for entering students to be eligible for NCAA competition. Under Proposition 48, which took effect on August 1, 1986, freshman athletes are eligible for NCAA competition only if they have met the following requirements:

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[114] *Id.* at 215 (citing N.C.A.A. By-law 4-1(f)(2), A. 173:

> Any participant in a [NCAA] event must meet all of the following requirements for eligibility . . . . He must not previously have engaged in three seasons of varsity competition after his freshman year, it being understood that . . . participation as an individual or as a representative of any team whatever in a foreign country by an alien student-athlete in each twelve-month period after his nineteenth birthday and prior to his matriculation at a member institution shall count as one year of varsity competition).

[115] *Id.* at 219-220.

[116] *Id.* at 222.

[117] *Id.*

[118] Proposition 48 is codified in the Manual of the NCAA as Bylaw 5-1-(j).

> 1. a high school cumulative grade point average of at least 2.0 on a 4.0 scale;
> 2. a 2.0 cumulative grade point average in a specified high school curriculum (including classes in English, Math, Social Sciences and Science); and
> 3. a total score of at least 700 on the Scholastic Aptitude Test (SAT) or 15 on the American College Test.[119]

Athletes who meet the requirement of a 2.0 cumulative grade point average, but fail to meet the other two requirements, may still be granted athletic scholarships, but they are not permitted to play or practice with the team during their freshman years.[120] Proposition 42, which will take effect on August 1, 1990, uses the same criteria as Proposition 48. As originally enacted Proposition 42 would have banned all scholarship money for a student-athlete who did not meet all of the requirements; however, on January 8, 1990 the NCAA voted to modify Proposition 42 so that student-athletes who do not meet all of the requirements may receive regular school scholarship aid but still may not receive athletic scholarships.[121] The debate over the propositions pits those who believe that the propositions will help maintain academic integrity in college athletics against those who see the propositions as being racially biased against minorities.

1. The Proponents' Position

The NCAA and other proponents of the propositions assert that the purpose of these regulations is to maintain the academic integrity of college athletics.[122] They allege that college athletics have taken on professional dimensions as schools offer scholarships to high school athletes whose qualifications would ordinarily be inadequate to gain admission to the institutions. Thomas J. Niland of the NCAA's rules committee described the situation:

> We've got our priorities mixed up, we used to play because we thought the kids were entitled and there were some values to be learned outside the classroom - hard work, sweat, the enjoyment of winning and even some disappointment. Then we got involved in how much money we could make at it, and it changed

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[119] *See* Yasser, *The Black Athletes' Equal Protection Case against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83 (1983) (citing 1983-84 Manual of the NCAA, Bylaws 5-1-(j)). In 1982, the year before the adoption of Proposition 48, the national mean score for the SAT was 890. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101, 120 (1984).

[120] *Id.*

[121] Honolulu Advertiser, Jan. 9, 1990, at C1, col. 1.

[122] *See* Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101 (1984); Reed, *A New Proposition*, SPORTS ILLUSTRATED, Jan. 23, 1989, at 16.

the game.[123]

The proponents contend that favoritism of athletes in the admission process is undermining the integrity of college sports. A major concern is the process referred to as "greasing" - the process in which student athletes are "passed along by high school [and college] teachers, coaches and administrators who cannot bring themselves to bar a star-athlete's academic progress."[124] The end result of "greasing" and similar tactics is that a large number of college athletes never receive degrees.[125] The supporters of Propositions 42 and 48 believe that the way to address these problems is to create admission standards that will insure that athletes are not accepted solely on the basis of athletic prowess without consideration of academic qualifications.[126] They contend that Propositions 42 and 48 set out reasonable standards for student-athletes seeking college admission.[127]

2. *The Opposition*

The opponents of the NCAA's freshman eligibility rules contend that the rules are meant to or will have the effect of excluding blacks from college athletics.[128] Criticism of the freshman eligibility rules range from the contention that they were intended to be discriminatory against blacks, to the contention that the rules represent a good idea that should have been addressed in a better fashion.[129] Opponents assert that the use of standardized test scores as an indicator has a disproportionate impact on minorities. This was the position taken by Gregory R. Anrig, the President of Educational Testing Services which is responsible for the development and administration of the SAT.[130] This result becomes apparent after reviewing SAT scores of white and black students. From the years 1976 to 1982, the average SAT score for white students ranged from

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[123] Gup, *supra* note 73, at 56.

[124] *Id.*

[125] *See Id.* "The NCAA publishes an annual compilation of athlete's graduation rates, but withholds the names of individual institutions. With good reason: many schools would be embarrassed." *Id.* at 58.

[126] *Id.*

[127] *Id.*

[128] Greene, *supra* note 122, at 117.

[129] *See* Reed, *A New Proposition*, SPORTS ILLUSTRATED 16-19 Jan. 23, 1989. John Thompson, the basketball coach of Georgetown University and the 1988 United States Olympic team, exhibited his disagreement with Proposition 42 by staging a highly publicized walkout at a basketball game in which his Georgetown team was competing against Boston College in January of 1989. *Id.*

[130] Yasser, *supra* note 119, at 85-86 (citing Jan. 19, 1983 statement of Gregory R. Anrig, President of Educational Testing Service).

924 to 944. During the same period, the average score for a black student varied from 686 to 707.[131] It appears that the minimum required 700 SAT score will have a disproportionate impact on blacks. In fact, this is exactly what happened when Proposition 48 took effect. As of January 1989, approximately 1,800 athletes had lost a year of eligibility due to Proposition 48. Of those excluded from football and basketball, eighty-six percent were black.[132]

The prior determinations that NCAA rules violated the equal protection rights of individuals[133] create a situation which clearly lends itself to an observation by Justice Frankfurter:

> If one factor is uniform in a continuing series of events that are brought to pass through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose.[134]

The past record of discrimination by the NCAA warrants review of their actions by the courts.

3. The Need for Judicial Determination of this Conflict

When there are allegations that the NCAA is motivated by racial discrimination in its policy decisions affecting college athletics, judicial review under Section 1983 is proper. Section 1983 arose as a weapon against racial discrimination. Federal courts were granted jurisdiction in cases such as this because the application of state remedies was inadequate to protect individual rights guaranteed under the fourteenth amendment.

If the eligibility requirements of the NCAA evade judicial review because the NCAA is not a state actor, the public's criticism and concern regarding their validity will continue. By finding state action where the NCAA has influenced educational policies through regulating athletic eligibility and addressing the allegations of racially motivated policy-making by the NCAA, however, the courts will resolve the dispute over whether the NCAA's policies violate the fourteenth amendment. If the courts decide that the NCAA's freshman eligibility requirements unconstitutionally discriminate against minorities, the NCAA may develop another plan which will not have such a disproportionate impact on minorities. Conversely, if the courts uphold the NCAA's regulations, the NCAA will rid itself of the allegations that its eligibility rules unconstitutionally

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[131] Green, *supra* note 122, at 120.

[132] Reed, *A New Proposition*, SPORTS ILLUSTRATED, Jan. 23, 1989, at 18.

[133] *See supra* notes 105-117 and accompanying text.

[134] Cassell v. Texas, 339 U.S. 282, 293 (1950) (Frankfurter, J., concurring).

discriminate against minorities. The outcome is not as important as the fact that the courts need to address constitutional challenges based on a complete consideration of the facts rather than on the issue of whether there is state action.

It appears that judicial economy will be the only policy served if a court determines that it does not have jurisdiction over this conflict due to a lack of state action by the NCAA. This will give the impression that the law has the "blindness of indifference" when it comes to protecting the rights of individuals. This should not happen, especially when matters as important as education and discrimination are involved. The courts must take an active role in the application of civil rights legislation, as stated by Judge Damon J. Keith, of the United States Court of Appeals for the Sixth Circuit:

> I cannot help but review the past two decades of civil rights law with a sense of frustration. Judges have not always been faithful in the interpretation of these laws or mindful of the purpose or spirit in which they were enacted.[135]

Accordingly, the courts should be able to find that the NCAA is a state actor so that student-athletes can enjoy the protection of Section 1983.

VIII. CONCLUSION

The potential result of the Supreme Court's determination in *Tarkanian* that the NCAA is not a state actor is that constitutional challenges to the policies of the NCAA will be barred from the courts. The Court's analysis in *Tarkanian* has the potential of insulating the actions of the NCAA from judicial review, thus leaving the constitutional rights of individuals unprotected from infringement by the NCAA. This result is inconsistent with the purposes behind the enactment of Section 1983, the history of past court decisions and the public policies concerning Section 1983.[136]

The determination of whether a private actor became a state actor has traditionally been accomplished on a case by case analysis.[137] This practice is consistent with the goal of Section 1983: to protect individuals' constitutional rights from being encroached upon by private parties when the protections of the state are inadequate.[138] In some situations the NCAA appears to satisfy the require-

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[135] Keith, *What Happens To a Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington*, 19 HARV. C.R-C.L. L. REV. 469 (1984). Judge Keith takes the position that pressure must be applied to the executive and legislative branches as well as the judiciary "[t]o ensure that equality is made a reality." *Id.* at 495.

[136] *See supra* notes 6-53 and accompanying text.

[137] *See supra* note 22 and accompanying text.

[138] *See supra* notes 6-21 and accompanying text.

ments for finding state action under both the "close nexus" and "government entanglement" tests. Indeed, lower courts have reached this conclusion.

The broad analysis used by the Supreme Court in *Tarkanian*, however, did not focus on the facts of the case but instead focused on general characteristics of the NCAA. This broad analysis will undoubtedly preclude lower courts from ever finding, regardless of the facts of the particular case, that the NCAA is a state actor for purposes of a Section 1983 challenge.

Where a private party, such as the NCAA, plays a dominant role in an area as important as education, the courts should be able to assume the responsibility of insuring that the party is undertaking its role within the parameters of the Constitution. In controversial situations such as the NCAA's freshman eligibility rules the courts must ask themselves whether requiring the NCAA to operate within the boundaries of the constitution is really so much to ask.

Wintehn K.T. Park

Stop H-3 Association v. Dole: Congressional Exemption From National Laws Does Not Violate Equal Protection

I. INTRODUCTION

In *Stop H-3 Association v. Dole* (*Stop H-3*),[1] the United States Court of Appeals for the Ninth Circuit held that a federal statute[2] which specifically exempted an interstate highway project in the State of Hawaii from meeting the requirements of federal environmental protection laws[3] did not violate equal protection rights of the state's citizens.[4] The court found substantial national and state interests to warrant dismissing the equal protection claims of the plaintiffs in the case. The court's decision focused on congressional intent to complete the project, as evidenced by the statute's legislative history, and on congressional power to make the exemption.

Section II of this note states the facts of *Stop H-3*. Section III gives a historical overview of the development of equal protection law and discusses the standards of review currently utilized by the courts in equal protection cases. Section IV analyzes the court's rationale for ruling that the federal statute did not violate equal protection, and Section V discusses the potential impact of the court's decision on future equal protection challenges involving a congressional exemption of a specific project from federal laws.

II. FACTS

Interstate Highway H-3 (H-3), as planned, is a six-lane freeway that will extend across the Koolau Mountains on the island of Oahu.[5] The highway will connect the Kaneohe Marine Corps Air Station on the windward side of the

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[1] 870 F.2d 1419 (9th Cir. 1989).

[2] *See infra* note 16 and accompanying text.

[3] *See infra* note 12 and accompanying text.

[4] *See infra* notes 22-25 and accompanying text for a description of plaintiffs' various claims.

[5] Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 438, *cert. denied*, 429 U.S. 999 (1976).

island to the Pearl Harbor Naval Base on the leeward side.[6] While two conventional highways[7] also provide trans-Koolau access, population projections made by the State of Hawaii suggested that these highways would be inadequate by the year 2000.[8]

Nearly 16 years of litigation to block construction of the H-3 resulted in significant disruptions to the highway's completion.[9] First, the H-3 was redesigned to remove it from Moanalua Valley because of the valley's historic import.[10] Second, until the latest litigation, an injunction had been in place for nearly all of the years since the 1972 challenge to construction was initiated.[11] Further, the requirements of the Federal-Aid Highway Act, section 4(f)[12] were

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[6] *Id.*

[7] Neither the Pali Highway nor the Likelike Highway are interstate highways.

[8] Stop H-3 Ass'n v. Dole, 740 F.2d 1422, 1455-58 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985), discussed the impact of H-3 on traffic demands. The Ninth Circuit was unconvinced that the H-3 was necessary to accommodate the increases in traffic projected and had ruled that the "No Build Alternative," (a justification hurdle that the Highway had to overcome since it impacted upon parkland) was not met in the Environmental Impact Statements filed to date. *Id.* at 1458.

[9] The 16-year litigation history is as follows: Stop H-3 Ass'n v. Volpe, 349 F. Supp. 1047 (D. Haw. 1972); Stop H-3 Ass'n v. Volpe, 353 F. Supp. 14 (D. Haw. 1972); Stop H-3 Ass'n v. Brinegar, 389 F. Supp. 1102 (D. Haw. 1974), *rev'd. sub nom.*, Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976); Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149 (D. Haw. 1982), *aff'd in part and rev'd in part*, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985); Stop H-3 v. Dole, 740 F.2d 1442 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

[10] Despite the State's assertion that Moanalua Valley was of "marginal" local historical importance as determined by the Historic Places Review Board in their Minutes of the Meeting of the Historic Places Review Board, August 5, 1974, the Ninth Circuit held that the potential for registry in the National Register of Historical Places was sufficient to cause the H-3 to comply with Section 4(f) of the Department of Transportation Act of 1966. Stop H-3 v. Coleman, 533 F.2d 434, 440 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976). *See infra* note 12 for text of Section 4(f).

[11] Injunctions blocking construction had been in place since 1972 except for nearly a year when the District Court, in 1983, dissolved the injunctions and construction began pending an appeal to the Ninth Circuit which reinstituted the injunction. Stop H-3 v. Dole, 740 F.2d 1442, 1447 n.1 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

[12] Department of Transportation Act of 1966, § 4(f), 49 U.S.C. § 303 and § 18 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, which contains nearly identical language, are together commonly referred to as "section 4(f) requirements."

Section 4(f) of the Department of Transportation Act provides:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development and Agriculture and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After

found to apply to the H-3 wherever it abutted protected land,[13] so that the highway had to meet the environmental protections of section 4(f)[14] where it abutted Ho'omaluhia Park and the Pali Golf Course.[15]

On October 18, 1986, the President of the United States signed a Continuing Appropriations Bill that included section 114, a provision that exempted the H-3 from the requirements of section 4(f), with the intent of paving the way for the rapid construction of the highway.[16] The State of Hawaii had urged its congressional delegation to attempt such an exemption[17] in the face of delays

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August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

Id.

[13] Stop H-3 v. Dole, 740 F.2d at 1447. Applying section 4(f) was consistent with prior holdings. The Ninth Circuit had previously held, in regard to Moanalua Valley, that "construction of a highway adjacent to a potential wilderness area was a 'use' of that land." Stop H-3 v. Coleman, 533 F.2d at 453 (quoting Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 362 F. Supp. 627, 638-39 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974)).

[14] Stop H-3 v. Dole, 740 F.2d at 1447.

[15] Federal Highway Admin., U.S. Dep't of Transp., Highways Div., State of Hawaii Dep't of Transp., Final Second Supplement to the Interstate Route H-3 Environmental Impact Statement (1982) reports that the H-3 is planned to occupy the area separating Ho'omaluhia Park and the Pali Golf Course Park. Additionally, the H-3 will use approximately 3.5 acres of Pali Golf Course land. Stop H-3 v. Dole, 740 F.2d at 1448 n.6.

[16] Continuing Appropriations Bill for Fiscal Year 1987, Pub. L. No. 99-500, 100 Stat. 1783 (later reenacted as Pub. L. No. 99-551, 100 Stat. 3341 because of clerical errors in the original enactment).

Section 114 reads:

Sec. 114, (a) The Secretary of Transportation shall approve the construction of Interstate Highway H-3 between the Halawa interchange to, and including the Halekou interchange (a distance of approximately 10.7 miles), and such construction shall proceed to completion notwithstanding section 138 of title 23 and section 303 of Title 49, United States Code.

(b) Notwithstanding section 102 of this joint resolution the provisions of subsection (a) shall constitute permanent law.

[17] *See* Sunday Star Bull. and Advertiser, Nov. 3, 1985, at B2, col. 1. Entitled, "H-3 Goes to Congress," this editorial comments:

Governor Ariyoshi has adopted a controversial tactic in seeking to win federal approval for the long-stalled H-3 Freeway.

The state administration has gone to Congress in an effort to bypass both federal environmental regulations and court decisions that have blocked this ill-advised and outdated 1960's project.

It is an admission that the state lost the long legal battle and can't come up with better justifications for H-3 required by our courts.

which jeopardized the entire funding of the project and which had caused dramatic increases in projected costs.[18]

While the bill was supported by Hawaii's congressional delegation, the proposed H-3 had detractors within the state besides the Stop H-3 Association.[19] Notably, the administration of the City and County of Honolulu, which comprises the entire island of Oahu and within whose boundaries H-3 wholly lies, was opposed to the highway's construction.[20]

The passage of the exemption did not mark an end to litigation.[21] In the latest litigation, Stop H-3 Association, Life of the Land, and Hui Malama Aina O Ko'olau, plaintiffs, challenged the constitutionality of section 114 claiming it violates the Spending Clause,[22] Separation of Powers,[23] and the Equal Protec-

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All four members of our congressional delegation perhaps as a courtesy have gone along with the state appeal for legislative circumvention.

[18] H.R. REP. NO. 1005, 99th Cong., 2d Sess. 784 (1986) [HOUSE REPORT] stated:

> A recent decision of the Ninth Circuit Court of Appeals makes approval of this project impossible before the 1986 and 1990 deadlines for interstate construction . . . . The conferees also take note of the fact that H-3 has been the subject of litigation for more than 14 years. During that time, construction costs have escalated substantially, and the people of Hawaii have been deprived of a much needed highway. It is the sense of the conferees that it is now time for litigation to be brought to a close and the highway to be built.

[19] *Federal-Aid Highway Act, 1986: Hearing on S. 2405 Before the Subcomm. on Transp.*, 99th Cong., 2d Sess. 23, 47, 86, 297, 328, 329 (May 20, 1986). Those opposing construction of the H-3 and providing written or oral testimony included the City and County of Honolulu, represented by D.G. Anderson, Acting Mayor and Managing Director of the City and County of Honolulu; Office of Hawaiian Affairs (expressing concern about the Luluku archaeological site); Marilyn Bornhorst, City and County of Honolulu Council Chair; League of Women Voters In Hawaii (opposing the congressional tactic of exempting single projects from federal environmental laws). The League of Women Voters of the United States also supported the position of their Hawaii chapter.

[20] Acting Mayor and Managing Director of the City and County of Honolulu, D.G. Anderson provided written testimony:

> An arbitrary waiver of a long standing federal law directed solely at a Honolulu project will preempt both the legal process and the local political process and deprive us of much needed funds to address our local transportation needs. We respectfully disagree with Senators Inouye and Matsunaga that the court was irresponsible and that opponents are obstructionists. In fact, we support the court's opinion that the most "prudent and feasible" alternative is not to build H-3.

Id. at 87.

[21] 870 F.2d at 1419.

[22] U.S. CONST. art. I, § 8, cl. 1. The plaintiffs asserted that since H-3 was of only local importance, given that it would connect no states and was allegedly regarded as unimportant by the Department of Defense, the exemption that allowed construction of the H-3 and thus, the expenditure of federal monies, violated the Spending Clause. 870 F.2d at 1427. The court concluded that H-3 was of national importance as determined by Congress's statement in 101(b) of the Federal-Aid Highways Act regarding completion of the Interstate System. *Id.* at 1429.

tion Clause.[24] Plaintiffs alleged, in the Equal Protection challenge, that discrimination occurred when Congress exempted the H-3 Highway from section 4(f) of the Federal-Aid Highways Act.[25] The Equal Protection challenge, a rarely used challenge to congressional authority to make exemptions to environmental laws, will be developed in this Note.[26]

III. HISTORY

A. *An Overview of Equal Protection Law*

Equal protection of the laws of the states and the federal government is guaranteed under the Equal Protection Clause of the fourteenth amendment[27] and the Due Process Clause of the fifth amendment[28] of the U.S. Constitution, respectively.[29] The U.S. Supreme Court originally interpreted equal protection

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[23] 870 F.2d at 1436. The Separation of Powers challenge was two-fold. First, although the language of § 114 exempted H-3 from the requirements of § 4(f), the legislative history suggested that Congress was making judicial findings of facts as its reason for the exemption when it reported:

> [The Ninth Circuit] relied on a highly technical reading of Section 4(f) of the Department of Transportation Act, designed to protect publicly owned parkland. In reality, no land from the park involved (Ho'omaluhia) has been, nor will be taken or used by the highway . . . . Section 4(f) as [sic] never intended to block the construction of a highway the design of which was specifically tailored to afford such special protection for parklands.

HOUSE REPORT at 784.

The other Separation of Power argument was that by removing H-3 from the 4(f) requirements, Congress had usurped administrative authority from the Executive Branch, usurped judicial review from the Judicial Branch and disrupted the coordinate branches' functions of government. 870 F.2d at 1436.

[24] U.S. CONST. amend. XIV, § 1.

[25] 870 F.2d at 1429.

[26] The removal of the injunctions prior to the filing of new Supplemental Environmental Impact Statements was also in dispute. These new statements were required because of the discovery of new archaeological sites and a finding that further study of the impact of the highway on banana farmers was warranted. 870 F.2d at 1425.

[27] U.S. CONST. amend. XIV, § 1 provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[28] U.S. CONST. amend. V provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

In Bolling v. Sharpe, 347 U.S. 497, 499 (1954), the U.S. Supreme Court interpreted the Due Process Clause of the fifth amendment to guarantee equal protection of federal laws, stating that "discrimination may be so unjustifiable as to be violative of due process."

[29] *See generally*, Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541, 560 (1977)(discussion of the basic congruence of the fifth and fourteenth amendment guar-

primarily as guaranteeing racial equality. In *The Slaughter-House Cases*,[30] the Court upheld a Louisiana statute which granted a company the exclusive right to carry out slaughter-house activities within a certain area which included New Orleans. The Court stated that "the one pervading purpose [of the thirteenth, fourteenth, and fifteenth amendments was] . . . the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[31] There was thus virtually no judicial intervention in equal protection cases beyond those involving racial discrimination until after the early 1960s.[32] Over the years, however, the Court expanded the equal protection doctrine to require that those who are similarly situated be treated alike.[33] The present significance of the equal protection guarantee is such that it has been called "the single most important concept in the Constitution for the protection of individual rights."[34]

Equal protection analysis is applied to government classifications, that is, legislation or administrative rules which burden or benefit a particular class of persons.[35] While all legislation classifies,[36] a classification is generally deemed constitutional if it relates to a legitimate governmental purpose[37] and does not invidiously discriminate.[38]

The Court has required reasonableness or rationality in government classifica-

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antees of equal protection).

[30] 83 U.S. (16 Wall.) 36 (1872).

[31] *Id.* at 71.

[32] Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). The Warren Court expanded the scope of equal protection beyond racial considerations. Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947 (1975).

[33] F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 417 (1920) (state statute which taxed all income of local corporations doing business within and outside of the state, while exempting local corporations which did no local business from taxes on income from out-of-state business, was arbitrary and violated the equal protection clause); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

[34] J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 14.1, at 524 (3d ed. 1986). Justice Holmes called the Equal Protection Clause "the last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

[35] Galloway, *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 123 (1989); Galloway, *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775, 783 (1988).

[36] Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979); 16A AM. JUR. 2D *Constitutional Law* § 746, at 802 (1979).

[37] Plyler v. Doe, 457 U.S. 202, 216, *reh'g denied*, 458 U.S. 1131 (1982).

[38] "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Williamson v. Lee Optical, Inc., 348 U.S. 483, 489, *reh'g denied*, 349 U.S. 925 (1955).

tions since it began reviewing social and economic legislation.[39] The rational basis standard assumes that all legislation has a "legitimate public purpose or set of purposes based on some conception of the general good."[40] The concept of judicial scrutiny beyond that of the rational basis standard was first suggested by Chief Justice Stone in his famous footnote in *United States v. Carolene Products Co.*[41] The Chief Justice suggested that there may be cases where the Court would consider "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[42] The Warren Court is credited with developing a two-tiered system of judicial review, consisting of strict scrutiny and the rational basis test.[43] The Burger Court, dissatisfied with the all-or-nothing standards of "the rubber stamp of the rational basis test and the fatal-in-fact, inexorable result under strict scrutiny,"[44] developed a middle tier of intermediate scrutiny.[45] Judicial review of legislation under the equal protection doctrine is now often described as a three-tiered system consisting of the rational basis test, intermediate scrutiny, and strict scrutiny.[46]

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[39] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1439-40 (2d ed. 1988).

[40] *Id.* at 1440.

[41] 304 U.S. 144, 152-53 n.4 (1938).

[42] *Id.*

[43] Gunther, *supra* note 32, at 8. Strict scrutiny has been described as the "new" equal protection signalling the Court's interventionist role, and rational basis the deferential "old" equal protection. *Id.*

[44] Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 MO. L. REV. 423, 427 (1988).

[45] It has been posited that the Burger Court established the middle tier in order to weaken the trend of activist equal protection started by the Warren Court and as a device to avoid strict scrutiny. *See id.* The Warren Court's expansion of the suspect classification and the fundamental rights doctrines was thus curtailed by the Burger Court. Blattner, *The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777, 785 (1981).

[46] Jackson Water Works, Inc. v. Public Utils. Comm'n, 793 F.2d 1090, 1093 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987); Hoffman v. United States, 767 F.2d 1431, 1434-35 (9th Cir. 1985).

There is disagreement in the Court as to the proper standards of analysis in equal protection. Justice Stevens, for example, advocates the rational basis test for all classifications. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 451-55 (1985)(Stevens, J., concurring). Justice Marshall, on the other hand, believes that the level of scrutiny should depend on "the constitutional and societal importance of the interest adversely affected," and the invidiousness of the basis of the classification. *Id.* at 460 (Marshall, J., concurring in part and dissenting in part (quoting San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)(Marshall, J., dissenting)).

B. *Levels of Judicial Review*

The first step in equal protection analysis is determining the appropriate level of review.[47] The appropriate level of review in turn, depends on the type of classification or interest involved in the legislation.[48] Once determined, the level of judicial scrutiny — the rational basis test or strict scrutiny — frequently foretells the outcome of the case. This is not the case with the intermediate level of scrutiny.[49]

1. *Rational basis test*

The rational basis test, described as "minimal scrutiny in theory and virtually none in fact,"[50] is generally applied to social or economic legislation.[51] The test is characterized by a presumption of constitutionality and judicial restraint[52] or deference to the legislature.[53] A court utilizing this kind of review must do a two-part analysis of the legislation. First, the court must decide whether the legislation has a legitimate purpose. Second, if a legitimate purpose exists, the court must decide whether the purpose would be furthered by the classification.[54] If the classification is conceivably related to a valid moral, health, or safety governmental interest, the court will generally determine that a rational basis exists.[55] The test only requires a reasonably conceivable statement of facts to justify the classification[56] and a "rational relationship to a legitimate govern-

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[47] Attorney General of N.Y. v. Soto-Lopez, 476 U.S. 898, 906 n.6 (1986); Jackson Water Works, 793 F.2d at 1093.

[48] Galloway, *Basic Equal Protection Analysis*, *supra* note 35, at 124.

[49] Note, *Alternative Models of Equal Protection Analysis: Plyler v. Doe*, 24 B.C.L. REV. 1363, 1375 (1983).

[50] Gunther, *supra* note 32, at 8.

[51] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (equal protection clause not violated by ban of nonreturnable plastic milk containers since the ban was rationally related to the state's purposes of conserving energy, easing solid waste disposal, and promoting conservation of resources), *reh'g denied*, 450 U.S. 1027 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980)(Railroad Retirement Act of 1974 which eliminated Social Security plus pension windfall unless individuals met certain requirements for length of service and status in order to protect the retirement program upheld), *reh'g denied*, 450 U.S. 960 (1981).

[52] *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1078 (1969).

[53] L. TRIBE, *supra* note 39, § 16-2, at 1442-43.

[54] Jackson Water Works, Inc. v. Public Utils. Comm'n, 793 F.2d 1090, 1094 (9th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987).

[55] Kushner, *supra* note 44, at 437. The Court has described regulations for the general benefit of society as including those which "promote the health, peace, morals, education, and good order of the people, and . . . increase the industries of the State, develop its resources, and add to its wealth and prosperity." Barbier v. Connolly, 113 U.S. 27, 31 (1885).

[56] There need not be a "tight fitting" relationship between the legislative objective and the

mental interest."[57] A classification is deemed unconstitutional only if it is arbitrary and has no rational basis.[58]

Williamson v. Lee Optical, Inc.[59] exemplifies the Court's ability to deduce a rational basis in economic legislation. The *Williamson* Court upheld an Oklahoma statute which made it unlawful for anyone who was not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace lenses or optical appliances into frames without a written prescription from a licensed optometrist or ophthalmologist.[60] The statute specifically exempted sellers of ready-to-wear glasses.[61] The Court presented a number of possible reasons for the statute in its decision, noting that "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."[62] The Court concluded that it could not say that the statute lacked a rational relationship to a legitimate governmental interest.

Similarly, the Court in *City of New Orleans v. Dukes*,[63] found valid a grandfather clause in a New Orleans ordinance which exempted vendors from the prohibition against selling food from pushcarts in the French Quarter, if the vendors had continuously operated the same business for eight or more years prior to a certain date. The Court stated that unless the classification involved fundamental personal rights or was drawn on inherently suspect lines such as race or religion, the Court would presume the statute's constitutionality and require only that the subject classification be rationally related to a legitimate governmental interest.[64] The "relatively relaxed standard"[65] of the rational basis

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classification. Hoffman v. United States, 767 F.2d 1431, 1437 n.7 (9th Cir. 1985). In Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, *reh'g denied*, 331 U.S. 864 (1947), the Court, in light of the unique institution of pilotage, upheld a pilot regulatory system although friends and relatives of incumbent pilots were favored. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), the Court upheld a statute forbidding a landowner from pumping or otherwise artificially drawing water containing natural mineral salts and carbonic acid gas for the purpose of collecting and selling the carbonic gas as a separate commodity since the statute's purpose was to prevent waste.

If the classification has a reasonable basis, it does not violate the Equal Protection Clause simply because the classification "is not made with mathematical nicety, or because in practice it results in some inequality." *Id.* at 78.

[57] Frontiero v. Richardson, 411 U.S. 677, 683 (1973).

[58] Lindsley, 220 U.S. at 78.

[59] 348 U.S. 483, *reh'g denied*, 349 U.S. 925 (1955).

[60] *Id.* at 485, 491.

[61] *Id.* at 488 n.2.

[62] *Id.* at 487. The Court stated that "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Id.* at 487-88.

[63] 427 U.S. 297 (1976)(per curiam).

[64] *Id.* at 303. The Court warned that "the judiciary may not sit as a superlegislature to judge

test and the Court's deference to Congress have been explained by the Court as "reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."[66]

2. *Strict scrutiny*

Strict scrutiny is reserved for "presumptively invidious"[67] classifications that involve either a "suspect" class,[68] such as race,[69] national origin[70] or alienage,[71]

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the wisdom or desirability of legislative policy determinations" in areas that did not affect either fundamental rights or suspect classifications. *Id.*

[65] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

[66] *Id.*

[67] Plyler v. Doe, 457 U.S. 202, 216, *reh'g denied*, 458 U.S. 1131 (1982). *See infra* note 94 and accompanying text.

[68] The term was first used in Korematsu v. United States, 323 U.S. 214, 216 (1944), *reh'g denied*, 324 U.S. 885 (1945). *See infra* note 83 for discussion of *Korematsu*.

Disparate impact on a suspect class is reviewed under the rational basis test unless discriminatory purpose is shown. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)(plaintiffs failed to show racially discriminatory intent or purpose in the denial of an application for rezoning a tract of land to allow construction of racially-integrated low- and moderate-income housing); Washington v. Davis, 426 U.S. 229 (1976)(disproportionate impact of a facially neutral written police recruiting test was not enough to show purposeful discrimination).

The Court defined discriminatory purpose as the implication "that the decision maker . . . [such as a state legislature,] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)(Massachusetts veteran's preference statute did not deprive females of equal protection since the preference was for veterans of either sex over nonveterans, not males over females).

[69] Loving v. Virginia, 388 U.S. 1 (1966)(anti-miscegenation statute prohibiting marriage between a white and a non-white violated equal protection). Strict scrutiny is also used in cases of "benign" racial discrimination which benefits racial minorities but burdens the white majority. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (schoolteacher layoff policy which would retain school system's percentage of black and white teachers was invalid since the policy was not "sufficiently narrowly tailored" to accomplish its purpose), *reh'g denied*, 478 U.S. 1014 (1986); Board of Regents v. Bakke, 438 U.S. 265 (1978)(university racial quota system reserving seats for racial minorities for admission purposes was unconstitutional); City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989)(city set-aside program which required prime contractors on city projects to subcontract at least 30% of the contract amount to Minority Business Enterprises was struck down; city did not show a compelling interest in the apportionment of public contracting opportunities by race and the program was not narrowly tailored to remedy effects of past discrimination).

[70] *See infra* note 83 for discussion of Korematsu v. United States, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945).

[71] J. NOWAK, *supra* note 34, § 14.12, at 630-44 discusses the levels of review utilized by the Court in three categories of alienage cases: 1) strict scrutiny is used for state or local laws classifying on the basis of U.S. citizenship for economic reasons, *e.g.*, Graham v. Richardson, 403 U.S.

or a person's fundamental rights.[72] Fundamental rights are those rights "explicitly or implicitly guaranteed by the Constitution,"[73] and include the right of interstate migration,[74] equal voting weight,[75] privacy,[76] and freedom of association.[77]

Under strict scrutiny's two-pronged test,[78] the government must show first, that the classification is required to promote a compelling governmental interest,[79] and second, that the "less drastic means" available are utilized,[80] that is, that the means used to achieve the government's goal are "narrowly tailored to the achievement of that goal."[81] Since strict scrutiny is deemed necessary to protect liberty and equality,[82] a classification subjected to strict scrutiny seldom

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365 (1971)(states may not deny welfare assistance to resident aliens or aliens who have not resided in the U.S. for a certain number of years); 2) the rational basis test is used for state or local laws regarding the distribution of political power or positions, *e.g.*, Foley v. Connelie, 435 U.S. 291 (1978)(state may limit appointment to police force only to U.S. citizens); and 3) the rational basis test is also used for federal classifications, *e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976)(Congress may impose residence requirements on alien's eligibility for federal medical insurance benefits). *Cf.* Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982)(the Court applied intermediate scrutiny to illegal alien children).

[72] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34, *reh'g denied*, 411 U.S. 959 (1973).

[73] *Id.*

[74] Shapiro v. Thompson, 394 U.S. 618 (1969)(statute which denied welfare benefits to residents who had not resided within the state for a specified period of time violated the right of interstate travel).

[75] Reynolds v. Sims, 377 U.S. 533 (state apportionment scheme deemed invalid since it was not based on population), *reh'g denied*, 379 U.S. 870 (1964).

[76] Zablocki v. Redhail, 434 U.S. 374 (1978)(striking down statute prohibiting state residents from marrying without a court order if they had minor issue not in their custody and were obligated to support the issue by court order or judgment); Roe v. Wade, 410 U.S. 113 (upholding woman's right to abortion), *reh'g denied*, 410 U.S. 959 (1973). *But see* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3067 (1989)(upholding the ban on the use of public facilities and public staff for performing abortions and requiring viability testing of fetus that physician believes is of a certain gestational age).

[77] NAACP v. Alabama, 357 U.S. 449 (1958)(mandatory disclosure of NAACP membership lists would violate citizens' associational rights).

[78] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, *reh'g denied*, 478 U.S. 1014 (1986).

[79] *Id. See also* Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(no compelling government interest to justify change in custody of a minor child to the father based on the possible damaging impact of racially mixed household in which the mother was living with and eventually married a Negro).

[80] Dunn v. Blumstein, 405 U.S. 330, 343 (1972)(quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

[81] *Wygant*, 476 U.S. at 274 (citing Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)).

[82] L. TRIBE, *supra* note 39, § 16-6, at 1451.

prevails.[83] The Court's dissatisfaction with the two-tiered system of judicial review[84] led to the development of the intermediate level of scrutiny, "between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny."[85]

3. Intermediate scrutiny

Although the Court has not whole-heartedly embraced the intermediate level per se,[86] the Court has generally used intermediate scrutiny for classifications based on gender[87] and illegitimacy,[88] where the classification involved the infringement of "important" rights or interests or "quasi-suspect"[89] means of classification. Unlike the rational basis test, for which a mere conceivable purpose is sufficient, intermediate scrutiny requires that the actual purpose of the legislation be examined.[90] The Court articulated a "middle-tier approach" in *Craig v. Boren*,[91] in which it ruled that a gender-based classification was consti-

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[83] *Id.* at 1451-52. Korematsu v. United States, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945), is the only case in which the Court upheld an explicit racial discrimination under strict scrutiny, according to L. Tribe, *supra* note 39, § 16-6, at 1451-52. Although the Court ruled that classifications based on race are "suspect" and thus subject to "the most rigid scrutiny," the Court upheld the exclusion of people of Japanese ancestry from certain West Coast areas because of the perceived necessities of World War II. *Korematsu*, 323 U.S. at 216. *See also* Hirabayashi v. United States, 320 U.S. 81 (1943)(military curfew for people of Japanese ancestry on West Coast upheld in the beginning of World War II).

[84] *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976)(Marshall, J., dissenting). Justice Marshall objected to the perpetuation of the "rigid two-tiered model."

[85] L. Tribe, *supra* note 39, § 16-32, at 1601.

[86] *See infra* note 91, which states Justice Rehnquist's opposition to the addition of a new tier of judicial review.

[87] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)(state-supported university's policy of excluding males from enrollment for credit in its nursing school violated equal protection clause).

[88] Clark v. Jeter, 486 U.S. 456 (1988)(six-year statute of limitations to establish paternity of illegitimate child was not substantially related to state's interest in preventing stale or fraudulent claims); Lalli v. Lalli, 439 U.S. 259 (1978)(upholding New York statute that required a court order of paternity issued while the father was alive in order for illegitimate child to inherit from intestate father).

[89] Plyler v. Doe, 457 U.S. 202, 244 (Burger, C.J., dissenting), *reh'g denied*, 458 U.S. 1131 (1982).

[90] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)(federal statute allowing Social Security survivors' benefits only to women violated equal protection). The Court need not accept the asserted legislative purposes "when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Id.* at 648 n.16.

[91] Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976)(Powell, J., concurring), *reh'g denied*, 429 U.S. 1124 (1977).

Justice Rehnquist strongly opposed the addition of another tier to the standards of review:

tutional if it actually served "important governmental objectives and . . . [was] substantially related to achievement of those objectives."[92] The classification in this case, which applied different minimum age levels for males and females for the purchase of 3.2% beer, was not substantially related to the state purpose of encouraging traffic safety, and thus invidiously discriminated against males of a certain age.[93]

Justice Brennan noted in *Plyler v. Doe*[94] that intermediate scrutiny is used "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and [Supreme Court] cases."[95] Although the Court generally reviews educational issues under the rational basis test,[96] in *Plyler*[97] the Court used heightened scrutiny to find that a Texas statute which withheld state funds for educating illegal alien children and which authorized school districts to deny the children enrollment in public schools violated the Equal Protection Clause. Acknowledging that education was not a "fundamental right,"[98] the Court nevertheless ruled that because of the importance of education in American society and because education allows individuals to better their societal positions on merit, the State had to justify its denial of free education by showing that it advanced a "substantial state interest."[99] Justice

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> The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized — the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved — so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement?

Id. at 220-21 (Rehnquist, J., dissenting).

[92] *Id.* at 197.

[93] *Id.* at 204.

[94] 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982).

[95] *Id.* at 218 n.16.

[96] *See, e.g.*, Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481 (1988)(statute permitting certain school districts to charge user fee for bus transportation did not violate equal protection rights since there was a rational basis for the statute); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34-35, *reh'g denied*, 411 U.S. 959 (1973)(education is not a fundamental right under the Constitution).

[97] 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982).

[98] *Id.* at 223.

[99] *Id.* at 230. Chief Justice Burger noted in his dissenting opinion that "by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases." *Id.* at 244 (Burger, C.J., dissenting).

Powell, in his concurring opinion, explained the Court's use of heightened scrutiny as due to the "unique circumstances" of the case.[100] *Plyler* demonstrates the Court's ability to apply reasoning beyond that required by the rational basis test when presented with particularly important interests.

C. *The Court Has Been Reluctant to Expand Its Definitions of Fundamental or Important Rights*

Despite the emergence of the intermediate level of scrutiny, the Court continues to use the rational basis test to review social and economic legislation, even in cases involving such seemingly fundamental or important interests as public welfare[101] and housing.[102] The Court has, however, utilized a heightened form of rational review in certain cases, leading one commentator to suggest the possible existence of a *fourth* level of judicial review,[103] a "rational basis with bite."[104] An enhanced form of rational basis scrutiny has been used by the Court in cases involving semi-important rights, requiring the State to show a higher level of governmental interests. The Court used such heightened scrutiny in *City of Cleburne v. Cleburne Living Center, Inc.*,[105] in which a purchaser of a building who intended to convert the building into a home for the mentally retarded was denied a special use permit to operate the home. The Court declined to hold the mentally retarded as a quasi-suspect class, but did, however, adopt a nondeferential heightened form of rational basis scrutiny to find uncon-

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[100] *Id.* at 239 (Powell, J., concurring). *See also* Kadrmas v. Dickinson Pub. Schools, 108 S. Ct. 2481, 2487-88 (1988), in which the Court noted that it had not extended the holding of *Plyler* beyond its "unique circumstances."

[101] Lyng v. Int'l Union, United Auto., Aerospace and Agricultural Implement Workers, 485 U.S. 360 (1988)(amendment to Food Stamp Act prohibiting household eligibility for food stamps or increased food stamps if household member was on strike was rationally related to governmental interest of avoiding favoritism in a private labor dispute); Bowen v. Gilliard, 483 U.S. 587 (1987)(amendment to Federal Aid to Families with Dependent Children statute requiring inclusion of child support payments made by noncustodial parent in determining family eligibility for benefits was rationally related to Congress's objective of reducing federal spending and governmental interest in fair distribution of benefits); Dandridge v. Williams, 397 U.S. 471, *reh'g denied*, 398 U.S. 914 (1970)(Maryland welfare system which set a maximum monthly payment regardless of family size and need upheld under rational basis).

[102] James v. Valtierra, 402 U.S. 137 (1971)(upholding state constitutional provision which required approval by a majority of voters in local referendums before low-rent housing projects could be developed); Lindsey v. Normet, 405 U.S. 56 (1972)(upholding forcible entry and wrongful detainer statute giving landlords the right to repossess premises while excluding defenses based on landlord's failure to maintain the premises).

[103] Kushner, *supra* note 44, at 458. Kushner credits the Burger Court for adding "teeth to the rational basis" test when reviewing social and economic legislation. *Id.* at 427-28.

[104] *Id.* at 458.

[105] 473 U.S. 432 (1985).

stitutional the application of the zoning ordinance which required the special use permit for the proposed home.[106] Although reluctant to expand the concepts of fundamental rights or suspect class, when faced with an alleged suspect classification or important right, the Court has been able to utilize a heightened scrutiny to protect the interests it deems important.

It is well-settled that the right to a healthful environment is not yet a constitutional right[107] deserving strict scrutiny. The U.S. Supreme Court, however, acknowledged the importance of a healthful environment in *Members of the City Council v. Taxpayers for Vincent*,[108] in which it noted that the aesthetic interest in the improvement of the city's appearance was substantial enough to justify restricting first amendment rights. In *Ward v. Rock Against Racism*[109] the Court found substantial government interest in protecting citizens from unwelcome noise and thus upheld noise guidelines for music programs at a bandshell.[110]

The possibility that the right to a healthful environment may one day attain judicial recognition as a constitutional right has been alluded to by the courts in cases such as *In Re "Agent Orange" Product Liability Litigation*[111] and *Township of Long Beach v. City of New York*.[112] Also significant is the fact that at least a

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[106] *See also* Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985)(state veterans' property tax preference for Vietnam veterans who resided in the state before a certain date invalidated); Williams v. Vermont, 472 U.S. 14 (1985)(state auto tax scheme giving preference to Vermont residents was unconstitutional); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, *reh'g denied*, 471 U.S. 1120 (1985)(tax on insurance premiums giving preference to domestic insurance companies struck down); Zobel v. Williams, 457 U.S. 55, 64 (1982)(striking down state scheme to give Alaska oil revenues based on length of state residency). Kushner, *supra* note 44, also cites Plyler v. Doe, 457 U.S. 202, *reh'g denied*, 458 U.S. 1131 (1982) as belonging to this "tier."

[107] 39A C.J.S. *Health and Environment* § 61, at 512-13 (1976). *See, e.g.*, Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971)(constitutional protection for the environment has not yet been given judicial sanction); In re "Agent Orange" Prod. Liab. Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979)("there is not yet any constitutional right to a healthful environment"); Pinkney v. Ohio EPA, 375 F. Supp. 305, 310 (N.D. Ohio 1974)(there is no implicit or explicit guarantee of the right to a healthful environment in the Constitution).

[108] 466 U.S. 789 (1984).

[109] 109 S. Ct. 2746, *reh'g denied*, 110 S. Ct. 23 (1989).

[110] The Court also recognized the importance of a clean and healthful environment in Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)(ordinance restricting land use to one-family dwellings upheld as the ordinance was intended to enable "quiet seclusion and clean air"); United States v. S.C.R.A.P., 412 U.S. 669 (1973)(users of natural resources who claimed harm to their use and enjoyment of the resources had standing to challenge actions of a federal agency); Berman v. Parker, 348 U.S. 26, 33 (1954)(interest in an environment that was "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled" justified the taking of private property).

[111] 475 F. Supp. 928, 934 (E.D.N.Y. 1979).

[112] 445 F. Supp. 1203 (D.N.J. 1978). The court stated that "it is not 'desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the

dozen states, including Hawaii, have included provisions recognizing the importance of a healthful environment in their constitutions.[113]

D. Congress Has the Right To Expressly Exempt Projects from Federal Laws

Courts have generally recognized that Congress may exempt projects from federal statutes,[114] and have accordingly allowed legislation to pass constitutional muster. The Alaska Pipeline is one such project exempted by congressional action.[115] The court in *Wilderness Society v. Morton*[116] enjoined the Secretary of the Interior from issuing a special land use permit to allow the Alyeska Pipeline Service Company to construct the Alaska pipeline at a width greater than that allowed by Section 28 of the Mineral Leasing Act of 1920.[117] The court noted its awareness of the "severe impacts"[118] of its ruling, but stated that it would enjoin the issuance of the permit until Congress changed the law either by amending the width limitation of section 28 or by exempting the project from section 28.[119] Congress subsequently amended section 28, removing the width restriction and reforming the law[120] regarding the pipeline rights

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womb of time, but whose birth is distant.' " *Id.* at 1212-13.

[113] HAW. CONST. art. XI, § 9 states:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

See also the Constitutions of Florida, Illinois, Massachusetts, Michigan, Montana, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, and Virginia; and J.M. Van Dyke, THE ROLE OF A CONSTITUTION IN RELATION TO THE U.S. OCEANS (June 27, 1988)(unpublished manuscript).

[114] *See infra* notes 115-31 and accompanying text. *But see* Judge Wright's opinion in D. C. Fed'n of Civic Ass'ns, Inc. v. Volpe, 434 F.2d 436, 439 (D.C. Cir. 1970), *infra* note 169 and accompanying text.

The U.S. Supreme Court has stated that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' " United States v. Will, 449 U.S. 200, 222 (1980)(citing United States v. Dickerson, 310 U.S. 554, 555, *reh'g denied*, 311 U.S. 724 (1940)). Absent express exemption, courts generally do not favor repeal by implication. T.V.A. v. Hill, 437 U.S. 153 (1978).

[115] D.R. MANDELKER, NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT § 5:07, at 10 (1984).

[116] 479 F.2d 842 (D.C. Cir.)(en banc), *cert. denied*, 411 U.S. 917 (1973).

[117] 479 F.2d at 846. The Mineral Leasing Act of 1920 is codified at 30 U.S.C. § 185 (1970).

[118] 479 F.2d at 847.

[119] *Id.* at 847-48.

[120] Pub. L. No. 93-153, 87 Stat. 576 (1973)(codified at 30 U.S.C. § 185 (1976)).

of way.[121]

The San Antonio Freeway was similarly exempted by Congress. In *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*,[122] the court held that section 154 of the Federal-Aid Highway Act of 1973,[123] which terminated federal funding for the San Antonio North Expressway, effected an exemption of the project from meeting NEPA requirements.[124]

In keeping with the courts' general trend of upholding congressional exemptions, the district court in *Friends of the Earth, Inc. v. Weinberger*[125] recognized that Congress, by passing the Jackson Amendment,[126] had exempted the President's report on the basing mode of the MX missile from NEPA requirements.[127] The court noted that "Congress can and does exempt projects from NEPA."[128]

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[121] Alyeska Pipeline Serv. Co. v. United States, 624 F.2d 1005, 1008 (Ct. Cl. 1980). Congress further helped to expedite the project by declaring that the environmental impact statement was satisfactory and by limiting judicial review of the Secretary's actions regarding the plaintiffs' right of way. *Id. See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 584 (1973)(codified at 43 U.S.C. § § 1651-1655 (1976)).

Similarly, Congress added a new section to the National Environmental Policy Act of 1969 (NEPA) to overturn the court's decision in Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974), *vacated and remanded*, 423 U.S. 809 (1975), that an Environmental Impact Statement (EIS) had to be prepared by the responsible federal agency, not a state agency, to comply with NEPA. The statutory amendment allowed a state agency to prepare the EIS as long as the federal agency and responsible federal official provided guidance and participated in the preparation of the EIS. Conservation Soc'y of S. Vt., Inc. v. Secretary of Transp., 531 F.2d 637, 638-39 (2d Cir. 1976)(per curiam).

[122] 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975).

[123] Pub. L. No. 93-87, § 154, 87 Stat. 250 (1973). Section 154 (a) stated:

> Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project.

[124] The court found congressional intent to exempt the Expressway from the requirements of environmental statutes, supported by the legislative history of the act which showed Congress's purpose of exempting the Expressway from federal environmental statutes including NEPA and § 4(f) of the Dept. of Transportation Act, 49 U.S.C. § 1653(f). Section 4(f) was not part of the case since § 154 terminated federal funding for the project and approval from the Secretary of Transportation was no longer needed. *Named Individual Members of the San Antonio Conservation Soc'y*, 496 F.2d at 1022, n.5.

[125] 562 F. Supp. 265 (D.D.C. 1983), *appeal dismissed without opinion*, 725 F.2d 125 (D.C. Cir. 1984).

[126] Pub. L. No. 97-377, 96 Stat. 1830 (1982).

[127] Friends of the Earth, Inc. v. Weinberger, 562 F. Supp. at 271-73.

[128] *Id.* at 271 (citing Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976)(NEPA must give way when there is "clear and unavoidable conflict" in statutory author-

In yet another case recognizing congressional authority to create specific exemptions from federal laws,[129] the district court in *Sequoyah v. TVA*[130] ruled that Congress had clearly and explicitly exempted the Tellico reservoir from any laws opposing its completion.[131] The cases discussed indicate that opponents of a particular congressional exemption will find it difficult to successfully challenge the exemption, given the courts' general acceptance of and deference to Congress's authority to exempt projects.

IV. ANALYSIS

The district court applied a "rational basis test" to decide the equal protection claim in *Stop H-3*.[132] The United States Court of Appeals for the Ninth Circuit noted the district court's finding that "no court has found that there is a fundamental right to a healthy environment."[133] The plaintiffs argued that the appropriate standard of scrutiny was the intermediate standard and that the exemption must, therefore, be "substantially related" to the achievement of a governmental goal.[134] The plaintiffs' argument for intermediate scrutiny was based on two points. First, plaintiffs claimed that the environment was an "important right" and laws that impinged upon important rights were deserving of intermediate scrutiny.[135] Second, they argued that in exempting H-3, Congress was classifying a single state and that, in the interest of federalism, this deserved heightened scrutiny.[136]

The Ninth Circuit affirmed the district court's decision that the equal protec-

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ity), *reh'g denied*, 429 U.S. 875 (1976); Izaak Walton League of America v. Marsh, 655 F.2d 346, 367-68 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981)(Congress has shown itself to be capable of demonstrating its intent to exempt projects from NEPA)). *See also* Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 355 (8th Cir. 1972)("Congress has the right to *authorize* projects and to exempt them" from NEPA).

[129] *See also* Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190 (1966)(determining whether section of Fair Labor Standards Act of 1938 which provided exemption for employees working for certain retail or service establishments included a sheet metal company and a tire company), *reh'g denied*, 383 U.S. 963 (1966); Lee Pharmaceuticals v. Kreps, 577 F.2d 610 (9th Cir. 1978)(materials falling within exemption provision to Freedom of Information Act were excluded from the Act), *cert. denied*, 439 U.S. 1073 (1979).

[130] 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). The district court stated that "Congress has the power to make exceptions to rights either it or state legislatures have created by statute, as long as such exceptions are not invidiously discriminatory." 480 F. Supp. at 611.

[131] *Id.* at 611. *See infra* notes 191-96 and accompanying text for a discussion of the case.

[132] 870 F.2d at 1429.

[133] *Id.* (citing Decision and Order, C.R. 507 at 7).

[134] *Id.*

[135] *Id.* at 1430.

[136] *Id.* at 1431.

tion challenge failed.[137] The court found that the exemption of H-3 from section 4(f) did not mean that the State of Hawaii had been classified at all, since H-3 was part of a larger national system and was accessible to all citizens.[138] The court also found that the plaintiffs failed to show the requisite purposefulness in discrimination that is required under intermediate scrutiny.[139] And finally, the court concluded that even had a classification been established and discrimination been demonstrated, the national interest in completing the Interstate Highway System was substantial.[140] As a result of finding a substantial state interest, the court also concluded that the challenge failed under a rational basis test as well.[141]

This analysis will focus on three notable aspects of the Ninth Circuit opinion. First, the court did not exclude the possibility that the right to a healthy environment may be an "important right" for equal protection claims.[142] Second, the court found no state classification for a project that is entirely within one state when the project is exempted from national laws.[143] Third, the court's determination of the national interest of an exemption was based on the initial legislation from which the project was exempted rather than an examination of whether a national interest was served by treating the project differently than others.[144] The court also found that congressional desire to overturn a court ruling demonstrated sufficient national interest to warrant exemptions from environmental laws.[145]

A. The Court Did Not Preclude Intermediate Scrutiny When Environmental Rights Are at Issue

The Ninth Circuit did not decide the important question of whether, when Congress passes legislation to exempt specific projects from national environmental protection laws, it necessitates the application of an intermediate scrutiny test.[146] Instead, the court concluded that even at this heightened level of scrutiny, section 114[147] still was shown to be "substantially related to achieve-

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[137] *Id.* at 1431-32.
[138] *Id.* at 1431.
[139] *Id.*
[140] *Id.* at 1432.
[141] *Id.* at 1432 n.22.
[142] *Id.* at 1430.
[143] *Id.* at 1431.
[144] *Id.* at 1432.
[145] *Id.*
[146] *Id.* at 1430.
[147] *See supra* note 16.

ment of an important governmental purpose."[148]

The Ninth Circuit was sensitive to the possibility that a healthy environment may one day be recognized as an important right of constitutional importance in the context of equal protection.[149] The court cited recent U.S. Supreme Court opinions[150] to explain the court's willingness to explore the "important right" argument.[151] The Ninth Circuit, however, recognized that although the U.S. Supreme Court has been willing to find that the environment is a substantial or compelling state interest against which to weigh individual freedoms, it has yet to hold that it is an important or fundamental right.[152]

The Ninth Circuit gave thoughtful analysis to why the environment may indeed be an "important right" in the area of equal protection. The principles that guided the Supreme Court to apply heightened scrutiny in *Plyler v. Doe*[153] are arguably as evident in environmental cases. The finding in *Plyler v. Doe* that although public education is not a fundamental right it plays a "fundamental role in maintaining the fabric of our society"[154] is not unlike the Ninth Circuit concluding that:

> We agree that it is difficult to conceive of a more absolute and enduring concern than the preservation and, increasingly, the restoration of a decent and livable environment. Human life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources. The centrality of the environment to all our undertakings gives individuals a vital stake in maintaining its integrity.[155]

The court, however, was mindful of the opposing tension in current case law. The U.S. Supreme Court has stated that it will apply intermediate scrutiny "[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and [Supreme Court] cases . . . ."[156] In light of the Court's reluctance to add new important or fundamental rights, the Ninth Circuit's serious consideration of plaintiffs' assertion that the right to a healthy

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[148] 870 F.2d at 1432.

[149] *Id.* at 1430.

[150] *See infra* notes 107-10 and accompanying text.

[151] The court cited United States v. S.C.R.A.P., 412 U.S. 669 (1973); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Village of Belle Terre v. Boraas, 416 U.S. 1, (1974); Berman v. Parker, 348 U.S. 26 (1954). 870 F.2d at 1430 n.21.

The court also noted several District Court opinions that "anticipate eventual recognition of a constitutional right to a healthful environment." *Id.*

[152] 870 F.2d at 1430.

[153] *See supra* notes 94-100 and accompanying text.

[154] *Plyler*, 457 U.S. at 221.

[155] 870 F.2d at 1430.

[156] *Id.* at 1430 (citing *Plyler*, 457 U.S. at 218 n.16).

environment was an important constitutional right was significant.

B. *A Facially Neutral Statute That Singles Out a Particular Project Within a Single State Is Not State-Based Discrimination*

The Ninth Circuit recognized that Congress frequently legislates by exemption.[157] The court concluded that legislating by exemption does not create state-based classifications.[158] Further, the court noted that, even were there a state-based classification, an exemption from general laws is not sufficient to show the discriminatory animus[159] toward that state needed to succeed in intermediate scrutiny.[160] Thus, the court concluded that section 114 did not create a state-based classification, or that, even if it did, intermediate scrutiny was necessary.[161]

By removing H-3 from the requirements of section 4(f), section 114 theoretically deprived some citizenry of the protection of 4(f) requirements.[162] Plaintiffs argued that the harmed class was the citizens of the State of Hawaii.[163] Plaintiffs maintained that singling out a state for detrimental treatment violated federalism principles and therefore warranted heightened scrutiny.[164] The court decided that exempting a single project within a state did not amount to a state-based classification.[165] It noted that highway use would not be based on residency, and that the harm would not fall on all state residents.[166]

The argument that an environmental law exemption might single out a state to the detriment of that state, and thus merit heightened scrutiny, was articulated in a concurring opinion in *D.C. Federation of Civic Associations, Inc. v. Volpe*,[167] a case decided on other grounds. The facts were remarkably similar to those in *Stop H-3*: Congress had exempted the Three Sisters Bridge from section 4(f) and the exemption was challenged. Judge Wright, concurring in the decision, stated:

> The net effect of Section 123, construed as Appellees insist it must be, *is to divide*

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[157] *Id.* at 1430.

[158] *Id.* at 1431.

[159] *Id.*

[160] *Id.*, citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[161] *Id.*

[162] This assumes that § 4(f) was in fact not complied with from the beginning as the Ninth Circuit had held. Stop H-3 Ass'n v. Lewis, 740 F.2d 1442, 1458 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

[163] 870 F.2d at 1431.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] 434 F.2d 436 (D.C. Cir. 1970).

> *citizens of the United States affected by road projects into two classes.* One small group of citizens, the residents of the District of Columbia who will be affected by the Three Sisters Bridge, is deprived of these important rights . . . .[168]

Without mention of *D.C. Federation of Civic Associations*, the Ninth Circuit did not adopt this reasoning. Instead, the Ninth Circuit found that section 114 was facially neutral, and that it did not single out Hawaii for different treatment because the highway was part of a national system to be used by many kinds of people.[169] This is consistent with the reasoning of *Sequoyah v. TVA*[170] where plaintiff, an American Indian group, claimed that a specific exemption to the Endangered Species Act that allowed construction of the Tellico Dam, which threatened the habitat of an endangered species, violated equal protection.[171] Similar to the court in *Stop H-3*, the court in *Sequoyah* noted that Congress can and does make exemptions to laws.[172] Additionally, the court failed to find a discernable classification, stating that, "[t]he flooding of the Little Tennessee will prevent everyone, not just plaintiffs from having access to the land in question."[173] Thus, the Ninth Circuit analysis was consistent with *Sequoyah*.[174]

C. Congressional Assessment of National Interest Relating Back to the Federal-Aid Highway Act and Congressional Desire to Overturn a Prior Decision Represented a Substantial State Interest

The court was particularly persuaded that legislation exempting single projects was commonplace and generally within congressional authority[175] and that the mere exemption of a project did not show discriminatory animus.[176]

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[168] *Id.* at 439 (emphasis added).

[169] 870 F.2d at 1431.

[170] 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 952 (1980).

[171] *Id.*

[172] *Id.* at 611.

[173] *Id.* at 612.

[174] 870 F.2d at 1430.

[175] *Id.* The court cited unsuccessful challenges to congressional exemptions such as Friends of the Earth v. Weinberger, 562 F. Supp. 265 (D.D.C. 1983), *appeal dismissed without opinion*, 725 F.2d 125 (D.C. Cir. 1984)(regarding the MX missile exemption to NEPA); Sequoyah v. T.V.A., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980)(exemption for Tellico Dam notwithstanding requirements of the Endangered Species Act); Izaak Walton League of America v. Marsh, 655 F.2d 346 (D.C. Cir.), *cert. denied*, 454 U.S. 1092 (1981)(exemption from NEPA requirements). *See supra* notes 114-31 and accompanying text.

[176] 870 F.2d at 1431.

The court relied on other examples of congressional legislation to demonstrate that Congress often successfully exempts specific projects from general laws.[177] These exempted projects included the Trans-Alaska Pipeline Authorization Act,[178] the Tennessee Valley Authority exemption for the Tellico Dam from the Endangered Species Act,[179] and the MX missile exemption from National Environmental Policy Act (NEPA) requirements.[180]

The Trans-Alaska Pipeline Authorization Act,[181] cited as one example of congressional authority to make exemptions to general laws,[182] exempted the pipeline from requirements of the Mineral Lands Leasing Act, just as it had exempted the pipeline from the requirements of the National Environmental Policy Act previously.[183] While the Ninth Circuit relied on the Trans-Alaska Pipeline Authorization Act as an example of a state-specific exemption that Congress enacted in response to a court decision,[184] the Ninth Circuit did not note that the national interest served by exempting the pipeline from various environmental laws was stated within the statute. Although the Trans-Alaska Pipeline Act expressly provided in section 1651 that the pipeline was of "national interest" and that the amendment became part of that act,[185] section 114 did not explicitly state a national interest in the H-3 exemption. Unlike section 114, the rational basis for the exemption to the Mineral Lands Leasing Act is discernable from the statutory language.

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[177] *See supra* notes 114-31.

[178] *See supra* note 121.

[179] Sequoyah v. T.V.A., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

[180] 870 F.2d at 1430.

[181] Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (codified at 30 U.S.C. § 185 (1976).

[182] 870 F.2d at 1431.

[183] The Act also exempted the Pipeline from the National Environmental Policy Act of 1969 and limited the period of judicial review of the law to 60 days following enactment. 87 Stat. 584 (codified at 43 U.S.C. § 1652(d)(1976)).

[184] Wilderness Soc'y v. Morton, 479 F.2d 842, 847-48 (D.C. Cir.)(en banc), *cert. denied*, 411 U.S. 917 (1973).

[185] 43 U.S.C. § 1651 states:

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska Pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

Likewise, the Jackson Amendment,[186] which exempted the proposals for the basing of the MX missile silos from NEPA, contained statutory language regarding the national importance of the project, justifications for the exemptions, and alternative requirements to the regular environmental laws that would protect the secrecy of the project.[187] In *Friends of the Earth, Inc. v. Weinberger*,[188] the issue was not equal protection, but whether Congress could moot an existing dispute with the passage of new legislation.[189]

While Congress can and does exempt specific projects from general laws, challenges on the basis of equal protection are scarce. *Sequoyah v. TVA* is similar to *Stop H-3* because Congress exempted[190] the Tellico Dam from the requirements of the Endangered Species Act[191] in an appropriations bill with the intent of ending fourteen years of litigation.[192] As in the H-3 exemption, the statute was simply attached to an appropriations bill, with no statutory language explaining the basis for the exemption.[193] Unlike H-3, the Tellico Dam, at the point of the final litigation had been free of injunctions for nine years, was 90% complete and was an integral part of the entire Tennessee Valley Authority system.[194] Nonetheless, the court in *Sequoyah* was not compelled to look at the motivation of Congress for the exemption, simply concluding that there was no classification and no discrimination at all.[195] But in *Stop H-3*, the court, in applying either a rational basis test or an intermediate scrutiny test did consider the motivations of Congress when it passed the exemption. The Ninth

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[186] Pub. L. No. 97-377, 96 Stat. 1830 (1982).

[187] *Id.* The statute requires, in part, that "an assessment of the environmental impact each such system of the missile would likely have and the identification of possible sites for each such system or missile," would be submitted to Congress. *Id.* at 1846-48.

[188] 562 F. Supp. 265 (D.D.C. 1983), *appeal dismissed without opinion*, 725 F.2d 125 (D.C.Cir. 1984).

[189] 562 F. Supp. at 270.

[190] Pub. L. No. 96-69, 93 Stat. 437 (1979).

[191] Endangered Species Act of 1973 § 2, 16 U.S.C. § 1531.

[192] Sequoyah v. T.V.A., 480 F. Supp. 608, 610 (E.D. Tenn. 1979), *aff'd*, 620 F.2d. 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

[193] The act states:

> [N]otwithstanding provisions of 16 U.S.C., Chapter 35 or any other law, the Corporation is authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir Project for navigation, flood control, electric power generation, and other purposes, including the maintenance of a normal summer reservoir pool of 813 feet above sea level.

Pub. L. No. 96-69, 93 Stat. 437 (1979).

[194] *Reauthorization of the Endangered Species Act of 1973: Hearing before the Senate Resource Conservation Sub Committee*, 96th Cong., 1st Sess. 56 (1979)(statement of Hon. John Duncan, Representative from the State of Tennessee).

[195] Sequoyah v. T.V.A., 480 F. Supp. at 612.

Circuit considered the purpose of the Federal-Aid Highway Act[196] and concluded that Congress' desire to finish the entire Interstate System was a sufficient basis for Congress to exempt the H-3 from the section 4(f) environmental requirements.[197]

There is a possible incongruity in this analysis. While Congress did express a desire to complete the Interstate System in section 101, it did not exempt *all* highways from the requirements of section 4(f). Another layer of inquiry, one that plaintiffs urged, was to ask what special importance H-3 demonstrated that it warranted exemption.[198] Under a deferential rational basis test the court's analysis was probably sufficient,[199] but had the court actually been reviewing the statute at either the intermediate level of scrutiny, or even the less rigorous so-called "fourth tier,"[200] their analysis might not have been sufficient.[201] In *Papasan v. Allain*,[202] the U.S. Supreme Court examined an equal protection claim that a particular school district in Mississippi received far less income than the average Mississippi school district.[203] The disparity was a result of the district's selling of lands, prior to the Civil War, that Congress had deeded to them.[204] As a result, their current appropriation from the State of Mississippi was far less than appropriations for districts that generated income from retained lands.[205] The U.S. Supreme Court remanded the case, holding that under a rational basis test, the *variation* in monies appropriated to the districts had to be rationally related to a legitimate state interest.[206] The Court

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[196] 870 F.2d at 1428 (citing 23 U.S.C. § 101 (1988)).

[197] *Id.* at 1432.

[198] Plaintiffs had asserted that H-3 was of minimal national importance according to the Congressional Budget Office. *Id.* at 1427 (citing *The Interstate Highway System: Issues and Options*, Table C-1 (June 1982)).

[199] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 427 (1961)("[T]erritorial uniformity is not a constitutional prerequisite").

[200] *See infra* notes 103-04 and accompanying text.

[201] Even when employing the deferential rational basis test, there is a suggestion that when statutes discriminate on the basis of "territoriality," the court will assume the legislature had a rational basis based on territorial differences. *See, e.g.*, Toyota v. Hawaii, 226 U.S. 184, 191 (1912)(disparate rural/urban state imposed auction rates not violative of equal protection based on assumption that state legislature "took into account varying conditions in the respective localities"); United States v. Tulare Lake Canal Co., 677 F.2d 713, 718 (9th Cir. 1982)(holding disparate acreage limitations based on land being west or east of the 100th meridian by federal land reclamation law not violative of equal protection because the statutes are "rational legislative response to climactic difference between western region and the remainder of the nation").

[202] 478 U.S. 265 (1986).

[203] *Id.* at 268-71.

[204] *Id.* at 273.

[205] *Id.*

[206] *Id.* at 289.

required that the reason for the variation itself must be examined.[207] In *Stop H-3*, the court did not require that the basis for the exemption be scrutinized; it was satisfied to examine the importance of the construction of the Interstate Highway System. Clearly, there was a legitimate government purpose in the construction of the Interstate Highway System, but was there a rational basis for singling out H-3 for an exemption to the environmental statutes to which other construction of interstate highways must adhere? The only apparent purposes for the exemption, as determined by the court examining the legislative history, were desires to complete the entire interstate system and to overrule a court decision that stood to delay the construction of the H-3.[208] The court might properly have concluded that those purposes, without an explicit statement of national interest in the H-3 Highway, were insufficient to allow Congress to deny those citizens affected by the H-3 the protections of section 4(f). The Ninth Circuit might have decided that in order to merit exceptional treatment, the construction of the H-3 must uniquely require special treatment because of either its importance beyond the typical interstate highway or because of unique features of the highway itself. Instead, the court was satisfied that lengthy litigation was a sufficient basis for an exemption.[209]

The court found adequate national interest in congressional intent to exempt certain projects for reasons related to completion of the system without regard to the national interest served by the environmental laws.[210] Significantly, the court did not look to the legislative intent of section 4(f),[211] from which the exemption was actually drawn, but instead was satisfied to look to the general importance of the Federal-Aid Highway Act to determine the national interest.[212] While the weight of case law indicates that Congress can exempt specific projects from environmental laws by separate legislation, and the *Stop H-3* decision is consistent with that, the court might have required that the basis for an exemption be something more than either a desire to overturn a court's interpretation of the general statute or a desire to finish a project that is part of a national program with a goal of completing the entire project.[213]

V. IMPACT

The Ninth Circuit Court was able to dismiss the plaintiffs' equal protection

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[207] *Id.*

[208] 870 F.2d at 1432.

[209] *Id.*

[210] *See supra* notes 114-31 and accompanying text for a discussion of the history of these exemptions.

[211] *See supra* note 12.

[212] 870 F.2d at 1428-29.

[213] *Id.* at 1432.

claims in *Stop H-3* by finding that the exemption was both rationally *and* substantially related to legitimate *and* important governmental purposes. Traditional deference to Congress was shown in the court's conclusion that there existed strong national and state interests in support of completing the H-3 project. The court's failure to question congressional authority to make the particular exemption in this case or to consider the purpose of the environmental protection laws from which the exemption was sought, raises the concern that such congressional exemptions will not be subjected to meaningful judicial scrutiny in the Ninth Circuit.

The decision of the Ninth Circuit is consistent with the courts' historical deference to congressional authority to expressly exempt a specific project from federal laws. Senator William W. Bradley's statement that the vote in favor of the H-3 exemption did not create a precedent for future exemptions from federal environmental laws is reassuring in this regard.[214] The Senator stressed that "exceptional measures" had been taken to meet or exceed all other State or Federal environmental laws.[215] Although the Ninth Circuit did not discuss Senator Bradley's statement, it did agree with the lower court's assessment that NEPA requirements had been met and that the exemption made moot any section 4(f) issues.

The reasoning that any possible detrimental effects of the exemption would be experienced by all whose "use and enjoyment of Hawaii's environment"[216] was affected by H-3, Hawaii residents and out-of-state visitors alike, is worrisome. No attention was given by the court in its opinion to the possible adverse consequences of the H-3 that were raised by plaintiffs, such as increased air pollution and increased traffic.[217] The court found no state-based classification, but instead drew the classification between those who would be affected by H-3 and those who would not. Based on the court's analysis, opponents of a state-specific exemption would find it practically impossible to successfully assert that

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[214] 132 CONG. REC. S17417-18 (daily ed. Nov. 6, 1986) (statement of Sen. William W. Bradley). *See infra* note 216 for excerpt of statement.

[215] Senator Bradley stated:

> Mr. President, in supporting the exemption of highway H-3 from section 4(f) of the U.S. Department of Transportation Act, I want to make clear my view that this vote does not and should not be seen as setting a precedent for departures in the future from the Nation's environmental laws. My understanding is that exceptional measures have been taken in this case to meet — and in some cases exceed — the requirements of all State and Federal environmental statutes with the exception of this provision of the Transportation Act. The facts surrounding H-3 make this situation unique and in my opinion justify exempting it from the 4(f) requirements.

132 CONG. REC. S17417-18 (daily ed. Nov. 6, 1986)(statement of Sen. William W. Bradley).

[216] 870 F.2d at 1431.

[217] *See* Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1452 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

the exemption discriminated by creating a state-based classification.

The court obliquely addressed the issue of the standard of review for the exemption. The court did not expressly state that the appropriate standard of review in this case was intermediate scrutiny, but it noted that the statute did meet the requirements of intermediate scrutiny because there was no invidious discrimination effected by the statute. The court also found, without rigorous scrutiny, that the statute was "substantially related" to important governmental purposes because the H-3, "as part of the Defense Interstate Highway System, serve[d] an important national defense role."[218] Given the analysis used by this court, equal protection does not present a viable challenge to congressional exemptions from national laws.

The court did not expressly hold that the intermediate level of scrutiny was required in this case, but significantly, it did not state nor imply that heightened scrutiny would be inappropriate. The court left the level of review open for future adjudication. Given the court's deference to Congress, however, an exemption would predictably be found to be rationally based, or, if heightened scrutiny was demanded, it would always be substantially related to an important governmental interest. A court using the Ninth Circuit's reasoning would thus be able to avoid ruling on the issue of the proper standard of review for a congressional exemption.

Although the court agreed with the plaintiffs that protecting a "decent and livable environment"[219] was of "absolute and enduring concern,"[220] it declined to decide the issue of whether the right to a healthful environment was an important right requiring heightened judicial scrutiny.[221] The court instead noted that even if the right to a healthful environment were an important right, the statute would survive intermediate scrutiny. There is hope, however, that the increasing national and state recognition of citizens' rights to a healthful and clean environment may one day compel a court to squarely address the issue.[222]

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[218] *Id.* at 1432.

[219] *Id.* at 1430.

[220] *Id.*

[221] The court's position is perhaps explained by Justice O'Connor's observation that "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3061 (1989)(O'Connor, J., concurring in part and concurring in judgment)(quoting Burton v. United States, 196 U.S. 283, 295 (1905)). If the U.S. Supreme Court is loathe to rule on constitutional issues, a lower court's reluctance to rule on such an issue is understandable.

[222] Arguments against courts granting constitutional status to environmental rights are based on such factors as problems in defining and enforcing such rights, and the lack of qualified judges to do the job. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 715-17 (1977); Interview with Jon Van Dyke, Professor of Law, University of Hawaii at Manoa (Oct. 2, 1989).

The Ninth Circuit's acknowledgment that citizens have a "vital stake"[223] in a healthful environment may help to increase judicial recognition of a right to a healthful environment as a constitutionally protected interest commanding heightened judicial scrutiny.

VI. CONCLUSION

The United States Court of Appeals for the Ninth Circuit ruled that state citizens' equal protection rights were not violated by congressional legislation which exempted the H-3 Highway specifically from complying with federal environmental protection laws. The court's decision was based largely on the legislative history of the statute and the general circumstances surrounding the project. The court found sufficient national defense interests and state interests in completing the H-3 to hold that the statute was substantially related to Congress's purpose of completing the highway. Congress's ability to exempt projects from federal laws also played an important part in the court's reasoning.

The court did not articulate whether the rational basis test or the intermediate level of scrutiny was the appropriate standard in determining whether a congressional exemption of a particular project from national environmental protection laws violates equal protection. The court instead noted that the statute did not invidiously discriminate since there was no state-based classification created by the statute, and no discriminatory purpose was alleged or shown by the plaintiffs. The question of the proper standard of judicial review in a case such as *Stop H-3* was left open for future adjudication.

The Ninth Circuit saw no need to decide whether the right to a healthful environment was at least an important right, deserving heightened scrutiny, since it found that the statute met the requirements of intermediate scrutiny regardless of the constitutional status of the interest involved. Given the court's considerable deference to Congress's intent to complete the H-3 highway, future challenges to similar congressional exemptions in the Ninth Circuit may prove to be futile.

Hazel Glenn Beh
Velma S. Kaneshige

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[223] 870 F.2d at 1430.

Hawaii's Thousand Friends v. Anderson: Standing to Challenge Governmental Actions

Complexities about standing are barriers to justice; in removing the barriers the emphasis should be on the needs of justice. One whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal.[1]

I. INTRODUCTION

In *Hawaii's Thousand Friends v. Anderson* (*HTF*),[2] the Hawaii Supreme Court addressed the issue of standing to judicially challenge a government action.[3] Plaintiff, a non-profit corporation, brought action against officials of the City and County of Honolulu,[4] alleging fraudulent use of public funds, misrepresentation in advertisements, and violation of public bidding requirements in connection with a proposed city-developed housing project.[5]

This note examines the recent history of the standing doctrine in both the Hawaii Supreme Court and the United States Supreme Court and analyzes its application in *HTF*. The facts and procedural history of *HTF* are examined in Part II. Part III discusses the history of the standing doctrine as applied by the United States Supreme Court and the Hawaii Supreme Court. In Part IV this note analyzes the application of the doctrine to the facts in *HTF*. Finally, Part V analyzes the impact of *HTF* on the standing doctrine in Hawaii.

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[1] Davis, *The Liberalized Law of Standing*, 37 U. OF CHI. L. REV. 450, 473 (1970).

[2] 70 Haw. 276, 768 P.2d 1293 (1989).

[3] *See infra* notes 24-25 and accompanying text.

[4] *See infra* note 8 and accompanying text.

[5] *See infra* note 21 and accompanying text.

II. FACTS

In 1985, Mayor Frank Fasi of the City and County of Honolulu directed his administration to make a study of available locations for a city-developed housing project.[6] The administration identified the Waiola Estates, a 270 acre agricultural parcel in Central Oahu, as ideal for the development, and negotiations with the owners for acquisition resulted in a letter of understanding.[7] In early 1986, defendants Pang and Anderson[8] entered into oral contracts with Park Engineering, Inc. to conduct an engineering and environmental feasibility study of the site and with Loomis and Pollack, Inc. to conduct a market assessment and advertising campaign for the development.[9] Pang and Anderson then briefed the City Council on the administration's proposal on April 4, 1986, but did not disclose the impending advertising campaign.[10]

A few days after this meeting with the City Council, two Honolulu newspapers began running full page advertisements promoting the City Administration's proposed Waiola Estates.[11] "One section of the newspaper advertisement touted Anderson's efforts in this project."[12] The advertising campaign also included radio and television commercials highlighting the proposed development.

In late April, bids were solicited from licensed contractors. In early May, the

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[6] 70 Haw. at 278, 768 P.2d at 1296. The proposed city-developed housing project was authorized by the legislature in Hawaii Revised Statutes (HRS) § 359G-4.1, and § 46-15.1. HRS § 395G-4.1 states: "The [Hawaiian Housing A]uthority may develop, on behalf of the State or in partnership, or may assist under a government assistance program in the development of housing projects which shall be exempt from all statutes, ordinances, charter provisions, and rules of any governmental agency. . . ." Chapter 359G was repealed in 1987. HRS § 46-15.1 grants any county the same power as granted to the housing finance and development corporation pursuant to chapter 201E including the power to develop and construct dwelling units, acquire necessary land, and contract to provide construction of housing for persons of low and moderate income.

[7] *Id.*

[8] *Id.* at 278-79, 768 P.2d at 1296. HTF brought suit against D.G. "Andy" Anderson, Managing Director of the City and County of Honolulu; Frank F. Fasi, Mayor of the City and County of Honolulu; Alvin K.H. Pang, Director, Department of Housing and Community Development, City of Honolulu; City and County of Honolulu; Rizalino Vicente, Director of Finance For the City of Honolulu; John Does 1-10; and Doe Corporations 1-10. Appeals were brought by Anderson, Fasi, and Pang.

[9] *Id.*

[10] *Id.* at 279, 768 P.2d at 1296.

[11] *Id.* The newspaper advertisement described the proposed project and eligibility requirements for prospective buyers. It further stated that a drawing would determine the order of eligible purchasers, but that the date of this drawing could not be set until the City Council took action to approve the project. The advertisement also contained an "application form" to be clipped and mailed to the City's housing department.

[12] *Id.*

oral contracts with Park Engineering and Loomis and Pollack were reduced to writing.[13]

The proposed project was formally submitted to the City Council on April 21, 1986.[14] A few weeks later the Council "conditionally approved the Waiola project subject to, *inter alia*, the preparation of an environmental impact statement and a change in the land use classification by the State Land Use Commission (LUC)."[15]

The City entered into a number of written contracts for professional services in response to the Council's conditional approval of the project.[16] Monies to finance these contracts, including the Park Engineering and Loomis and Pollack contracts, came from either the City's Housing Assistance Fund or federal section 8 housing funds available to the City.[17]

Hawaii's Thousand Friends (HTF), concerned that the proposed project was to be situated on land designated as agricultural in the State Development Plan,[18] began an investigation into the project. Based on its investigation, HTF subsequently filed suit on May 13, 1986.[19] The third amended complaint[20] alleged "that (1) defendants conspired to place the public ads for the Waiola project solely to promote Anderson's political goals, thereby committing a fraudulent use of public funds; (2) defendants made numerous misrepresentations in the advertisements; and (3) defendants violated the public bidding requirements in executing the contract with Park Engineering."[21]

The complaint stated that the injury sustained by HTF was the " 'unlawful depletion of the City and County of Honolulu cash assets held in public trust.' "[22] The relief prayed for included "general damages be paid directly to the City treasury in the amount of the public funds used to finance the Waiola project."[23]

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[13] *Id.*

[14] *Id.*

[15] *Id.* Hawaii passed a State Land Use Law (Act 187) in 1961 that divided the entire state into district classifications. The law calls for a Land Use Commission to administer the state-wide zoning of land. Only the Land Use Commission may reclassify Hawaii's land. The resultant "Hawaii State Plan" was converted into a law in 1978 (Act 100). D. CALLIES, REGULATING PARADISE 6-7, 12 (1984).

[16] 70 Haw. at 279, 768 P.2d at 1297.

[17] *Id.*

[18] *See supra* note 15.

[19] 70 Haw. at 279, 768 P.2d at 1297.

[20] *Id.* The original complaint alleged the proposed development was contrary to the State Constitutional Provision promoting preservation of agricultural land. When the LUC rejected the city's reclassification of the land to urban, this allegation was rendered moot.

[21] *Id.* at 280, 768 P.2d at 1297.

[22] *Id.* (quoting plaintiff's complaint).

[23] *Id.* Plaintiff also sought injunctive relief and a declaration that § 359G-4.1 and § 46-15.1

Defendants' partial summary judgment motion challenging HTF's standing was denied,[24] and the case went to the jury.[25] Throughout the trial, counsel for HTF promoted the theory that defendants were defrauding the citizens in general and fraudulently using public funds for non-public uses.[26] No evidence was presented that HTF was defrauded personally or damaged individually by defendants' acts.[27] Oddly, however, the jury was instructed solely as to private fraud and not as to fraud upon the public in general.[28] The jury, through a special verdict form,[29] found that defendants defrauded HTF and awarded plaintiff $482,921 in damages.[30]

On appeal, the primary issue before the court was whether HTF had standing to challenge the actions of the defendants.[31] Plaintiff asserted standing on three alternative theories: (1) taxpayer standing; (2) environmental/public interest standing; and (3) private attorney general.[32]

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were unconstitutional. *Id.*

[24] *Id.* Defendants moved for partial summary judgment prior to trial on the ground that HTF lacked standing. The trial court denied the motion and determined that questions of material fact existed. At the trial's conclusion, defendants moved for directed verdict on the same ground, and, again, the motion was denied. *Id.*, 768 P.2d at 1298.

[25] *Id.*, 768 P.2d at 1297.

[26] *Id.*

[27] *Id.* In the course of the proceedings, counsel for HTF repeatedly stated that HTF did not seek any monies for itself, but wanted Defendants to repay to the City treasury the monies used for the Waiola project, but the jury was instructed only as to private fraud.

[28] *Id.* The complaint alleged and the trial proceeded upon the theory that defendants defrauded the citizens in general and fraudulently used public funds for non-public purposes. Yet the jury's special verdict found HTF was personally defrauded. The Hawaii Supreme Court characterized this as a "strange and unexplained twist." *Id.* at 285-86, 768 P.2d at 1300.

[29] *Id.* at 280, 768 P.2d at 1297. The special verdict form "asked only whether HTF personally and individually was defrauded, and, if so, the amount of damages HTF suffered." *Id.*

[30] *Id.* HTF asked that this judgment reflect that the damages awarded be paid to the City treasury. The Trial Court said this would constitute an amendment to the jury's verdict, which the court did not have authority to do. *Id.*

[31] *Id.* at 281, 768 P.2d at 1298. Because the issue of private fraud had been raised in the jury instructions, and because HTF had standing to pursue a private fraud claim, the court was also called on to decide whether there was sufficient evidence to uphold the jury's verdict. The court found that HTF's complaint did not allege that HTF itself was defrauded, nor was this theory ever proposed during the course of the trial. Further, the court found that no evidence suggested that HTF either relied on defendant's misrepresentations nor suffered any pecuniary damage as a result of defendant's actions. The court thus held that the record contained insufficient evidence to support the jury's verdict. *Id.* at 286, 768 P.2d at 1300.

[32] *Id.* at 281, 768 P.2d at 1298. For private attorney general standing, both HTF and the Court relied on the statement that "once review is properly invoked [plaintiff] may argue the public interest . . . ." Sierra Club v. Morton, 405 U.S. 727, 737 (1972). The *HTF* court interpreted this to mean that the injury must invoke standing, and not the "public interest" as HTF argued. Since the court found that HTF did not invoke standing through injury-in-fact, it did not have standing under the Private Attorney General doctrine.

III. HISTORICAL BACKGROUND

Standing, like other doctrines of justiciability, limits the power of the courts.[33] It focuses on the party seeking to invoke the court's power, and not on the issues to be adjudicated,[34] and is a threshold requirement for adjudication of all lawsuits. Consequently the courts do not have jurisdiction over cases in which litigants do not have standing to sue.

The United States Constitution limits the federal courts to deciding "cases" and "controversies."[35] The courts have jurisdiction over only those cases which are presented by a litigant with a sufficient stake in the controversy, that is, a litigant with "standing."

Thus, the federal courts are constitutionally limited in their judicial power to "cases" and "controversies." This limitation requires a litigant to demonstrate injury-in-fact, which has been interpreted by the United States Supreme Court as a tangible injury that is traceable to the defendant's action and redressable through judicial relief.[36] The requirement of injury-in-fact is considered a con-

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In denying standing on this issue, the Hawaii Supreme Court relied on the United States Supreme Court's view that a plaintiff must have standing before he can assert a "public interest" under the Private Attorney General doctrine. If prior standing was not a requisite, any group or individual could challenge any government action by simply invoking the doctrine. *Id.* at 285, 768 P.2d at 1300.

[33] *See, e.g.* Flast v. Cohen, 392 U.S. 83, 95 (1968). The courts are also barred from issuing advisory opinions and from deciding political questions or moot issues.

[34] *Id.* at 99-100. "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* (footnote omitted).

[35] Art. III provides:

> The judicial Power of the United States, shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls—to all Cases of admiralty and maritime Jurisdiction—to Controversies to which the United States shall be a Party—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

[36] *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984). "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 751. Parents of black school children brought a nationwide class action suit against the Internal Revenue Service, contending that the illegal actions of the IRS in granting tax-exempt status to private schools that discriminated on the basis of race caused public schools to remain segregated. The Court held that plaintiffs did not have standing to sue since the action of the IRS was not fairly traceable to the alleged result.

stitutional limitation.[37]

The courts have also imposed "prudential" limitations on standing that are not constitutionally mandated. These prudential limitations require that the plaintiff assert his own legal rights and interests as opposed to those of third parties, that the court refrain from adjudicating abstract questions of wide public significance that amount to generalized grievances, and that the plaintiff's claim fall within the "zone of interests" protected by the statute or constitutional guarantee in question.[38]

Hawaii courts are not "Article III"[39] courts, and are thus not limited to "cases" or "controversies." Theoretically, they may set their own limitations in granting or denying standing.[40] The Hawaii Supreme Court, however, has determined that the judicial power of the courts should be limited to questions capable of judicial resolution and presented in an adversarial context.[41] The touchstone of standing in the Hawaii Supreme Court remains "the needs of justice,"[42] and although recent decisions have exhibited an unmistakable parallel to related federal decisions, the Hawaii courts have indicated that they "will not follow every twist and turn in the development of the federal standing doctrine."[43]

A. Taxpayer Standing

1. United States Supreme Court

For 45 years the United States Supreme Court holding in *Frothingham v. Mellon*[44] precluded suits challenging government actions on the basis of taxpayer standing in the federal courts. In *Frothingham*, the plaintiff challenged the constitutionality of the federal Maternity Act which attempted to reduce maternal and infant mortality through appropriations to states complying with its provisions. Frothingham alleged that she was injured as a taxpayer because the appropriations would increase her future tax burden and that this was a taking of her property without due process of the law.[45]

The Supreme Court in *Frothingham* held that the effect of any payment from

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[37] *See* Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982).

[38] *Id.* at 474-75.

[39] *See supra* note 35 and accompanying text.

[40] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981).

[41] *Id.* at 171-72, 623 P.2d at 438.

[42] *Id.* at 176, 623 P.2d at 440 (footnote omitted).

[43] *Id.*

[44] 262 U.S. 447 (1923).

[45] *Id.* at 479-80.

treasury funds on future taxation was "remote, fluctuating, and uncertain."[46] Thus the taxpayer plaintiff had failed to allege the necessary "direct injury" to confer standing.[47]

In *Flast v. Cohen*,[48] the Supreme Court undertook "a fresh examination of the limitations upon standing to sue in a federal court and the application of those limitations to taxpayer suits,"[49] and granted taxpayer standing for the first time since its *Frothingham* decision. In *Flast*, federal taxpayers challenged the expenditure of federal funds under the Elementary and Secondary Education Act of 1965.[50] Plaintiffs alleged that the funds were being used to finance teaching and the purchase of textbooks for religious and sectarian schools, in violation of the Establishment Clause of the first amendment.[51]

The *Flast* Court did not overrule *Frothingham*, but rather characterized the decision as representing judicial self restraint based solely on "prudential" bars to taxpayer standing,[52] not required by the Constitution.[53] Further, the Court held that the policy concerns underlying the *Frothingham* decision were lessened by such newer procedural devices as class actions and joinder.[54] The Court found no absolute constitutional bar to suits by federal taxpayers alleging the unconstitutionality of federal taxing and spending programs and went on to develop a two-part nexus test in order to determine whether a litigant's interests were sufficient to confer standing.[55]

According to the Court, plaintiff taxpayers must initially "establish a logical link between their taxpayer status and the type of legislative enactment attacked."[56] This, the Court stated, will only confer federal taxpayer standing to litigants who allege the unconstitutionality of congressional exercises of power under the Taxing and Spending Clause of Art. I, § 8, of the Constitution.[57] A plaintiff taxpayer must then "establish a nexus between that status and the precise nature of the constitutional infringement alleged."[58]

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[46] *Id.* at 487.

[47] *Id.* at 488.

[48] 392 U.S. 83 (1968).

[49] *Id.* at 94.

[50] *Id.* at 85.

[51] *Id.* at 86. The Constitution provides: "Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[52] *See supra* note 38 and accompanying text.

[53] 392 U.S. at 101.

[54] 392 U.S. at 94.

[55] *Id.* at 102. The *Flast* Court stated that it was both appropriate and necessary to look at the substantive issues of a case in ruling on standing in order to determine whether there existed a logical nexus between the status asserted and the claim sought to be adjudicated.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 102. Here the taxpayer must show that the enactment exceeds the specific constitu-

Although the *Flast* Court allowed standing, the double nexus test it developed has been used consistently to deny taxpayer standing. In *United States v. Richardson*,[59] plaintiff taxpayers alleged that a challenged statute was unconstitutional in that it allowed the Director of the Central Intelligence Agency to avoid the requirement of public reporting of its expenditures of public funds.[60] The Court found that plaintiffs lacked standing under the *Flast* test, but predicted that the double nexus test would in time collapse of its own weight because of its "lack of real meaning and principled content."[61]

This criticism, however, did not prevent the Court from utilizing the test in another case decided the same day. In *Schlesinger v. Reservists Commission to Stop the War*,[62] plaintiffs challenged Members of Congress' membership in the military reserve under the Constitution.[63] The Court held that plaintiffs lacked standing both as taxpayers and as citizens generally.[64]

The Court has also used the double nexus test as a basis to deny standing in recent Establishment Clause challenges.[65] In *Valley Forge Christian College v. Americans United*,[66] an organization dedicated to the separation of church and state, along with several of its members, challenged the conveyance of surplus government property[67] to the Valley Forge Christian College.

In denying standing, the *Valley Forge* Court initially found that the plaintiffs had failed to demonstrate injury-in-fact. The Court further held that plaintiffs' primary objections were to the disposition of land and did not constitute a challenge to an exercise of power under the Taxing and Spending Clause as required by the test.[68] The Court, however, was willing to recognize that cases

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tional limitations of congressional taxing and spending power. A showing that the enactment generally exceeds the powers delegated to Congress is insufficient. *Id.* at 102-03.

[59] 418 U.S. 166 (1974).

[60] *Id.* at 167-68. Plaintiffs alleged that this violated Art. I, § 9, cl.7 of the Constitution, which provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." *Id.* at 168.

[61] 418 U.S. at 183-84.

[62] 418 U.S. 208 (1974).

[63] U.S. CONST. art. I, § 6, cl. 2 provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

[64] 418 U.S. at 209. Regarding plaintiffs' standing as citizens, the Court found plaintiffs had alleged only "injury in the abstract." *Id.* at 217.

[65] *See supra* note 57 and accompanying text.

[66] 454 U.S. 464 (1982).

[67] 454 U.S. at 468-69. Property that has outlived its usefulness to the government is declared "surplus" under the Federal Property and Administrative Services Act of 1949, and may be transferred to private or public entities. *Id.* at 466.

[68] *Id.* at 485-86; *see supra* note 57 and accompanying text.

might arise in which no one would have standing. Nevertheless, this alone would be insufficient to confer standing, as it would convert standing into a requirement that must be observed only when satisfied.[69] The Court was unwilling to assume that injured parties were nonexistent simply because they had not joined in the suit.[70]

It is often difficult, and in some cases impossible, to meet the taxpayer standing requirements necessary to challenge a governmental action in the federal courts. The state courts, however, are not bound by the federal court holdings.[71] To date, the Hawaii courts have not applied the *Flast* nexus test, and though claiming to follow in substance the federal standing doctrines,[72] have been much more liberal in granting taxpayer standing than the federal courts.

2. *Hawaii Supreme Court*

In its early years, the Hawaii Supreme Court was clearly willing, if not eager, to find standing where taxpayers sought to prevent public officials from inflicting public harm. In *Castle v. Secretary of the Territory*,[73] plaintiff brought action to enjoin the expenditure of Territorial funds in connection with the first election of county officers.[74] In allowing standing, the court characterized actions of this nature as "exhibitions of public spirit,"[75] and held that the disposition of public funds was not a moot nor abstract question, but one of vital concern to every taxpayer.[76] In expressing its openness to taxpayer standing, the *Castle* court seemed to invite such challenges: "We trust that the time will never come in Hawaii when taxpayers shall not care to seek by appropriate proceedings in court to avert unlawful use of public money in connection with an unconstitutional statute."[77]

The court again reaffirmed this invitation to taxpayers two years later in *McCandless v. Carter*.[78] In *McCandless*, plaintiff sought to enjoin a land exchange proposed by the governor and commissioner of public lands.[79] The court successfully avoided the standing issue, but did express its opinion that:

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[69] *Id.* at 489.

[70] *Id.* The Court went on to state that "the law of averages is not a substitute for standing." *Id.*

[71] *See supra* notes 39-43 and accompanying text.

[72] *See infra* notes 144-45 and accompanying text.

[73] 16 Haw. 769 (1905).

[74] *Id.* at 770.

[75] *Id.* at 778.

[76] *Id.*

[77] *Id.*

[78] 18 Haw. 221 (1907).

[79] *Id.* at 222.

> [p]erhaps a citizen and taxpayer's right to obtain injunctions to restrain official acts affecting public property ought not to be based on the pecuniary loss, howsoever trivial or conjectural, but on the broad ground that any citizen may obtain a judicial inquiry into the validity of such acts and an injunction against them if found to be unauthorized.[80]

These early decisions suggest a judicial willingness to recognize taxpayer standing whenever "any citizen" brought an action challenging the validity of official acts affecting public property. By the early 1950's, however, the Hawaii Supreme Court was beginning to reexamine its policy on standing and to limit standing based solely on taxpayer status.

In *Wilson v. Stainback*,[81] plaintiff brought an action to prevent the construction of a public highway by challenging the constitutionality of the State's condemnation statutes.[82] Plaintiff based his right to bring the action on his contributions to the territorial highway fund in the form of fuel taxes, from which the necessary condemnation and construction funds would be expended.[83] Although the plaintiff cited *McCandless*[84] in arguing that he was not required to show he would be injured by the statutes he sought to challenge, the court held that because he lacked an interest in the particular lands sought through condemnation, the absence of personal injury undermined his standing to challenge the validity of the statutes.[85] The court went further by characterizing the *McCandless* language cited by the plaintiff as "pure dictum and as constitut[ing] no part of the authoritative holding of that case."[86] Thus after *Wilson*,[87] a Hawaii taxpayer's right to challenge the illegal acts of a public official demanded a showing that some interest or property of the taxpayer would be injured.[88]

The court further refined its position on taxpayer standing in *Munoz v. Commissioner of Public Lands*.[89] In *Munoz*, plaintiff claimed that irreparable injury resulted when public officials failed to strictly adhere to statutory procedure in disposing of public lands.[90] The court held that a taxpayer's action could be

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[80] *Id.* at 224.

[81] 39 Haw. 67 (1951).

[82] *Id.* at 68.

[83] *Id.*

[84] 18 Haw. 221 (1907).

[85] 39 Haw. at 73.

[86] *Id.* at 71. The court also referred to an "implied disapproval" of *McCandless*, citing Wilder v. Pinkham, 23 Haw. 571 (1917), where it had held that the right to challenge the illegal expenditures of public money was founded in the protection of plaintiff's property rights. *Id.*

[87] 39 Haw. 67.

[88] *Id.* at 72.

[89] 40 Haw. 675 (1955).

[90] *Id.* at 685.

maintained only where plaintiff is a taxpayer and taxpayers as a class have sustained or will sustain pecuniary loss.[91] The court denied standing, finding that the actions complained of did not materially affect the personal tax burden of plaintiff nor that of all taxpayers.[92]

The *Munoz* court also held that actual or constructive fraud can be considered tantamount to a waste of public funds, thereby vesting a taxpayer with sufficient pecuniary interest to challenge an official's actions.[93] The court, however, cautioned that mere irregularity not amounting to fraud is insufficient to justify taxpayer intervention.[94] Thus, taxpayer standing must be founded on more than an illegal act.[95] The court added that a demand on the proper public official to take action to alleviate the situation is a condition precedent to the maintenance of a taxpayer's action.[96]

These requirements were sufficient to deny standing in *Iuli v. Fasi*[97] in which plaintiffs challenged an agreement entered into by the City and County of Honolulu to provide a temporary transportation system made necessary by a bus strike. The plaintiffs alleged that this interim agreement violated provisions of state law and the Honolulu Charter requiring competitive bidding.[98] The court failed to reach the merits of this argument, as it held that plaintiffs had neither shown nor alleged pecuniary loss and thus lacked standing to challenge the official acts.[99]

The court stated that there are three requirements imposed on a complainant to maintain a taxpayer's suit in the Hawaii State Courts. First, the act complained of must be more than a mere irregularity, and in addition to being illegal, the act must be such as to imperil the public interest or work public injury. Second, the complaint must allege loss in revenues resulting in an in-

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[91] *Id.* at 682.

[92] *Id.* at 686.

[93] *Id.* at 682.

[94] *Id.* at 682-83. The court went on to state that:

> [t]he very nature and purpose of a taxpayer's action, like the present one, presume that there will be more than illegality in order to enable him to intervene. The basic theory of such an action is that the illegal action is in some way injurious to municipal and public interests, and that if permitted to continue, it will in some manner result in increased burdens upon, and danger and disadvantages to, the municipality and to the interests represented by it and so to those who are taxpayers.

Id. at 683 (citation omitted).

[95] *Id.* at 685. The act complained of must also be such as to imperil the public interest or work public injury. The petition must allege loss of revenues resulting in an increase in plaintiff's tax burdens or to taxpayers in general.

[96] *Id.* at 690.

[97] 62 Haw. 180, 613 P.2d 653 (1980).

[98] HAW. REV. STAT. § 103-22, and § 8-301(3) of the 1973 Honolulu Charter (subsequently renumbered—§ 9-301(3)).

[99] 62 Haw. at 185, 613 P.2d at 657.

crease in the tax burden of the complainant or of taxpayers in general. Finally, in the absence of a statute governing taxpayer's suits, a demand upon the proper public officer to take appropriate action must have been made unless the facts alleged show that such demand would have been useless.[100]

Beyond this holding, however, the *Iuli* court recognized a class of cases it deemed "special situations" in which it was necessary to relax the strict standing requirements. The court noted that these "special situations" might arise where the controversy involved the fundamental right to vote, or where bidding procedures for city contracts are found to be patently improper or defective.[101]

In *Bulgo v. County of Maui*,[102] plaintiff sought to restrain the holding of a special election for Maui county chairman. In challenging the constitutionality of this election, plaintiff based his standing to sue on the fact that the real property tax that he paid to the county of Maui goes into the county general fund from which the expenses of the special elections are payable.[103] The court found that plaintiff had alleged sufficient personal interest in the controversy to entitle him to his day in court. Implicit in this holding was the recognition that voting rights were of primary importance. Such importance mandates that each citizen be heard when questions involving these rights are raised.[104]

A second class of "special situations" recognized by the *Iuli* court involved challenges to improper competitive bidding procedures. In *Federal Electric Corp. v. Fasi*,[105] plaintiff brought action as a taxpayer and as an unsuccessful bidder on a city contract to improve the communication system of the Honolulu Police Department. The court held that in awarding the contract the city had utilized a unique procedure lacking definitive guidelines, and that this procedure was inherently defective and suceptible to abuse and manipulation.[106] Although Federal Electric lacked standing solely as an unsuccessful bidder,[107] the court granted standing based on the obvious resulting injury to taxpayers when bidding procedures are found to be defective.

Thus in these "special situations" the Hawaii Supreme Court will relax the strict standing requirements. Aside from those disputes involving the right to vote or defective bidding procedures, however, taxpayers must meet the three requirements as defined in *Iuli*—they must allege an illegal act which works a public injury, they must allege an increase in the individual or public tax burden and they must make a demand on the proper public official to take appro-

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[100] *Id.* at 184, 613 P.2d at 657.

[101] *Id.*

[102] 50 Haw. 51, 430 P.2d 321 (1967).

[103] *Id.* at 54, 430 P.2d at 324.

[104] *See Iuli v. Fasi* 62 Haw. at 185-86, 613 P.2d at 657.

[105] 56 Haw. 57, 527 P.2d 1284 (1974).

[106] *Id.* at 60-62, 527 P.2d at 1288-89.

[107] *Id.* at 64, 527 P.2d at 1290.

priate action to no avail.

B. *Public Standing*

1. *United States Supreme Court*

In determining standing to challenge government actions on grounds other than that of a taxpayer, the United States Supreme Court has consistently held that a plaintiff must show that he himself has suffered or will suffer actual injury.[108] Non-economic injury is sufficient,[109] but a mere interest in a problem is not, for the Court has determined that this would allow a party to "vindicate his own value preferences through the judicial process."[110]

In *Sierra Club v. Morton*,[111] the plaintiff, a membership corporation with a "special interest" in the conservation and maintenance of the national parks, brought action seeking a declaratory judgment that aspects of a proposed skiing development "contravenes federal laws and regulations governing the preservation of national parks, forests, and game refuges . . . ."[112] The plaintiff further sought injunctions restraining the grant of approval or issuance of permits by federal officials in connection with the project.[113] The plaintiff, however, failed to assert individualized harm to itself or its members,[114] and the Supreme Court thus held it lacked standing to challenge the federal approval of the project.[115]

A different result was achieved in *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*),[116] in which plaintiffs alleged that Interstate Commerce Commission approval of a railroad freight rate increase would cause its members economic, recreational, and aesthetic harm, and would adversely affect the environment.[117] The Court held that this was a sufficient allegation of actual injury to confer standing.[118] In contrast, plaintiffs in *Sierra Club* did not

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[108] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

[109] *Id.* at 734.

[110] *Id.* at 740.

[111] 405 U.S. 727.

[112] *Id.* at 730 (footnote omitted).

[113] *Id.*

[114] *Id.*

[115] *Id.* at 735.

[116] 412 U.S. 669 (1973).

[117] *Id.* at 676. Plaintiff specifically claimed that the freight rate increase would discourage the use of recyclable materials. This in turn would promote the use of new raw materials, thus adversely affecting the environment. Plaintiff's members would then be forced to pay more for finished products. The members' use of the forests and streams would also allegedly be impaired because of the destruction caused by the increased use of raw materials. *Id.*

[118] *Id.* at 689-90.

allege that they were among the injured.[119]

In 1978, the Supreme Court rejected the application of the *Flast* nexus test[120] to other than taxpayer suits in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[121] Plaintiffs were individuals and environmental groups challenging the Price Anderson Act's[122] limitation on liability for private developers of nuclear power plants.[123] The Court found injury-in-fact in plaintiffs' allegations of the harmful effects of thermal pollution to two lakes near the disputed power plants.[124] This injury was both fairly traceable to the challenged action of the defendant and redressable by the Court's remedial powers, so it was sufficient to confer standing.[125]

Thus, the current test for standing to challenge a governmental action in the federal courts as a member of the general public requires a plaintiff to show three things. First, plaintiff must show a tangible injury.[126] Second, this injury must be fairly traceable to the defendant's alleged wrong.[127] Finally, defendant's action must be redressable through judicial relief.[128] Although these are considered constitutionally mandated requirements,[129] the Hawaii courts also require similar criteria.

2. *Hawaii Supreme Court*

In contrast to the evolution of taxpayer standing in Hawaii that began nearly a century ago, the Hawaii Supreme Court has begun only recently to define its position on standing as it applies to non-taxpayer actions. Beginning in the mid 1970's with *In Re Hawaiian Electric Co.*,[130] the court began to focus on the threshold question of "who is injured," accepting as an elementary proposition that one who is injured by the act of another must be allowed to challenge the propriety of the action.[131]

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[119] *See supra* notes 113-14 and accompanying text.

[120] *See supra* notes 55-58 and accompanying text.

[121] 438 U.S. 59 (1978). The Court refused to "accept the contention that, outside the context of taxpayers' suits, a litigant must demonstrate something more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Art. III." *Id.* at 79 (footnote omitted).

[122] 42 U.S.C. § 2210 (1982).

[123] 438 U.S. at 67.

[124] *Id.* at 73-74.

[125] *Id.* at 74.

[126] *Id. See also* Allen v. Wright, 468 U.S. 737 (1984).

[127] 438 U.S. at 74.

[128] *Id.*

[129] *See supra* notes 36-37 and accompanying text.

[130] 56 Haw. 260, 535 P.2d 1102 (1975).

[131] *Id.* at 263, 535 P.2d at 1105.

In *Hawaiian Electric*, Life of the Land, a non-profit organization, sought intervenor status to challenge a proposed rate increase. The Public Utilities Commission (PUC) denied intervention and subsequently approved the proposed rate hikes. In deciding the issue of standing, the court recognized that a ratepayer who is compelled to pay higher utility rates is a person specially, personally and adversely affected, and "the fact that he shares this additional burden with all other users does not disentitle him from challenging the results."[132]

In allowing standing, the *Hawaiian Electric* court took notice of a growing trend toward broadening the class of persons who might challenge agency action and took its direction from *Sierra Club*[133] and *SCRAP*.[134] The Hawaii Court saw in recent federal decisions clear indications that standing could not be confined only to those who alleged economic harm, nor could it be denied simply because many persons shared the same purported injury.[135] The court held that in matters of this nature, the duty of protecting the public interest lay with the PUC.[136] As the Commission had not acted to appeal the rate increase, to deny standing would be to effectively silence the public's voice.[137]

The Hawaii Supreme Court further defined the parameters of citizen standing three years later in *Reliable Collection Agency v. Cole*.[138] Plaintiff, a corporation engaged in the business of debt collection, brought action as assignee of debts owed by defendants. The defendants asserted as an affirmative defense that Reliable was engaged in an unauthorized legal practice, and had thus violated state law.[139] The court, however, found that plaintiffs had failed to show any pecuniary damage as a result of this illegal conduct.[140] In denying declaratory and injunctive relief, the court noted:

> While we are not subject to the "case or controversy" requirement of Article III of the United States Constitution, the prudential considerations which have been suggested in the federal cases on standing persuade us that a party should not be permitted to assume the role and responsibility of a public official to enforce public law without a personal interest which will be measurably affected by the outcome of the case.[141]

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[132] *Id.* at 264, 535 P.2d at 1105.

[133] 405 U.S. 727 (1972).

[134] 412 U.S. 669 (1973).

[135] In Re Hawaiian Elec. Co., 56 Haw. at 265 n.1, 535 P.2d at 1105-06 n.1.

[136] *Id.* at 265, 535 P.2d at 1106.

[137] *Id.*

[138] 59 Haw. 503, 584 P.2d 107 (1978).

[139] *Id.* at 504, 584 P.2d at 108.

[140] *Id.* at 508, 584 P.2d at 110.

[141] *Id.* at 510-11, 584 P.2d at 111 (citations omitted).

These prudential considerations were echoed in *Life of the Land v. Land Use Commission*,[142] in which the court stated that its power to resolve public disputes was limited to those questions capable of judicial resolution and presented in an adversary context.[143] The court in *Life of the Land* declined to follow a "legal right" or "legal interest" argument and held instead that its past decisions reflected an awareness of the transition to "injury in fact," the federal standard, in issues of standing.[144]

Suggesting that its decisions in this area afforded standing on a basis at least coextensive with the federal doctrine, the Hawaii Court held that Life of the Land and its members had an adequate stake in the outcome to invoke judicial intervention.[145] The court, however, cautioned that it would not necessarily follow every twist or turn in the development of the federal doctrine, but would continue to look to "the needs of justice" as its touchstones.[146]

The trend away from the special injury rule towards the view that a plaintiff, if injured, has standing was reaffirmed in *Akau v. Olomana*.[147] Plaintiffs brought a class action to enforce trail access near Kawaihae on the Island of Hawaii.[148] The court, believing it unjust to deny members of the public the ability to enforce the public's rights when they are injured, allowed standing.

The court held that "a plaintiff has standing if he can demonstrate some injury to a recognized interest, such as economic or aesthetic, and is himself among the injured and not merely airing a political or intellectual grievance."[149] Further, the court held that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means,

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[142] 63 Haw. 166, 623 P.2d 431 (1981). Life of the Land had sought judicial scrutiny both of procedures followed by the commission and of determinations made by it in conjunction with the mandatory boundary review of classifications and districting of all lands. The defendants had argued that as plaintiffs owned neither reclassified land nor land adjacent thereto, they lacked a legally recognized interest sufficient to confer standing. *Id.* at 169, 623 P.2d at 436.

[143] *Id.* at 172, 623 P.2d at 438. The court went on to state that "[e]ven in the absence of constitutional restrictions, courts still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government." *Id.*

[144] 63 Haw. at 172-173, 623 P.2d at 439. The court went on to cite an earlier case, involving the same litigants, in which it "recognized the importance of aesthetic and environmental interests and has allowed those who show aesthetic and environmental injury standing to sue where their aesthetic and environmental interests are 'personal' and 'special,' or where a property interest is also affected." Life of the Land v. Land Use Comm'n, 61 Haw. 3, 594 P.2d at 1082 (1979).

[145] 63 Haw. at 176-77, 623 P.2d at 441.

[146] *Id.* at 176, 623 P.2d at 441.

[147] 65 Haw. 383, 652 P.2d 1130 (1982).

[148] *Id.* at 384, 652 P.2d at 1132.

[149] *Id.* at 390, 652 P. 2d at 1135.

including a class action.[150]

In the view of the *Akau* court, plaintiffs' difficulty in getting to the beach sufficiently injured their recreational interests as to allow standing to seek judicial intervention.[151] Further, since the class description included all those who had used or had been deterred from using the trails, all members of the class had suffered an injury in fact.[152]

Thus, the Hawaii Supreme Court has consistently looked toward "the needs of justice" in deciding public standing issues, and in allowing those injured by the acts of others to challenge the propriety of that action.

IV. Analysis of Standing as Applied to *HTF*

In *HTF* the Hawaii Supreme Court explained "standing" as:

> . . . that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated. And the crucial inquiry in its determinations is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of . . . [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf."[153]

A. *Taxpayer Standing*

The *HTF* court initially relied on *Smith v. Graham County Community College District*[154] for the proposition that standing to question illegal expenditures by a public agency is based on a taxpayer's equitable ownership of such funds and his liability to replenish the public treasury.[155] From this basic premise, the court set out two requirements that would confer taxpayer standing in *HTF*. First, the plaintiff must be a taxpayer who contributes to the particular fund from which the illegal expenditures are allegedly made. Second, the "plaintiff

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[150] *Id.* at 388-89, 652 P.2d at 1134.

[151] *Id.* at 390, 652 P.2d at 1135. The court saw this injury as similar to the one in *SCRAP* because the ability to get to a recreational area is as vital for enjoying it as having it in its natural condition. *Id.*

[152] *Id.*

[153] 70 Haw. at 281-82, 768 P.2d at 1298 (citations omitted) (quoting Life of the Land v. Land Use Comm'n, 63 Haw. at 172, 623 P.2d at 438).

[154] 123 Ariz. 430, 431-33, 600 P.2d 44, 45-46 (Ariz. App. 1979). Appellant, a local resident taxpayer, sought to enjoin appellees from making alterations on an Arizona college roof without having the work done by a licensed contractor. Appellant also sought declaratory relief, contending that appellees were unlawfully expending funds by failing to comply with an Arizona statute.

[155] 70 Haw. at 282, 768 P.2d at 1298.

must suffer a pecuniary loss, which, in cases of fraud, are [sic] presumed."[156]

The lower court, relying in part on *Munoz*,[157] had denied defendants's motion for summary judgment, finding that factual questions existed on the issue of fraud.[158] The Hawaii Supreme Court concluded, however, that since HTF is a nonprofit tax-exempt membership corporation and is not assessed any taxes, it did not contribute to the "particular funds from which illegal expenditures [were] allegedly made."[159] Thus HTF had failed to satisfy the first requirement of taxpayer standing, and could not maintain an action as a taxpayer.[160]

By relying on *Munoz*[161] instead of *Flast*,[162] the Hawaii Supreme Court chose not to "parallel[], in substance, the evolution of the federal doctrine."[163] Considering the criticism and confusion surrounding the federal taxpayer standing doctrine as stated in *Flast*,[164] the court wisely articulated a simple test that mandates actual injury to the taxpayer. The policy behind the standing doctrine is to assure that suits are brought before the court in an adversarial context sufficient to warrant invocation of the court's jurisdiction and to justify the exercise of its remedial powers.[165] The requirements set forth for taxpayer standing

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[156] *Id.* The Court quoted *Munoz* here for the proposition that where fraud is shown it is considered tantamount to a waste of public funds. Thus the burden of showing pecuniary loss is relaxed. *Id.*

[157] 40 Haw. 675 (1953).

[158] 70 Haw. at 282, 768 P.2d at 1298.

[159] *Id.*, 768 P.2d at 1298-99.

[160] *Id.*

[161] *See supra* notes 89-92 and accompanying text.

[162] *See supra* notes 48-58 and accompanying text.

[163] 63 Haw. at 174, 623 P.2d at 439. This articulation of the court's view on standing requirements is set forth in *Life of the Land*. The Hawaii Supreme Court explained that although the state courts are not bound by the same standards as are the federal courts, they tend to follow them in substance. The standard for the Hawaii courts remains "the needs of justice." *Id.* at 176, 623 P.2d at 441.

[164] In *Flast*, 392 U.S. 83 (1968), Justice Douglas in concurrence, and Justice Harlan in dissent, both argued that the double nexus test was untenable. *Id.* at 114, 117. Harlan argued that a taxpayer's interest in a suit is unrelated to whether the challenged expenditure is "incidental" to an "essentially regulatory" program. *Id.* at 122. The first nexus was intended only to require that a taxpayer allege that the challenged activity increased his tax bill. *Id.* at 122 n.9. Harlan objected to the second nexus because he saw no relation between a taxpayer's interest in the litigation and whether the asserted limitation on Congress's power was directed specifically to its taxing and spending powers. *Id.* at 123-24 (Harlan, J., dissenting).

Although Justice Douglas agreed with these criticisms regarding the first nexus, he felt that plaintiff's minuscule financial interest did satisfy the constitutional standing requirements. *Id.* at 109 (Douglas, J., concurring).

Later, in U.S. v. Richardson, 48 U.S. 166 (1974), Justice Powell in a concurring opinion, found it impossible "to determine whether the two-part 'nexus' test created in *Flast* amount[ed] to a constitutional or a prudential limitation." *Id.* at 181 (Powell, J., concurring).

[165] *See supra* note 34 and accompanying text.

to challenge government actions in *HTF* clearly fulfill this policy consideration.

B. *Public Standing*

The Hawaii Supreme Court in *HTF* followed *Akau*[166] in holding that a member of the public has standing even if his injury is not different in kind from that of the general public.[167] A public member plaintiff must show (1) injury-in-fact and (2) that concerns of a multiplicity of suits are satisfied by any means.[168]

The *HTF* court set forth a test for injury-in-fact:

> Injury in fact requires a showing by the plaintiff that (1) he suffered actual or threatened injury as a result of defendant's conduct; (2) the injury is traceable to the challenged action; and (3) the injury is likely to be remedied by a favorable judicial decision.[169]

Applying this test, the court concluded that although HTF alleged it suffered three types of injury, none of them was sufficient to show injury-in-fact.[170]

HTF alleged the illegal use of public monies reduced the availability of funds for environmental studies and for low and moderate income housing developments.[171] The court noted two interpretations of this alleged injury: 1) that additional monies would be needed to be found to pay for future studies and developments or 2) that because the funds were depleted, such studies and developments would not be addressed.[172] The court characterized these interpretations of the alleged injury as merely the value preferences of HTF rather than legal rights.[173] Citing *Sierra Club*, the court distinguished between a value preference and a legal right, holding that value preferences should be vindicated in the legislature, the executive, or the administrative agencies, but not the judiciary.[174]

HTF also asserted that its financial expenditures incurred while investigating

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[166] 65 Haw. 383, 652 P.2d 1130 (1982). In *Akau* plaintiffs brought a class action alleging they were prevented from using once public trails as rights-of-ways to the beach. This hampered their use and enjoyment of the beaches. *Id.* at 384, 652 P.2d at 1132.

[167] 70 Haw. at 283, 768 P.2d at 1299.

[168] 65 Haw. at 388-89, 652 P.2d at 1134-35.

[169] 70 Haw. at 283, 768 P.2d at 1299 (citing *Akau*, 65 Haw. at 389, 652 P.2d at 1135).

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* (citing 405 U.S. at 740). The United States Supreme Court stated that because plaintiff could not show some concrete injury, it was merely asserting a "value preference." *Id.*

defendants' illegal activities were sufficient injury to allow standing.[175] The court again quoted *Sierra Club* for the proposition that HTF was only asserting a "special interest" and not an injury-in-fact.[176] The court found that if it were to allow this type of injury as injury-in-fact, "any interest group or individual could initiate special interest litigation merely by incurring expenses connected therewith."[177]

HTF's third allegation of injury-in-fact was that some of its members were misled by the project's ads and suffered injury thereby. The court stated that suit was brought by HTF and not by its individual members. The injury alleged, however, was not one suffered by the membership in general as in *Waianae Model Neighborhood Area Association, Inc. v. City and County*.[178] HTF alleged an injury that was personalized to some of its members. The differences in reliance for each member, however, made the actual injury different for each member. Any remedy that could be awarded to HTF would not compensate each of its members that was injured by defendants' misrepresentations. HTF, the court found, thus failed to show injury-in-fact since its injury was not redressable by judicial relief.[179]

Thus, the court held that plaintiffs lacked public standing to bring the action. In the process, however, the *HTF* court did state a clear and simple test—plaintiff must suffer an actual injury, fairly traceable to the defendants' acts, and redressable through judicial relief—to determine whether an alleged injury is sufficient to confer standing to a member of the general public. Unfortunately, the court failed to articulate how the requirements of the test were applied to each of HTF's allegations of injury.

It is clear that HTF lacked standing as a taxpayer under the test set forth by the court. HTF is a tax-exempt organization and failed to allege individual injury to its taxpaying members. HTF did not contribute to the pool from which the alleged illegal expenditures were made, and thus failed to show injury sufficient to confer standing.

HTF, however, alleged that it was injured by defendents' illegal expenditures because the monies, illegally spent on the project, were no longer available for

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[175] *Id.* at 284, 768 P.2d at 1299.

[176] *Id.*

[177] *Id.* Plaintiff in *Sierra Club*, in its pleadings, stated that it was a membership corporation with a "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country." 405 U.S. at 730.

[178] 55 Haw. 40, 514 P.2d 861 (1973). Plaintiff in *Waianae Model Neighborhood* was incorporated to promote the general welfare of the community in which its members reside or own property, and to improve the quality of the environment and living conditions therein. The court allowed standing, finding that the pleadings contained a sufficient showing of individualized harm to the corporate plaintiff and its members, and that the plaintiff did not seek to vindicate its own value preferences. *Id.* at 44, 514 P.2d at 864.

[179] 70 Haw. at 284-85, 768 P.2d at 1300.

intended legal expenditures such as environmental studies and housing developments. Characterizing these allegations as mere "value preferences," the court found that the allegations were insufficient to confer standing as a member of the general public, but it failed to explain the basis for its decision. HTF was clearly injured in fact, however, because it, like the general public, would never receive the benefits those monies would have conferred had they been legally disbursed.

In applying its test, the court could have found that HTF had alleged sufficient injury to confer standing as a member of the general public. Although the court correctly interpreted *Sierra Club*,[180] the fact that the complaint in that case alleged only statute violations and plaintiff sued as a membership corporation with a "special interest" in conserving national parks[181] distinguishes it from *HTF*. The HTF complaint alleged the injury sustained was the "unlawful depletion of the City and County of Honolulu cash assets held in public trust."[182] The result of this "unlawful depletion" was that these funds could no longer be used to benefit the general public, and HTF claimed membership in the general public. Under the court's injury-in-fact test, actual injury could have been found here.

HTF further alleged that it had suffered injury in its expenditures to investigate defendants' actions. After correctly identifing HTF's allegations as a manifestation of "value preference," the court supported its point with a judicial economy argument.[183] The court did not identify the reasons why HTF's alleged injury was insufficient, however, and did not apply the second prong of traceability or the third prong of redressability.

The court applied the first and third prongs of its test to HTF's allegation that some of its members were detrimentally misled by defendants' advertisements. Allegations that *some* of its members suffered actual injury may arguably be sufficient under the first prong of actual injury of the court's test. As noted by the court, however, this alleged injury clearly fails under the third prong of redressability.[184]

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[180] 405 U.S. 727 (1972).

[181] *Id.* at 730.

[182] 70 Haw. at 280, 768 P.2d at 1297.

[183] *Id.* at 284, 768 P.2d at 1299. The court recognized that if it found standing for this type of alleged injury that "any interest group or individual could initiate special interest litigation merely by incurring expenses therewith." *Id.*

[184] *Id.* at 285, 768 P.2d at 1300. "[T]he remedy which could be awarded to the HTF organization would not compensate each of the members who incurred personal damages as a result of defendants' misrepresentations."

V. IMPACT

In *HTF* the Hawaii Supreme Court set forth two concise tests to determine standing to challenge government actions. In practice these tests should make the determination of standing a relatively straightforward process.

A. The Test For Taxpayer Standing

The Hawaii Supreme Court held that to assert standing to challenge governmental actions, a litigant must meet two criteria. Plaintiff must be a taxpayer who contributes to the particular fund from which the illegal expenditures are allegedly made, and must suffer pecuniary loss.[185] This test makes it clear that a tax-exempt organization such as HTF does not have standing to sue as a taxpayer.

By adopting this test the court has avoided the problems associated with the *Flast* nexus test.[186] The Hawaii courts will not look to the adjudication of the claim, but will focus solely on the status of the litigant. The Hawaii Supreme Court's use of this broad test assures that challenges to government expenditures will not arise unless the litigant has standing.

In *HTF* the court did not address the "pecuniary loss" prong of its test because it found HTF had not met the first prong since it had not contributed to the tax fund. The court's position on the issue of pecuniary loss, however, can be inferred from its reliance on *Munoz* in articulating the taxpayer standing test.[187] Plaintiff in *Munoz* failed to show that his personal tax burden would increase or that the burden on all taxpayers in general would increase because of the alleged government wrong.[188] Thus, plaintiff failed to show a pecuniary loss.[189] Therefore, a plaintiff who does contribute to the particular fund from which illegal expenditures are allegedly made must also show that these expenditures caused the plaintiff's personal tax burden, or the burden of taxpayers in general, to increase.[190] This will be sufficient to confer standing on a plaintiff in a Hawaii court. The *HTF* court's reliance on *Munoz* has extended this proposition beyond such property sales.

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[185] *See supra* note 91 and accompanying text.

[186] *See supra* note 164.

[187] 70 Haw. at 282, 768 P.2d at 1298.

[188] 40 Haw. at 686.

[189] *See supra* notes 93-97 and accompanying text. In order to show fraud, "it must appear that in addition to being an illegal official act, the . . . act is such as to imperil the public interest or calculated to work public injury or produce some public mischief." 40 Haw. at 685 (quoting Henderson v. McCormick, 70 Ariz. 24, 215 P.2d 608 (1950)).

[190] *See supra* note 91 and accompanying text.

B. *The Test For a Member of the General Public*

The requirements set out by the court in *HTF* to challenge a governmental action as a member of the general public are that plaintiff must show injury-in-fact and that concerns of a multiplicity of suits are satisfied.[191] Because the court found HTF had failed to show injury-in-fact, it did not discuss the concerns of a multiplicity of suits. The procedural devices of class action suits and joinder, however, have minimized the threat of a multiplicity of suits.

The court's test for injury-in-fact requires that the plaintiff suffer actual or threatened injury as a result of defendant's conduct. This injury must be traceable to the challenged action and likely to be remedied by a favorable judicial decision.[192]

Although this test seems concise and easy to apply, the court in *HTF* made clear that there are many fine distinctions to be made between actual injuries and "value preferences" or "special interests." Plaintiffs in borderline cases may tip the scales in favor of standing through careful pleading. For example, HTF may have shown injury-in-fact under the court's test if it had alleged that the illegally spent monies were no longer available for any number of projects for the public's benefit, thereby avoiding the mere "value preference" label. By naming the specific uses for which the money would no longer be available,[193] the court found that HTF was merely asserting its own value preferences rather than an actual injury. The test for injury-in-fact gives future litigants a clear and simple checklist by which to measure their pleadings. The court, however, concluded that HTF's allegations of injury were mere value preferences without analyzing how it arrived at this conclusion. Thus, actual predictability is lessened and the court has retained some discretion.

The court in *HTF* has insured that for every questionable government action a proper plaintiff can be found. If careful pleading is employed, standing should not be an insurmountable barrier to an action challenging governmental conduct.

The court seemed to find that plaintiffs here, like those in *Sierra Club*,[194] simply failed to allege any individualized injury to its members. A simple amendment to the pleadings, which specifically was not precluded by the *Sierra Club* Court,[195] seems to be all that is necessary to confer standing on HTF, both

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[191] 70 Haw. at 283, 768 P.2d at 1299.

[192] *Id.*

[193] *Id.* at 283, 768 P.2d at 1299. HTF alleged it was injured because monies were not available for environmental studies or low/moderate income housing developments. *Id.*

[194] 405 U.S. 727 (1972).

[195] *Id.* at 735-36, n.8. The Court noted that the Sierra Club declined to rely on an individualized interest in its reply brief, but stated that the Court's decision does not "bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal

as a taxpayer and as a member of the general public.

VI. CONCLUSION

Plaintiff in *HTF* sought to challenge the legality of certain government expenditures. To determine standing, the Hawaii Supreme Court looked solely at the plaintiff and not at the claims sought to be adjudicated. The court held that to allege injury as a taxpayer, plaintiff must be a taxpayer who contributes to the funds from which the alleged illegal expenditures were made and suffers a pecuniary loss. These requirements insure that claims come before the court in an adversarial context.

To challenge a governmental action as a member of the general public, a plaintiff must first show injury-in-fact, that is, an actual injury caused by defendant's conduct, traceable to the alleged misconduct, that will be remedied by a favorable judicial decision. Plaintiff must then show that concerns of a multiplicity of suits are satisfied by any means, such as joinder or class action.

The *HTF* court defined the parameters of the standing doctrine in Hawaii and articulated a set of relatively concise tests that it will use in determining a plaintiff's right to seek judicial review of governmental actions. By using actual injury as a standard, both tests seem to satisfy the court's concern that claims be brought only in an adversarial context.

Thus, it is clear that the Hawaii Supreme Court has produced a set of useful tests which should guide future plaintiffs seeking a judicial forum in which to challenge governmental actions. It is equally clear, however, that the standards thus articulated tend to limit standing when compared with prior Hawaii decisions.[196]

Further, the court made clear what is not an "actual injury." A non-taxpaying plaintiff cannot suffer actual injury through illegally expended tax funds. A special interest, value preference, or showing of a strong public policy alone is insufficient injury to confer standing on a plaintiff as a member of the general public.

Although the standing boundaries set forth in *HTF* are broad, they are not without limits, as was seen in this case. Careful pleading, however, will make even these limits surmountable.

Rules of Civil Procedure." *Id.*

[196] *See, e.g.*, Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981).

Unlike some federal court cases in which no one may have standing, the Hawaii Supreme Court has assured that, in Hawaii at least, there will be a plaintiff with standing for every injury incurred by allegedly illegal governmental actions.

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State v. Suka: Balancing the Need for Witness Accompaniment Against Its Prejudicial Effect

I. INTRODUCTION

In *State v. Suka*,[1] the Hawaii Supreme Court considered whether allowing a support counselor to accompany and touch a witness while the witness gives testimony unfairly bolsters the witness' credibility, prejudices the defendant and, therefore, deprives the defendant of a right to a fair trial. The court held that allowing such accompaniment, without a showing that it was necessary, would violate the defendant's "due process right to a fair and impartial trial."[2] In *Suka*, a support counselor accompanied and touched the shoulders of a rape victim as she testified against the defendant. Since the record did not support a finding that accompanying the witness was necessary for her to continue testifying, and since the court found that allowing the witness to be accompanied was prejudicial to the defendant because it unfairly bolstered the witness' credibility, the court vacated the defendant's convictions and ordered a new trial.[3]

Victim-witnesses often have difficulty facing the accused and testifying against them at trial. *State v. Suka* is significant because it is the first Hawaii

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[1] 70 Haw. 472, 777 P.2d 240 (1989).

[2] *Id.* at 473, 777 P.2d at 243.

[3] *Id.* at 479, 777 P.2d at 243-44. The court also agreed with the defendant's contention "that the trial court erred in refusing to instruct the jury that consent of the complainant is a defense to the charges of first degree rape, sodomy, and sexual abuse." *Id.* at 478, 777 P.2d at 243. The court found that if a crime includes the element of forcible compulsion, the trial court must give the jury a consent defense instruction if there is some evidence of consent and the defense requests such an instruction. *Id.* at 478-79, 777 P.2d at 243-44. HAW. REV. STAT. § 702-233 (1985) provides that consent to the charged act is a defense" if the consent negatives an element of the offense." The element of "forcible compulsion" was a part of each sexual offense with which the defendant was charged. The court reasoned that since consent to the sexual acts negates the element of forcible compulsion, consent would be a valid defense. To resolve this consent defense issue, the court simply reaffirmed its prior ruling in State v. Lira, 70 Haw. 23, 759 P.2d 869 (1988), which *rejected* the State's argument that since consent "is the flip side of forcible compulsion and the jury was instructed that it must find forcible compulsion in order to convict defendant of each of the sexual offenses, the consent instruction was unnecessary." 70 Haw. at 478, 777 P.2d at 244.

Supreme Court decision that confronts the State's attempt to help victim/witnesses testify. The court attempts to safeguard the criminal justice system's interest, as well as the defendant's interest, in conducting fair trials. In so doing, the court must inevitably balance the need to allow witnesses to be accompanied against its possible prejudicial effect. It appears that the Hawaii Supreme Court, in *State v. Suka*, found that the prejudicial effect outweighed any demonstrated need for the witness be accompanied.

This note initially describes the facts of the case in Part II. Part III provides a background of statutory history and case law. Part IV explains the standard of review. Part V analyzes and evaluates the court's reasoning and Part VI discusses the impact of the decision.

II. FACTS

In *State v. Suka*, the complainant (Nani) testified that defendant Keila Suka, Jr. (Suka) sexually attacked her on two separate occasions.[4] Nani was fourteen years old at the time of the alleged offense,[5] and fifteen years old at the time of the trial.[6] Suka, age thirty-six at the time of the alleged assaults,[7] did not deny sexual contact but claimed that Nani had consented to the various sexual acts.[8]

On direct examination, Nani's difficulty in describing the alleged assaults prompted the trial court to recess.[9] To help her complete her testimony, the prosecutor requested that Jackie Phillips (Jackie) of the Victim/Witness Kokua Service,[10] be allowed to sit next to Nani while Nani testified.[11] Responding to

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[4] 70 Haw. at 473, 77 P.2d at 240.

[5] Findings of Fact, Conclusions of Law, and Order Granting Motion for Extended Term of Imprisonment at 2 (March 2, 1988), State v. Suka, 70 Haw. 472, 777 P.2d 240 (1989)(Findings of Fact).

[6] 70 Haw. at 477, 777 P.2d at 243.

[7] Findings of Fact, *supra*, note 5 and accompanying text.

[8] 70 Haw. at 473, 777 P.2d at 240-41.

[9] *Id.* at 473, 777 P.2d at 241.

[10] The Victim/Witness Kokua Service (Kokua), which is a section within the Department of the Prosecuting Attorney, City and County of Honolulu, is a support program for victim-witnesses. Kokua lists several services for victims and witnesses in an informational brochure, including Orientation to the Criminal Justice System, Crisis Counseling, Assistance with Filing a Criminal Complaint, Case Status Information, Social Services for Victims with Special Needs, Assistance with Compensation Procedures for Victims of Violent Crime, *Arrangements for Court Accompaniment*, and Explanation of the Rights of Crime Victims under Hawaii State Law. Kokua's Director, Dennis M. Dunn, explained the purpose of the service in the same brochure:

> Each year, millions of dollars are spent to arrest, prosecute, punish and hopefully, rehabilitate criminals in Hawaii. There have been major improvements in our system for protecting the rights of the accused, providing humane treatment to the convicted, and delivering services to the ex-offender. Lost in the criminal justice system is the "forgotten person" - the VICTIM or WITNESS.

the defense's objection, the trial court ruled that it would permit Jackie to sit with Nani if the prosecutor "laid a foundation for her presence."[12] The prosecutor proceeded to have Nani tell the court that it would help to have someone sit with her while she testified, that Jackie was someone who had helped Nani when Nani needed someone to talk to, and that Nani knew she would not be allowed to talk to Jackie while she testified.[13] The trial court subsequently granted the prosecutor's request.[14]

Nani, however, still had difficulty testifying, and after another recess, Jackie took a position behind Nani with her hands on Nani's shoulders.[15] The defense again objected, claiming there was already a "very strong sympathy factor" and that Jackie's actions unduly prejudiced the defendant.[16] The defense asserted that the prosecutor had not shown a need for Jackie's accompaniment of Nani and the physical contact between them, rather she had only shown that Nani wished to be accompanied while testifying.[17]

The prosecutor argued that the physical contact between Nani and Jackie would not be prejudicial because Jackie would not talk with Nani and there would be no other audible contact.[18] The prosecutor further argued that physical contact would reduce Nani's crying and would thus allow her to continue. The prosecutor explained that the State was not trying to elicit sympathy from the jury, but sought only to help Nani get through her testimony more easily and quickly.[19] The trial court overruled the defense's objections and upon the prosecution's laying a proper foundation, allowed Jackie to stand behind Nani and touch her.[20]

Before cross examining Nani, the defense renewed its objection to the witness

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> When a crime occurs, an innocent person is suddenly pulled into an unfamiliar criminal justice system either as a victim or a witness. The unfortunate innocent victim or the concerned citizen willing to testify as a witness is all too often neglected, disregarded or defamed. While defendants have a constitutionally-guaranteed right to an attorney to represent their interests, and a host of other "advantages" in the system, the victim or witness must do it alone.
>
> Victim/Witness Kokua Services is a sincere attempt to see that victims and witnesses of crimes no longer have to "go it alone" and to assure them that someone cares.

Informational brochure, Victim/Witness Kokua Services, City and County of Honolulu.

[11] 70 Haw. at 473, 777 P.2d at 241.

[12] *Id.*

[13] *Id.* at 473-74, 777 P.2d at 241.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 474, 777 P.2d at 241.

[17] *Id.*

[18] *Id.* at 475, 777 P.2d at 242.

[19] *Id.*

[20] Upon the prosecutor's prompting, Nani stated that if Jackie stood behind her it would help her to testify. She also acknowledged that Jackie could not talk to her. *Id.*

accompaniment, arguing that the prejudicial effect was greater than the established need for Nani's accompaniment.[21] The trial court, however, overruled the objection, ruling that there already was an adequate foundation set for the procedure.[22] The trial court reasoned that Nani's conduct revealed that she was embarrassed or afraid of Suka and that it would be for the jury to weigh and consider Jackie's presence in evaluating Nani's testimony.[23] The trial court explicitly found that Jackie's presence was "necessary" for the trial to continue and "to give the defendant his right to confront the complaining witness."[24] The jury convicted Suka of two counts of first degree rape, two counts of kidnapping, three counts of first degree sexual abuse and one count of first degree sodomy.[25]

III. HISTORICAL BACKGROUND

A. Statutory History

The State Legislature through the Hawaii Revised Statutes, recognizes that, in Family Court proceedings children victim/witnesses in courtroom situations present unique problems and thus requires children to be accompanied by adults.[26] Family Court proceedings exclude the public, but the Hawaii Revised Statutes provides "the victim of the alleged violation and all other witnesses who are less than eighteen years of age, shall have parents, guardians, or one other adult and may have an attorney present while testifying . . . . "[27] The

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 476, 777 P.2d at 242.

[24] *Id.* The Hawaii Supreme Court and the United States Supreme Court previously recognized the right to confront one's accusing witness as a constitutionally protected right. See State v. Napeahi, 57 Haw. 365, 372, 556 P.2d 569, 574 (1976)("[I]it is elementary that the right of an accused to confront witnesses against him is a constitutionally protected right." (citing Pointer v. Texas, 380 U.S. 400 (1965); Alford v. United States, 282 U.S. 687 (1931))). *See also* Kentucky v. Stincer, 482 U.S. 730 (1987)(sixth amendment confrontation clause satisfied if the accused is eventually given the opportunity to cross examine the witness in his presence). *See* U.S. CONST. amend. VI, and HAW. CONST. art. I, § 14 (1968, renewed and amended 1978). The Hawaii Supreme Court in *State v. Suka* did not address the implications of this issue in its opinion.

[25] 70 Haw. at 472-73, 777 P.2d at 240. Suka's convictions included: first degree rape, two counts (I & IV), HAW. RAW. STAT. § 707-730(1)(a)(1985); kidnapping, two counts (II & VI), HAW. REV. STAT. § 707-720(1)(d)(1985); first degree sexual abuse, three counts (III, VII & VIII), HAW. REV. STAT. § 707-736(1)(a)(1985); first degree sodomy, one count (V), HAW. REV. STAT. § 707-733(1)(a)(1985). Suka was sentenced to life imprisonment for the rape and sodomy charges, twenty years for kidnapping, ten years for sexual abuse, and ordered to pay $234.00 in restitution. Findings of Fact, *supra* note 5 at 4.

[26] HAW. REV. STAT. § 571-41(b)(1985).

[27] *Id.*

statute does not expressly grant the right to be accompanied while testifying, however, for it only specifies that an adult may be "present." The Family Court, in any event, does not have jurisdiction over cases like *State v. Suka*.[28] Family Court allowances for accompaniment of witnesses, therefore, do not apply to other judicial proceedings not within the scope of the Family Court's jurisdiction.

In 1985 the legislature amended the Hawaii Revised Statutes by adding section 621-28, thus giving a child under the age of fourteen the right to be accompanied by an adult in a judicial proceeding.[29] By adding this new section, the legislature showed that they recognized the need for children to be accompanied in the court room while testifying.[30] The bill enacting Hawaii Revised Statutes section 621-28 was originally written to allow witnesses under the age of eighteen to be accompanied by an adult, but during the legislative process,

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[28] The provisions of HAW. REV. STAT. § 571-41(b)(1985) allowing victims and witnesses under eighteen to be accompanied by an adult, apply only to Family Court hearings initiated under HAW. REV. STAT. § 571-11(1) or (2). HAW. REV. STAT. § 571-41(b)(1985). HAW. REV. STAT. 571-11 delineates the Family Court's jurisdiction over children. The Family Court did not have jurisdiction over Nani under HAW. REV. STAT. § 571-11 because she was not accused of an offense, alleged to be deprived of educational services, thought to be beyond the control of her parents or in violation of curfew.

Generally the Family Court only has jurisdiction over an adult if 1) an adult parent, guardian or custodian of a child commits an offense against the child or 2) if the adult is charged with abandonment, an offense against his or her spouse, a violation of a domestic abuse protective order or a violation of a Family Court judge's order. HAW. REV. STAT. § 571-14 (1985). Suka was not a parent, guardian or custodian of Nani, nor was he charged with any of the offenses specified in HAW. REV. STAT. § 571-14(1985).

[29] HAW. REV. STAT. § 621-28 (1985) states:

> A child less than fourteen years of age, involved in a judicial proceeding, including a grand jury proceeding, *shall have the right to be accompanied by a parent, a victim/witness counselor, or other adult designated by the court*. The accompanying person may be placed side by side with the child at the discretion of the presiding judge or court officer; provided that this position does not interfere with the proceedings of the court. The accompanying person shall not communicate in any manner with the child unless directed by the presiding judge or court officer.

Id. (emphasis added).

[30] As explained by the House Committee on Human Services:

> Your committee believes that, as more and more child victims become involved with judicial proceedings, our system of criminal justice needs to afford these children with additional rights and protection. Our criminal justice system is often criticized for adding to the trauma of an already traumatized child victim.
>
> Your Committee believes that the system must change and begin caring for the rights of child victims. Unless the system is improved, many parents will choose to protect their child from the system and not testify. Your committee believes that this system plays into the hands of child molesters and abusers by allowing them to remain free to continue to molest and abuse our children.

H.R. Stand. Comm. Rep. No. 156, (13th Haw. Leg., Reg. Sess., 1985 House J. 1036).

the right to witness accompaniment was eventually limited to witnesses under fourteen.[31] The Legislature thus decided that young witnesses testifying in judicial proceedings should be given the right to be accompanied by an adult.

B. Caselaw

Courts in other jurisdictions have also addressed the witness accompaniment issue, albeit for younger victim/witnesses. In *Sexton v. State*,[32] the defendant (Sexton) was charged with and convicted of the rape and sodomy of his five-year old daughter.[33] On appeal, Sexton argued that allowing his daughter to sit with a female assistant district attorney "improperly bolstered the credibility of the [child]."[34] In general, it is improper to bolster the credibility of a witness before the witness' credibility has been attacked.[35] The court noted that "[t]he

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[31] The House Judiciary Committee, having decided that older children have less need of accompaniment by an adult, reduced the stated age to fifteen:

> In order for a young child to participate in a judicial proceeding, particularly as a witness, it is often necessary for the child to be accompanied by an adult who can provide emotional support to the child. Unless this emotional support is provided, the child may refuse to attend or testify at a judicial proceeding. The refusal to testify may result in the inability to prosecute heinous crimes, particularly where the child is the victim of sex abuse or rape and the child's testimony is necessary for an indictment and subsequent conviction.
>
> Your Committee believes, however, that the need for the child to be accompanied by an adult at judicial proceedings decreases as the child matures. Therefore, this bill . . . is amended to limit its application to a *child who is less than fifteen years of age.*

H.R. Stand. Comm. Rep. No. 571, (13th Haw. Leg., Reg. Sess. 1985 House J. 1258-59)(emphasis added).

The Senate Judiciary Committee decided to reduce the age to "fourteen" to be consistent with the threshold age for sexual offenses. "Your committee amended this bill to lower the age that entitles a child to accompaniment at judicial proceedings from fifteen to fourteen years. The age of fourteen years is the threshold age that is protected in part V, chapter 707, Hawaii Revised Statutes, relating to sexual offenses." S. Stand. Comm. Rep. No. 902, (13th Haw. Leg., Reg. Sess. 1985 Senate J. 1293).

[32] 529 So. 2d 1041 (Ala. Crim. App. 1988).

[33] *Id.* at 1043.

[34] *Id.* at 1044.

[35] *See* Hawaii Rules of Evidence 608(a)(2) which provides that "[e]vidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." The commentary to the subsection (a) of Rule 608 explains that "evidence of reputation for truthfulness offered to bolster credibility is admissible only to rebut an attack on witness' veracity. See *Brown v. Walker*, 24 Haw. 285, 291 (1918)." *See* In Interest of Doe, 70 Haw. 32, 761 P.2d 299 (1988)(evidence supporting credibility of witness should not be admitted absent attack on witness' credibility). *See also* Haw. R. Evid. 613(c) regarding the admissibility of a prior consistent statement of a witness to support witness' credibility.

test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility," and that vouching could be either explicit or implicit.[36] The court explained that

> [b]ecause of the possibility that a jury might interpret the prosecutor's action as indicating a personal belief in the credibility of the witness or the guilt of the accused, it is generally improper for the prosecutor to sit with a witness during her testimony. If, because of age, timidity, or frailty, a witness requires aid in order to testify, that aid should be rendered by someone other than the prosecuting attorney.[37]

The *Sexton* court, however, did not find the error reversible, but deferred to the judgment and discretion of the trial court because "[t]he trial judge was in the best position to determine what, if any, probable effect this action would have on the jury."[38] Thus, the *Sexton* court affirmed the rape and sodomy convictions,[39] and focused more on the absence of a prejudicial effect, rather than on a showing of need for the witness' accompaniment. The showing of need in *Sexton* was based only on an "indication that the five-year-old witness was reluctant to testify at trial."[40]

Courts in other jurisdictions have also based the decision to allow accompaniment of testifying children on the lack of undue prejudice to the defendant. For example, in *Baxter v. State of Indiana*,[41] the defendant was accused of sexually molesting his step-daughters.[42] The defendant argued that it was prejudicial to allow the child's mother to hold her daughter's hand while the daughter testified.[43] The Supreme Court of Indiana disagreed for two reasons. First, the court held that the trial court had discretion to approve special procedures that would

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[36] 529 So. 2d at 1044. ("by indicating that information not presented to the jury supports the testimony.")(quoting United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983), cert. denied, 465 U.S. 1034 (1984)).

[37] 529 So. 2d at 1044.

[38] *Id.*

[39] *Id.* at 1053.

[40] *Id.* at 1043. Note, however, that the crime that the defendant was convicted of was particularly heinous. This fact could have made the court reluctant to reverse the convictions, resulting in an anomalous decision:

> The [child's] testimony established the elements of rape and sodomy. In addition, the child testified that her father urinated and defecated on her, and then made her eat his feces. She testified that she threw up and that he made her "eat the throw up." She testified that these incidents occurred daily for a period of several months but she did not tell her mother for some time.

Id.

[41] 522 N.E. 2d 362 (Ind. 1988).

[42] At the time of trial, one child was nine years old and the other was eight. *Id.* at 370.

[43] *Id.* at 365.

comfort children while they testified.[44] Second, the mother herself testified and denied that there was any sexual abuse. Thus the court did not find that the mother's presence and physical contact with the child caused undue prejudice.[45]

Some courts allow accompaniment as long as the accompanying person does not influence the witness' testimony. The Pennsylvania Supreme Court in *Commonwealth of Pennsylvania v. Pankranz*,[46] for example, approved a trial court's decision to allow a four-year-old witness to sit on her grandmother's lap while she testified as to how she had been molested.[47] The *Pankranz* court found that the trial court did not abuse its discretion in allowing the child to be accompanied by her grandmother[48] since the child's grandmother did not influence the child's testimony in any way.[49] In concluding that the trial court had not abused its discretion, the court considered the trial court's broad discretion in conducting the trial, the "tender age" of the witness and the "nature of her testimony."[50] The court cautioned, however, that allowing a child to testify on an adult's lap should not be encouraged; it was allowed only because "the record fail[ed] to disclose that [the] appellant was prejudiced or that the witness'

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[44] The court noted that "[t]he trial court had discretion to allow special measures aimed at putting the young child at ease on the witness stand. *See* Ricketts v. State (1986), Ind., 498 N.E.2d 1222." *Id.* at 365.

[45] The court explained that "[w]e fail to see how Baxter was unduly prejudiced, particularly considering that the victims' mother testified and denied the sexual abuse." *Id.*

[46] 382 Pa. Super. 116, 554 A.2d 974 (1989).

[47] The court cited several cases for the proposition that another person may be allowed to sit with the witness if he knows he is not allowed to prompt the witness:

> *State v. Brockman*, 184 Neb. 435, 168 N.W. 2d 367 (1969)(trial court in prosection for statutory rape did not err in allowing adult lady friend of eight year old victim to sit in close proximity to victim while she testified); *Gould v. State*, 71 Neb. 651, 99 N.W. 541 (1904)(no prejudicial error in prosecution for child stealing where trial court allowed father of child to sit near witness during her testimony, since record disclosed no improper conduct by father nor any influence by father on his daughter's testimony); *Rodgers v. State*, 30 Tex. App. 510, 17 S.W. 1077 (1891)(no error in prosecution for statutory rape in permitting aunt of ten year old victim to sit near witness during her testimony as trial judge had warned aunt not to speak to or prompt witness and aunt complied with warning); *State v. Keeley*, 8 Utah 2d 70, 328 P.2d 724 (1958)(trial court did not abuse its discretion in permitting school employee, to whom ten year old prosecuting witness had first reported assault by her stepfather, to sit near the witness during her testimony where record failed to disclose that witness had been influenced or coached in any way).

382 Pa. Super. 116, 125-26, 554 A.2d 974, 979 (1989).

[48] *Id.* at 127, 554 A.2d at 980.

[49] *Id.* at 126, 554 A.2d at 979.

[50] *Id.* at 127, 554 A.2d at 980. The child was only four years old at the time of trial, and the nature of her testimony was extremely sensitive. With the help of an anatomically correct doll, the child testified that her father "repeatedly inserted a sharp object, which she believed to be a screwdriver or knife, into her vagina." *Id.* at 119, 554 A.2d at 976.

testimony was influenced by the presence of the grandmother."[51]

In sum, courts will allow witness accompaniment where there are special circumstances requiring it, such as the "tender age" of the witness or the special "nature of the testimony."[52] Furthermore, courts allow witness accompaniment where it will not prejudice the defendant and where it will not influence the witness' testimony. The accompaniment of *adult* victim/witnesses on the witness stand has received scant attention.[53]

IV. STANDARD OF REVIEW

Hawaii appellate courts have recognized that a trial court has broad discretionary powers in conducting its trials.[54] In particular, "[m]atters regarding the examination of witnesses are within the discretion of the trial court and its rulings will not be subject to reversal absent prejudicial abuse of such discretion."[55] The burden of showing an abuse of discretion by the trial court is a

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[51] *Id.* at 127 n.6, 554 A.2d at 980 n.6. For other cases allowing young witnesses to sit on adults' laps, see State of Oregon v. Dompier, 94 Or.App. 258, 764 P.2d 979 (1988)(seven year-old victim/witness sitting on foster mother's lap to testify permissible where foster mother did not communicate to child or jury and where trial court gave limiting instruction); State of Ohio v. Johnson, 38 Ohio App. 3d 152, 153-55, 528 N.E.2d 567, 568-70 (1986)(no constitutional violation of right of confrontation nor an abuse of discretion by the trial court in allowing an eight year-old witness to sit on a relative's lap while testifying; the trial court has the authority and the duty to exercise reasonable control over the method of examination).

[52] *See supra* note 50 and accompanying text.

[53] In 1942, the Georgia Supreme Court decided that permitting a witness' husband to hold her hand while she testified was no reason to reverse the trial court's directed verdict for the plaintiff. Hortman v. Vissage, 193 Ga. 596, 19 S.E. 2d 523 (1942). The witness' husband was a plaintiff in "an action to recover possession of land from a daughter of a deceased heir of the intestate." 19 S.E.2d at 524. Defendants alleged that the trial court erroneously allowed the plaintiff to hold the witness' hand while she testified. The trial court noted that "the witness was of an extremely nervous temperament, and her husband standing next to the witness-stand was for the sole purpose of keeping his wife from breaking down." *Id.* The Georgia Supreme Court did not question the decision of the trial court and found no grounds for reversal. 19 S.E.2d at 525. The Georgia Supreme Court did not explain its reasoning.

[54] State v. Silva, 67 Haw. 581, 698 P.2d 293 (1985)(trial court's decision to admit evidence in a criminal trial will be reversed only if there is an abuse of discretion); State v. O'Daniel, 62 Haw. 518, 616 P.2d 1383 (1980)(trial court has discretion in admitting evidence at trial and such decision will not be reversed absent abuse); State v. Kim, 64 Haw. 598, 645 P.2d 1330 (1982)(trial court's decision to admit psychiatrist's expert testimony on a witness' credibility is in the discretion of the trial court and should not be overturned absent a clear abuse of discretion); State v. Emmsley, 3 Haw. App. 459, 652 P.2d 148 (1982)(trial court's exercise of its discretion with regard to scope of cross-examination on collateral matters affecting credibility will not be overturned without a strong showing of abuse).

[55] The Nature Conservancy v. Nakila, 4 Haw. App. 584, 596, 671 P.2d 1025, 1034 (1983). *See also* Haw. R. Evid. 611(a) which "states the common law principle allowing the court broad

difficult one.[56] To "constitute an abuse, it must appear that the court clearly exceeded the bounds of reason or disregarded the rules or principles of law or practice to the substantial detriment of a party litigant."[57]

Generally, if a trial court commits an error in conducting its trial, the reviewing court must decide whether the error was harmless.[58] If the reviewing court finds an error, "the real question becomes, whether there is a reasonable possibility that the error might have contributed to the convictions."[59] Accordingly, a trial court's error is grounds for reversal if the error might have contributed to the conviction.

The trial court's decision to allow witness accompaniment should fall within the trial court's broad discretionary powers. Since it is a matter "regarding the examination of witnesses,"[60] it should not be overturned without finding an abuse of discretion. If, however, the trial court is found to have erred in allowing witness accompaniment, such an error should be grounds for reversal unless the error is shown to be harmless.

V. ANALYSIS

A. The Approach of the Hawaii Supreme Court

1. The prejudicial effect of bolstering credibility

In *State v. Suka*,[61] the Hawaii Supreme Court began its concise analysis by declaring that it was not convinced that Jackie's presence did not unfairly bol-

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discretion in determining order and mode of interrogation." Commentary to subsection (a) of Haw. R. Evid. 611. Also, *see supra* note 38 and accompanying text.

[56] State v. Estencion, 63 Haw. 264, 267, 625 P.2d 1040, 1043 (1981)("The burden of establishing an abuse of discretion is on appellant . . . and a strong showing is required to establish it.")(citations omitted); Michael J. Yoshii, Appellate Standards of Review in Hawaii, 7 U. HAW. L. RAW. 273, 293 (1985)("A strong showing is required to establish an abuse, and each case must be decided on its own facts. An abuse may be found where the trial court lacked jurisdiction to grant the relief . . . or where the trial court based its decision on an unsound proposition of law.")(citations omitted).

[57] State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961).

[58] State v. Perez, 64 Haw. 232, 234, 638 P.2d 335, 337 (1981)(error in admitting hearsay testimony was harmless because there was no reasonable possibility that the error, if any, might have contributed to the conviction).

[59] State v. Huihui, III, 62 Haw. 142, 145, 612 P.2d 115, 117 (1980)(the prosecutor's use of the words "police mug photographs" in questioning a witness to identify the defendant was an error that did raise a reasonable possibility of contributing to the conviction).

[60] *See supra* note 55 and accompanying text.

[61] 70 Haw. 472, 777 P.2d 240 (1989).

ster Nani's testimony.[62] The court was concerned that the accompaniment may indeed have prejudiced the jury against the defendant.[63]

The court stated that the jury might have believed that Jackie was endorsing Nani's testimony or vouching for her sincerity.[64] The court was concerned that the jury might have thought that Jackie had other information not given to the jury that assured her that Nani was telling the truth. As the court explained:

> The jury might very well have concluded that Jackie [sic] being present supported complainant's story or re-assured complainant's veracity. The jury could very well have surmised that Jackie had extensive talks with the complainant, and/or knows of other information not presented to the jury that convinces Jackie that complainant is telling the truth.[65]

Because of the possibility that Jackie's accompaniment of Nani communicated to the jury that Nani's testimony was accurate and truthful, the court concluded that the accompaniment was prejudicial to the defendant and thus denied him a fair trial.[66]

In dictum, the court noted that perhaps a family member, rather than a neutral counselor, would be seen more as one giving support rather than as one bolstering the witness' credibility.[67] In addition, the court felt that the younger the victim/witness, the more likely it is that the jury will view the accompaniment as support to a "tender and fragile witness" rather than as a voucher for the witness' credibility.[68]

2. *The need for witness accompaniment*

Although the trial court found that Jackie's accompaniment was "necessary" for the proceeding to continue,[69] the Hawaii Supreme Court concluded that the

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[62] *Id.* at 476, 777 P.2d at 242.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 477, 777 P.2d at 243.

[67] The court explained:

> [A]ccompaniment by a *parent* or *other close relative* would be less prejudicial than would accompaniment by a victim/witness counselor as the former is more likely to be seen as family support rather than as vouching for the witness' credibility. On the other hand, the accompaniment of an unrelated victim/witness counselor who is perceived as more neutral is more likely to be seen as vouching for the witness' credibility.

Id. at 476 n.1, 777 P.2d at 242-43 n.1.

[68] *Id.*

[69] *Id.* at 476, 777 P.2d at 243.

record did not support such a finding.[70] The court reasoned that since Nani was fifteen, she could be expected to testify more readily than a younger witness.[71] The court stated that the younger the witness, the more likely that accompaniment would be found to be necessary.[72]

Furthermore, the court reasoned, the record showed only that testifying was difficult for Nani, not that it was impossible for her to testify without accompaniment.[73] While the record reflected that Nani would "like" to have Jackie there to "help" and to "comfort" her, the court emphasized that Nani was not asked if alternative procedures would have helped her get through her testimony.[74] According to the court, such procedures might have included having Nani testify alone after a longer recess or having Jackie sit in the courtroom within Nani's view.[75] The court stated expressly, however, that it did not decide whether Nani's accompaniment would have been permissible if options to witness accompaniment were examined but found unacceptable.[76]

The court quoted Hawaii Revised Statutes section 621-28 in its entirety only to declare that since the statute extended the right to accompaniment only to witnesses under "fourteen years of age," it was inapplicable in this case because Nani was fifteen years old at the time of trial.[77]

In sum, the Hawaii Supreme Court made two findings in overturning the lower court's decision. First, the court concluded that Jackie's presence bolstered Nani's credibility and therefore prejudiced the defendant and violated his right to a fair and impartial trial.[78] Second, the court found that the record did not substantiate the trial court's finding that witness accompaniment was necessary for Nani to continue with her testimony, and therefore Jackie's accompaniment of Nani could not be justified by necessity.[79] The court, therefore, vacated Suka's convictions and ordered a new trial.[80]

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[70] *Id.* at 476-77, 777 P.2d at 243.

[71] *Id.* at 477, 777 P.2d 243.

[72] *Id.* at 477 n.2, 777 P.2d at 243 n.2.

[73] *Id.* at 476-77, 777 P.2d at 243.

[74] *Id.* at 477, 777 P.2d at 243.

[75] *Id. See also* HAW. R. EVID. 616, which provides for the "[v]ideotaping of the testimony of a child who is a victim of an abuse offense or a sexual offense."

[76] The court noted that "[t]he issue of whether Jackie's presence would have been consistent with due process in the case where other alternatives had been explored but had failed need not be decided." *Id.* at 477 n.3, 777 P.2d at 243, n.3.

[77] *Id.* at 477, 777 P.2d at 243. *See supra* note 29 and accompanying text.

[78] *Id.*

[79] *Id.* at 476-77, 777 P.2d at 243.

[80] *Id.* at 479, 777 P.2d at 244.

B. *Commentary*

Since it is improper to bolster the credibility of a witness by any means absent an attack on the witness' credibility,[81] and since the prosecution did not allege that the defense had attacked Nani's credibility, any bolstering of Nani's credibility by the prosecution would have been improper. Although the court did not give a clear test for what would constitute an improper vouching of credibility in witness accompaniment, the analysis it applied was very similar to the test applied by the Criminal Appeals Court of Alabama in *Sexton v. State*.[82] The court in *Sexton* stated that the accompanying person is improperly vouching for the witness' credibility if "the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility."[83] The *Sexton* court asserted that the vouching could be implied by "indicating that information not presented to the jury supports the testimony."[84] The Hawaii Supreme Court's analysis of the witness accompaniment's bolstering of credibility in *Suka* was consistent with this reasoning.[85]

Unlike *Suka*, however, the *Sexton* court approved of the witness' accompaniment.[86] The court deferred to the trial court's discretion because the trial judge was in a better position to decide whether witness accompaniment would result in prejudice to the defendant.[87] The court in *Suka* did not give the same deference to the trial court that the court in *Sexton* did; the Hawaii Supreme Court decided that the bolstering of Nani's credibility was prejudicial without explicitly holding that the trial court abused its discretion.[88]

The *Suka* court thus seems to have ruled that the court must first be "convinced" that witness accompaniment will not result in unfair prejudice before it will allow a counselor or other adult to accompany a testifying witness.[89] Since trial courts are normally given broad discretion in determining the method of interrogation,[90] a decision to allow witness accompaniment should fall within the trial court's broad discretion.[91] The court in *Suka*, apparently removed the issue of witness accompaniment from the general rule that gives the trial court discretion in conducting witness examinations. The witness accompaniment

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[81] *See supra* note 35 and accompanying text.
[82] *See supra* note 36 and accompanying text.
[83] *Id.*
[84] *Id.*
[85] *See supra* note 65 and accompanying text.
[86] *See supra* note 39 and accompanying text.
[87] *See supra* notes 38, 54 and accompanying text.
[88] *See supra* note 66 and accompanying text.
[89] *See supra* note 62 and accompanying text.
[90] *See supra* note 55 and accompanying text.
[91] *Id.*

cases discussed earlier did not require such a demanding showing of a lack of prejudice.[92] Those cases, however, involved much younger victim/witnesses. If the Hawaii Supreme Court did not remove the witness accompaniment decision from the trial court's broad discretion, it implicitly held that the trial court abused its discretion in allowing witness accompaniment.

Assuming that it was erroneous for the trial court to allow witness accompaniment, the convictions should be reversed only if there was a reasonable possibility that the error contributed to the convictions.[93] The court suggests that allowing Jackie to accompany Nani could have contributed to the convictions because it "could have had the effect of conveying to the jury Jackie's belief that complainant was telling the truth."[94] Since there was a reasonable possibility that the error led to the guilty verdicts the court vacated the convictions.

Although the trial court expressly found that having Jackie accompany Nani while she testified was necessary for the trial to continue, the Hawaii Supreme Court held that the record did not support that finding.[95] Courts in other jurisdictions have not made the showing of "need" such an insurmountable obstacle. For example, the "need" for the witness accompaniment allowed in *Sexton* was based on the "reluctance" of a five-year-old witness to testify at trial.[96] In *Baxter*, the court recognized that the trial court had discretion to allow for special procedures that would "comfort" children while they testified.[97]

The Hawaii Supreme Court in *Suka* required a greater showing of necessity: it must be shown that the witness will not be able to continue testifying without accompaniment.[98] This proposition is supported by the court's later ruling in *State v. Rulona*,[99] which required a showing of a "compelling necessity" before it would allow an eight-year-old victim/witness to sit on a counselor's lap while testifying.

The Hawaii Supreme Court decided *Rulona* six months after the *Suka* deci-

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[92] *See supra* notes 32-53 and accompanying text.

[93] *See supra* note 59 and accompanying text.

[94] *See supra* note 66 and accompanying text. In its appellate brief, the State argued that the defendant never polled the jury to ascertain the prejudicial effect, if any, of the procedure and without a showing of prejudicial effect, argued the State, the defendant cannot assert a reversible error. Answering Brief of the State of Hawaii at 18, State v. Suka, 70 Haw. 472, 777 P.2d 240 (1989)(citing H.R.A.P. 52(a) [sic] H.R.P.P. 52(a): "Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). The court was apparently not persuaded by the State's contention and did not address it in its opinion, probably because the State had the burden to show that there was no reasonable possibility that the error might have contributed to the conviction. *See supra* note 58 and accompanying text.

[95] *See supra* note 70 and accompanying text.

[96] *See supra* note 40 and accompanying text.

[97] *See supra* note 44 and accompanying text.

[98] *See supra* note 73 and accompanying text.

[99] No. 13427, slip op. (1990).

sion, and the court applied and interpreted Hawaii Revised Statutes section 621-28 for the first time.[100] In *Rulona*, the court held that the defendant, convicted of two counts of first degree sexual assault[101] and two counts of third degree sexual assault,[102] did not receive a fair trial partly because the trial court abused its discretion by allowing the eight-year-old alleged victim to sit on the lap of a sexual abuse counselor as she testified.[103]

The court did not expressly decide whether a trial court has the discretion to allow a witness to sit on an adult's lap while giving testimony.[104] Instead the court assumed that the trial court had such discretion, and decided that permitting accompaniment without a showing of a "*compelling necessity* for allowing such a *prejudicial* scenario" would be an abuse of that discretion.[105] The *Rulona*

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[100] *Id.*

[101] HAW. REV. STAT. § 707-730(1)(b) [Supp. 1989] provides that "(1) A person commits the offense of sexual assault in the first degree if: . . . (b) The person knowingly subjects to sexual penetration another person who is less than fourteen years old." *Id.*

[102] HAW. REV. STAT. § 707-732(1)(b) [Supp. 1989] provides that "(1) A person commits the offense of sexual assault in the third degree if: . . . (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person." *Id.*

[103] No. 13427, slip op. at 3-4. The court also identified two other errors by the trial court. The second error involved the trial court's refusal to allow the defense to bring in testimony that substantiated Marlyn Ochobillo's testimony. The prosecution called Marlyn as a witness, but her testimony at trial contradicted the complaining witness' testimony. The trial court allowed the prosecution to bring in testimonial evidence (by Detective Antenorcruz) to show that Marlyn's testimony at trial was inconsistent with Marlyn's prior statement. The court stated:

> Here we have a situation in which the court freely allowed the introduction of prior consistent statements by the complaining witness, allowed the introduction of alleged prior inconsistent statements of the witness Marlyn, but refused to allow the defense to show, by a witness, that Marlyn did not make the statements attributed to her by Detective Antenorcruz. The ruling of the court below on this point is inexplicable, unjustifiable, and erroneous.

Id. at 4-5.

The court identified a third error which involved the prosecutor's method of cross-examining a defense witness, Clara Ochobillo, where the court held:

> The form of questions used by the prosecutrix, in examining Clara Ochobillo as to the conversation which had taken place between them, made those questions an assertion of the prosecutrix' personal knowledge of the facts in issue with respect to that conversation.
>
> . . . .
>
> It was error for the court below to refuse to stop the prejudicial line of examination concerning the out-of-court conversation between the prosecutrix and the witness Clara Ochobillo.

Id. at 5-7.

The court, having decided that these three errors denied the defendant a fair trial, reversed the convictions and remanded the case for a new trial.

[104] *Id.* at 4.

[105] *Id.* at 3-4 (emphasis added). The court explained:

court did not find a "compelling necessity" in the record sufficient to justify allowing the witness to sit on the counselor's lap.[106]

Hawaii courts thus appear to require a greater showing of need before they will permit another person to accompany a testifying witness. As previously discussed, appellate courts in Hawaii have given trial courts broad discretion in conducting their trials.[107] In deciding on whether there was a need for witness accompaniment, however, the court in *Suka*, either chose not to give the trial court such deference or concluded, without stating, that the trial court's finding of "need" was an abuse of discretion because it was not supported by the facts in the record.[108]

The Hawaii Supreme Court, like courts in other jurisdictions, recognize a greater need for witness accompaniment when younger witnesses are in-

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> If the court below had discretion to permit the complaining witness to sit on the lap of a sexual abuse counselor, the exercise of that discretion in this case, on the record, was abused, and the court below erred in permitting the procedure.

Id.

[106] The *Rulona* court found that the witness could testify without sitting on an adult's lap:

> On the contrary, the record shows that the child apparently testified before the grand jury without needing to be seated on the lap of a sexual abuse counselor. Her testimony in sum was that she was frightened to be there as a witness, and would feel better if she sat on the sexual abuse counselor's lap. Most of the witnesses appearing in trial for the first time, even adults are frightened, but *there was no indication that she could not testify without being seated in the counselor's lap.*

Id. at 4 (emphasis added). *But see* State of West Virginia v. Jones, 362 S.E.2d 330, 332 (W.Va. 1987)(seven year-old victim/witness allowed to sit on foster mother's lap where there was no evidence that foster mother prompted the witness, since there is a difference between the atmosphere at a pre-trial hearing in which the child was able to testify alone and an actual trial, and there was no evidence of prejudice to the defendant).

The *Rulona* court was also concerned with the possibility of communication between the counselor and the witness sitting on the counselor's lap. No. 13427, slip op. at 4. Such communication is prohibited by HAW. REV. STAT. § 621-28, which states that "[t]he accompanying person shall not communicate in any manner with the child unless directed by the presiding judge or court officer." HAW. REV. STAT. § 621-28 (1985). The court cautioned that "[c]ommunication is not always verbal, and the procedure followed here was fraught with opportunity for a violation of that sentence." No. 13427, slip op. at 4.

In sum, the *Rulona* court was concerned with the prejudicial effect of witness accompaniment as well as with the danger that the counselor or other adult may communicate by means of physical or other inaudible contact. The court was inclined, therefore, not to allow the eight-year-old witness to testify while sitting on the lap of her sexual abuse counselor. *Id.*

Although the Hawaii Supreme Court in *Rulona* did not explain why allowing the witness to sit on a counselor's lap while she testified made the "scenario" prejudicial, the court probably thought it was prejudicial because of the "bolstering of credibility" effect explained by the Court of Criminal Appeals of Alabama in *Sexton v. State*, *see supra* notes 32-40 and notes 82-84, and the Hawaii Supreme Court in *Suka*, *see supra* notes 61-68.

[107] *See supra* note 54 and accompanying text.

[108] *See supra* note 70 and accompanying text.

volved.[109] The Hawaii State Legislature has likewise taken age into consideration by recognizing a need for witnesses under fourteen to be accompanied by an adult while testifying.[110] The court in *Suka* was consistent with other authorities in this respect when it stated that the prejudicial impact of accompanying a witness would be less for younger witnesses[111] and that it would be easier for a trial court to find a need for witness accompaniment as the witness' age decreases.[112]

Unlike the court in *Pankranz*,[113] the *Suka* court did not express a concern for the possibility that the accompanying person may influence the testimony of the witness by communicating with the witness in some fashion. The *Suka* court did not deem it necessary to discuss the danger that the accompanying person may communicate with the witness as it did in deciding *Rulona*.[114] Given the court's finding, however, that bolstering Nani's credibility was prejudicial, it was unnecessary for the *Suka* court to consider this alternative rationale.

The *Suka* court's interpretation of Hawaii Revised Statutes section 621-28 was limited to a finding that the statute did not apply in this case.[115] Although the court did not directly address the issue of whether the statutory age limit of "under fourteen" is a maximum age allowable for witness accompaniment, the court's ruling suggests that the statutory age limitation should not be treated as a ceiling. The statutory history of Hawaii Revised Statutes section 621-28 shows that the legislature specifically intended to extend the right of witness accompaniment only to witnesses "under fourteen" by replacing the word "eighteen" in the original bill with "fourteen."[116] It is not entirely clear, however, whether the legislature intended to leave the courts with no discretion to allow witnesses fourteen years old and older to be accompanied by an adult. If the legislature did intend to take all discretion from the courts in witness accompaniment situations, they could have reworded Hawaii Revised Statutes section 621-28 specifically so to provide.[117] The court read the statute as granting younger witnesses the right to accompaniment, rather than as limiting such a right.

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[109] *See supra* notes 40, 44, 50, and accompanying texts.

[110] *See supra* note 30 and accompanying text.

[111] *See supra* note 68 and accompanying text.

[112] *See supra* note 72 and accompanying text.

[113] *See supra* notes 46 to 51 and accompanying text.

[114] In *Rulona*, the court recognized that HAW. REV. STAT. § 621-28 (1985) specifically prohibited the accompanying person from communicating with the witness. *See supra* note 106.

[115] *See supra* note 77 and accompanying text.

[116] *See supra* notes 29-31 and accompanying text.

[117] For example, the legislature could have written HAW. REV. STAT. § 621-28 to read: "A child fourteen years of age or older, involved in a judicial proceeding, including a grand jury proceeding, shall not have the right to be accompanied by a parent, a victim/witness counselor, or other adult."

The court also gave future tribunals limited guidelines in deciding witness accompaniment cases. The court suggests that it would more likely approve of witness accompaniment if the accompanying person were a parent or relative of the witness rather than a neutral counselor because the chances of the accompaniment resulting in prejudice to the defendant would be less.[118] The court also indicated that the younger the witness, the more likely witness accompaniment would be approved. The court gave two reasons for this guideline. First, the younger the witness, the more likely the jury would consider the accompaniment as assistance to a "tender and fragile witness" rather than as vouching for the witness' credibility.[119] Second, "a court would generally find it easier to conclude that accompaniment is necessary as the witness' age declines."[120] The court has thus at least indicated the circumstances in which it will most likely consider witness accompaniment proper.

VI. IMPACT

The Hawaii Supreme Court's decision in *State v. Suka*,[121] set forth broad and strict guidelines. In all witness accompaniment cases in which Hawaii Revised Statutes section 621-28 does not apply, the court will require a strict showing of need and an absence of prejudice, before it will permit another person to accompany a witness.

After *Suka*, a party seeking witness accompaniment must convince the court that accompaniment would not be prejudicial to his/her opponent and show that witness accompaniment is necessary for the witness to testify. The court must therefore balance the need for witness accompaniment against its possible prejudicial effect.

The *Suka* opinion suggests that the possible prejudicial effect of witness accompaniment is more significant than the need for witness accompaniment and thus requires the closer scrutiny. This proposition is supported not only by the court's language implying that they must be "convinced" that the witness' accompaniment did not unfairly bolster the witness' credibility, but also by the fact that the court declined to decide whether an exhaustion of alternatives would justify witness accompaniment and comport with due process.[122] In other words, the court has not decided exactly what must be shown to persuade the court that witness accompaniment is needed, and even if alternatives are examined but prove unworkable, there is no certainty that the court would find

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[118] *See supra* note 67 and accompanying text.

[119] *Id.*

[120] *See supra* note 82 and accompanying text.

[121] 70 Haw. 472, 777 P.2d 240.

[122] *See supra* note 76, and accompanying text.

witness accompaniment permissible. The chances of approving witness accompaniment improve as the witnesses age declines and if the accompanying person is a friend or a relative instead of a neutral third party.[123]

VII. CONCLUSION

Although the *Suka* court disallowed witness accompaniment, it left open the possibility of allowing it under certain circumstances. The *Suka* opinion suggests, however, that it will be difficult to persuade the court to permit a counselor or other adult to accompany a victim/witness in a judicial proceeding. *Suka* suggests that preserving an accused's right to a fair and impartial trial is paramount. In balancing the need for witness accompaniment against its prejudicial effect, therefore, the court is likely to place greater importance on the prevention of unfair prejudice. Perhaps the court really balanced the costs of conducting a new trial, which included forcing the victim/witness to endure a second trial, against the possibility that the defendant was denied a fair hearing. The court chose to safeguard the defendant's right to a fair trial.

Carlito P. Caliboso

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[123] *See supra* notes 118-120 and accompanying text.

Makaneole v. Gampon: Site Owners Vicariously Liable for Negligence of Contractors and Their Employees

I. INTRODUCTION

In *Makaneole v. Gampon*,[1] the Hawaii Supreme Court held that a premises owner who hires an independent contractor to do work on the premises is liable vicariously for the negligence of the independent contractor and/or the independent contractor's employees, where the injury arose from dangers which the owner contemplated or should have contemplated at the time the independent contractor was hired.

This article will analyze the policies behind vicarious liability at the work site, how vicarious liability fits into the workers' compensation scheme, and the future impact of vicarious liability at the work site as determined by the Hawaii Supreme Court's decision in *Makaneole*.

II. FACTS

On September 18, 1981, an accident occurred on the construction site of the Sheraton Kauai expansion project. Appellant George Makaneole was working on the project as a carpenter for Dillingham Construction Corporation (Dillingham).[2] The site was owned by defendant Kauai Development Corp. (KDC),[3] and KDC had hired Dillingham as the general contractor for the project. Defendant Drake Gampon was a crane operator at the site, working for a subcontractor, Norman's Construction, Inc. (Norman's).[4]

The crane Gampon was operating was being used to lift 200-lbs. pieces of

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[1] 70 Haw. 501, 777 P.2d 1183 (1989) (opinion of the court by Padgett, J.), *rev'g in part and aff'g in part* 7 Haw. App. ____, 776 P.2d 402 (1989). *Makaneole* was a consolidation of Supreme Court Nos. 12049 (Makaneole v. Gampon) and 12218 (Makaneole v. Gampon).

[2] Dillingham was doing business as Hawaiian Dredging & Construction Co., Ltd. 70 Haw. at 502, 777 P.2d at 1184.

[3] KDC was doing business as Ohbayashi-Gumi, Ltd. *Id.* at 501, 777 P.2d at 1183.

[4] *Id.* at 503, 777 P.2d at 1184.

plywood onto the framed roof of a building, using a c-clamp.[5] The c-clamp was part of the terminal rigging of the crane; it was attached to the crane's cable by the loop of a rope.[6] When the carpenters doing work on the roof were ready, a worker on the ground would place a single sheet of plywood within the jaws of the c-clamp, then tighten the c-clamp's bolt.[7] The crane would raise the plywood sheet to workers on the roof, who would remove the plywood sheet and tighten the c-clamp's bolt all the way down.[8] The crane would then swing the clamp back to the ground.[9]

Either through Gampon's negligence, a defect in the c-clamp, or the negligence of the employee who had been directing Gampon's operation of the crane, Makaneole, who was working on the roof close to where the plywood sheet had just been delivered, was struck on the head by the c-clamp.[10]

Makaneole sued Gampon, KDC, Norman's, and Sheraton.[11] Dillingham intervened as plaintiff-intervenor in the action to recoup attorney's fees and workers' compensation benefits paid to Makaneole.[12] Default judgment was entered against Norman's,[13] and summary judgment was entered in favor of Sheraton.[14] At trial, after the presentation of the plaintiff's case, directed verdicts were entered by Hawaii Fifth Circuit Judge Kei Hirano in favor of defendants Gampon and KDC.[15] Both Makaneole and Dillingham appealed the directed verdicts and the appeals were consolidated.[16]

On appeal, the Hawaii Intermediate Court of Appeals (ICA) reversed both directed verdicts. The ICA held: 1) that a premises owner who hires an independent contractor to do work on the premises is directly liable for injuries to the contractor's employees where the owner exercised complete discretion and control over the independent contractor's manner of doing the work; but 2) that an owner should not be held vicariously liable where the negligence of an independent contractor caused injuries to employees because such employees would receive sufficient compensation from workers' compensation benefits.[17] The ICA reasoned that if the owner were held vicariously liable, it would be, in effect, paying twice for the employee's injury: once by having the cost of workers'

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[5] *Id.*
[6] Makaneole v. Gampon, 7 Haw. App. at ____, 776 P.2d at 405.
[7] *Id.*
[8] *Id.* at ____, 776 P.2d at 405-06.
[9] *Id.* at ____, 776 P.2d at 406.
[10] *Id.*
[11] *Id.* at ____, 776 P.2d at 404-05.
[12] *Id.* at ____, 776 P.2d at 405 n.1.
[13] *Id.*
[14] *Id.*
[15] *Id.* at ____, 776 P.2d at 404-05.
[16] *Id.* at ____, 776 P.2d at 405 n.1.
[17] *Id.* at ____, 776 P.2d at 408, 410.

compensation passed on to the owner as a consumer of the contractor's services, and again through vicarious liability.[18]

Both KDC and Makaneole filed applications for writs of certiorari, which the Hawaii Supreme Court granted.[19]

III. HISTORICAL BACKGROUND

The decision of the Hawaii Supreme Court in *Makaneole* encompassed three major concepts: 1) the traditional idea of non-liability for the acts of an independent contractor, 2) the concept of vicarious liability as set forth in the Restatement (Second) of Torts and 3) the concept of workers' compensation and tort liability as envisioned by the Hawaii legislature. It is necessary to have a basic knowledge of these concepts to understand the potential controversy surrounding the Hawaii Supreme Court's *Makaneole* decision.

A. Non-liability for Acts of an Independent Contractor

The traditional rule in Anglo-American legal systems is that an employer is not liable for the torts of an independent contractor. The theory is that the employer lacks the requisite degree of control over the contractor's work to be held responsible for it.[20]

B. Vicarious Liability under the Restatement

An exception to the traditional rule of non-liability has been recognized by many jurisdictions and by the Restatement (Second) of Torts for situations where the contractor's work involves a special risk of physical harm to individuals.[21] The gist of the "special risk" exception, stated in sections 416 and 427,[22]

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[18] *Id.* at _____, 776 P.2d at 410.

[19] 70 Haw. at 501, 777 P.2d at 1183-84.

[20] Prosser stated:

> [S]ince the employer has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it.

W. P. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS § 71 at 509 (5th ed. 1984) (footnotes omitted) [hereinafter PROSSER].

[21] Annotation, *Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor*, 34 A.L.R. 4th 914 (1984); PROSSER, *supra* note 20, § 71; RESTATEMENT (SECOND) OF TORTS §§ 416, 427 (1965).

[22] § 416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recog-

is that a person who hires an independent contractor to do work which the employer knows or should know is likely to involve a special risk of physical harm to others is subject to liability for any harm which is caused by the contractor's failure to exercise reasonable care.

The commentary to section 416 notes that sections 416 and 427 are closely related. The difference between the two is that section 416 is applicable where there is a need for a specific precaution, such as a railing around an excavation, while section 427 applies where there are a number of possible hazards, such as those involved in a blasting operation or in using a scaffold to paint a house.[23] Both sections, however, stand for the proposition that a premises owner cannot shirk liability that arises from an inherently dangerous situation by delegating his responsibility for safety through a contract to an independent contractor.[24]

This was explained in Prosser as follows:

> [T]he employer's enterprise, and his relation to the plaintiff, are such as to impose upon him a duty which cannot be delegated to the contractor. It has been maintained earlier that there are numerous situations in which it may be negligence to rely upon another person, and the defendant is not thereby relieved of the obligation of taking reasonable precautions himself. But the cases of "non-delegable duty" go further, and hold the employer liable for the negligence of the contractor, although he has himself done everything that could be reasonably required of him. They are thus cases of vicarious liability
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> . . . . .
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> It is difficult to suggest any criterion by which the non-delegable character of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another.[25]

So many jurisdictions have adopted the reasoning of the Restatement that,

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nize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions even though the employer has provided for such precautions in the contract or otherwise.

§ 427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

RESTATEMENT (SECOND) OF TORTS §§ 416, 427 (1965).

[23] RESTATEMENT (SECOND) OF TORTS § 416 comment a (1965). *See also* PROSSER, *supra* note 20, § 71, at 513.

[24] PROSSER, *supra* note 20, § 71, at 512.

[25] *Id.* § 71, at 511-512 (footnotes omitted).

according to Prosser, the general rule has been swallowed up by the exception.[26]

The major criticism of the "special risk" exception is that vicarious liability is usually applied only when the injury results to a bystander unconnected with the work being done by the contractor or on the site, rather than to an employee.[27]

Based on this criticism, many jurisdictions that still follow the "general rule" of non-liability for the acts of an independent contractor have refused to apply the Restatement's "special risk" exception when the injured party is an employee of the contractor.[28] These decisions point out that in the case of an innocent bystander, the concern is the possible lack of a solvent tortfeasor to compensate the injured party.[29] Therefore, if the contractor is insolvent, it is fair to hold the premises owner liable.[30] On the other hand, in the case of an employee, there are statutory provisions to provide the injured party with workers' compensation benefits, even if his employer is insolvent.[31]

In its decision in *Makaneole*, the ICA found this argument convincing. It decided to follow the rule set out by the Wyoming court in *Jones v. Chevron U.S.A.*[32] The *Jones* court noted that: 1) the owner was already financially responsible for the injured employee because the independent contractor would pass along the cost of workers' compensation to the owner; and in any case, 2) the owner is still directly liable for any negligence if he retains and exercises control of the contractor's work.[33] *Jones* thus refused to apply vicarious liability to a premises owner for the negligence of an independent contractor where the inju-

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[26] *Id.* § 71, at 509-510.

[27] Annotation, *Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor*, 34 A.L.R. 4th 914 at § 5 (1984); Tauscher v. Puget Sound Power & Light Co., 96 Wash. 2d 274, 635 P.2d 426 (1981) *cited in Makaneole*, 7 Haw. App. ____, 776 P.2d 402, 410 (1989).

The illustrations to sections 416 and 427 support this conclusion, citing instances involving passing motorists and pedestrians. RESTATEMENT (SECOND) OF TORTS § 416 comment c, illustrations 1 to 2 (1965); *Id.* comment e, illustration 3; *Id.* comment f, illustration 4. *Id.* at § 427 comment d, illustrations 1 to 6.

[28] *E.g.*, Jones v. Chevron U.S.A., 718 P.2d 890, 899 (Wyo. 1986), *cited in Makaneole*, 7 Haw. App. at ____], 776 P.2d at 410.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] 718 P.2d 890 (Wyo. 1986).

[33] *Id.* at 899. (This line of thought is hereinafter referred to as the "*Jones* reasoning" or "*Jones* point of view" or "*Jones* rationale.") The idea that a premises owner is directly or individually liable for any negligence if he retains and exercises sufficient control over the contractor's work is discussed more fully in the ICA opinion in *Makaneole*, 7 Haw. App. ____, 776 P.2d 404 (1989). According to this doctrine, the premises owner is directly liable because his own actions have in part contributed to the conditions within which the injury arose.

ries were suffered by the contractor's employee.[34]

Critics of the *Jones* point of view note that its rationale was rejected by the drafters of the Restatement (Second) of Torts.[35] The drafters of the Restatement contemplated but rejected a special note that stated:

> The other class of plaintiffs not included in this Chapter consists of the employees of the independent contractor. As the common law developed, the defendant who hired the contractor was under no obligation to the servants of the contractor, and it was the contractor who was responsible for safety. The one exception which developed was that the servants of the contractor doing work upon the defendant's land were treated as invitees of the defendant, to whom he owed a duty of reasonable care to see that the premises were safe. This is still true. See § 343. In other respects, however, it is still largely true that the defendant has no responsibility to the contractor's servants. One reason why such responsibility has not developed has been that the workman's recovery is now, with relatively few exceptions, regulated by workmen's compensation acts, the theory of which is that the insurance out of which the compensation is to be paid is to be carried by the workman's own employer, and of course premiums are to be calculated on that basis. While workmen's compensation acts not infrequently provide for third-party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.[36]

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[34] 718 P.2d 890, 899 (Wyo. 1986). Cases that have found the owner not liable despite the existence of an inherently dangerous situation or a specific risk have followed three distinct theories, often citing a combination in their rulings:

a. The injured employee is not a member of the class sought to be protected by the "inherently dangerous" rule. Section 416 speaks of a "peculiar risk of harm to *others*" and § 427 talks of "work involving a special danger to *others*." These cases usually note, as *Jones* did, that the "others" referred to in the rule meant innocent bystanders or the general public, not the employee. Annotation, *Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor*, 34 A.L.R. 4th 914 at § 5 (1984).

b. The injured employee is entitled to worker's compensation benefits only since they are provided by the owner directly as part of the contract with the independent contractor, statutorily as a "responsible party," or indirectly, through the cost of the contractor's services. These cases sometimes note that if vicarious liability were imposed, the use of independent contractors would be discouraged because the owner would be subject to more liability than he would have if he had his own employees do the job. *Id.* at § 6.

c. The injured employee assumed the risks involved in the job by accepting the employment. This theory is related to the rationale stated in paragraph a above, in that the innocent bystander or member of the general public would be "unaware of any danger until it struck," whereas the injured employee had knowledge of the risks inherent in the job. *Id.* at § 7.

[35] Peone v. Regulus Stud Mills, Inc., 113 Idaho 374, 384-85, 744 P.2d 102, 112-13 (1987) (Bistline, J. dissenting).

[36] *Id.* at 384, 774 P.2d at 112 (1987) (Bistline, J., dissenting) (quoting RESTATEMENT (SEC-

According to Dean Prosser, the reason why the note was not adopted was that the workers' compensation laws of each state varied widely from each other and therefore "it appears undesirable, if not impossible, to state . . . [any single rule] about what the liability is to the employees of an independent contractor."[37] The United States Circuit Court of Appeals for the District of Columbia similarly refused to follow the reasoning of the draft, noting: "The question is not who may ultimately bear the costs [of workmen's compensation], but rather who does the law require to bear the costs."[38] And it was for precisely this reason, that the Hawaii Workers' Compensation Act specifically designates which party must bear the cost of workmen's compensation, that the Hawaii Supreme Court in *Makaneole* reversed the ICA ruling.

C. *Workers' Compensation and Tort Law in Hawaii*

The purpose of the workers' compensation law in Hawaii is:

> [T]o charge against the industry the pecuniary losses arising from disabling or fatal personal injury, regardless of negligence by the employee or lack of negligence by the employer, instead of permitting the entire risk to be assumed by the individuals immediately affected. It is based on the obligation of industry to recognize accidental injury and death arising out of employment as one of the costs of production.[39]

The Hawaii Supreme Court opinion in *Makaneole* found that the vicarious liability of a premises owner for injuries sustained by a contractor's employee depends upon whether the premises owner is immunized as an employer from tort liability by the provisions of the Hawaii Workers' Compensation Act (HWCA).[40] This is because Hawaii Revised Statutes section 386-5,[41] known as

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OND) OF TORTS, ch. 15, special note 17-18 (Tent. Draft No. 7, 1962)).

[37] 39 ALI Proceedings 246 (1963), *quoted in Peone*, 113 Idaho at 385, 744 P.2d at 113 (Bistline, J., dissenting).

[38] 113 Idaho at 385, 344 P.2d at 113, (quoting Lindler v. District of Columbia, 502 F.2d 495, 499 (D.C. Cir. 1974)).

[39] Kamanu *ex rel* Kamanu v. E.E. Black, Ltd., 41 Haw. 442, 443 (1956).

[40] The Hawaii Workers' Compensation Act was enacted in 1915, after similar measures had been rejected by two prior legislatures. S. STAND. COMM. REP. NO. 120, 1915 HAW. LEG. SESS., SENATE J. 387.

The HWCA gave employees who suffered personal injuries sustained in the course of their employment set amounts of compensation, according to the nature of the injury. "If a workman receives personal injury by accident arising out of and in the course of such employment, his employer or the insurance carrier shall pay compensation in the amounts and to the person or persons hereinafter specified." Act of Apr. 28, 1915, No. 221, § 1, 1915 Haw. Sess. Laws 323.

The Hawaii legislature based the HWCA on a bill recommended by the Committee on Uni-

the "exclusivity clause," bars an injured employee who has already collected workers' compensation benefits from his employer for a particular injury from suing the employer in tort for the same injury, while Hawaii Revised Statutes section 386-8 preserves the employee's right to sue any party other than his benefit-paying employer in tort to recover for his injuries. If an injured employee is allowed to recover from a third party, the benefit-paying employer, in turn, can seek reimbursement from the employee's judgment or settlement proceeds. The employer is entitled to the workers' compensation benefits that it has paid to the employee, less the employer's imputed share of reasonable litigation expenses and attorney's fees.[42]

The issue in *Makaneole* was whether under the HWCA, the premises owner, KDC, was an "employer," and thus protected by the exclusivity clause, or

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formity of Legislation, making few changes except for the amount of compensation to be paid for each injury. S. STAND. COMM. REP. NO. 120, 1915 HAW. LEG. SESS., SENATE J. 387.

The Senate Judiciary Committee noted that by 1915, workmen's compensation had "been tried enough to prove its value, and the Committee can without hesitation recommend the passage of a law on this subject." *Id.*

[41] Section 386-5 states:

> The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury.

HAW. REV. STAT. § 386-5 (1985).

The effect of § 386-5 is to immunize the employer of the injured worker from tort liability in exchange for providing worker's compensation benefits to the worker under the HWCA. Therefore, pursuant to the HWCA, the only remedy that a worker and his family have against an employer for injuries sustained on the job is the statutory compensation provided by the act.

[42] Section 386-8 states in pertinent part:

> When a work injury for which compensation is payable under this chapter has been sustained under circumstances creating in some person other than the employer or another employee of the employer acting in the course of his employment a legal liability to pay damages on account thereof; the injured employee or his dependents (hereinafter referred to collectively as the employee) may claim compensation under this chapter and recover damages from such third person.
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> . . . .
>
> If the action is prosecuted by the employee alone, the employee shall be entitled to apply out of the amount of the judgment for damages, or settlement in case the action is compromised before judgment, the reasonable litigation expenses incurred in preparation and prosecution of such action, together with a reasonable attorney's fee which shall be based solely upon the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer. After the payment of such expenses and attorney's fee there shall be applied out of the amount of the judgment or settlement proceeds, the amount of the employer's expenditure for compensation, less his share of such expenses and attorney's fee . . . .

HAW. REV. STAT. § 386-8 (1985).

whether it was a "third party," and so subject to suit. The ICA, following the *Jones* rationale, said KDC was a protected "employer." The Hawaii Supreme Court disagreed, holding that under the HWCA, KDC was a "third party," subject to suit.

The confusion in *Makaneole* stemmed from the problem that premises owners had been included under the statutory definition of "employer" within the statute.[43]

In 1963, the legislature substantially revised the HWCA. When the changes were complete, there was a new definition of "employer" that did not include the premises owner.[44] In fact, the premises owner is not mentioned in the new HWCA.

As the Hawaii Supreme Court explained in a series of decisions ending in *Makaneole*,[45] the result was to make the shield of the exclusivity provision available only to the party who actually paid the injured employee's workers' compensation premiums. According to the new definition of "employee," in a situation involving the injured employee of a subcontractor, the shielded party can only be the direct employer, that is, the subcontractor or the independent contractor who hired the subcontractor.[46] In *Fonseca v. Pacific Construction Co.*[47]

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[43] When the HWCA was first enacted, the term "employer" was defined as follows:

> 'Employer' unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed.

Act of Apr. 28, 1915, No. 221, § 60(a), 1915 Haw. Sess. Laws 347. The identical language existed until the amendment of the section in 1963.

[44] The new definition of "employer" enacted in the 1963 legislation read:

> 'Employer' means any person having one or more persons in his employment. It includes the legal representative of a deceased employer and the State, any county or political subdivision of the State, and any other public entity within the State.
>
> The insurer of an employer is subject to such employer's liabilities and entitled to his rights and remedies under this chapter as far as applicable.

Act of May 31, 1963, No. 116, § 97-1, 1963 Haw. Sess. Laws 104.

[45] Lawrence v. Yamauchi, 50 Haw. 293, 439 P.2d 669 (1968); Evanson v. Univ. of Hawaii, 52 Haw. 595, 483 P.2d 187 (1971); Fonseca v. Pac. Constr. Co., 54 Haw. 578, 513 P.2d 156 (1973).

[46] The 1963 amendment dealt with the employer's status only as it affected responsibility for providing workers' compensation insurance.

> Whenever an independent contractor undertakes to perform work for another person pursuant to contract, express or implied, oral or written, such independent contractor shall be deemed the employer of all employees performing work in the execution of the contract, including employees of his subcontractors and their subcontractors. However, the liability of the direct employer of an employee who suffers a work injury shall be primary and that of the others secondary in their order. An employer secondarily liable who satisfies a liabil-

the court noted that where a party has given nothing in the form of workers' compensation benefits, it cannot expect complete immunity in return.[48] The court described it as a "quid pro quo."[49] Citing Professor Allan McCoid's article on third-party liability,[50] the court explained why third-party suits should still be allowed despite the availability of workers' compensation. Professor McCoid stated that "a basic premise of tort law is to give adequate protection to persons injured through the unreasonable conduct of others . . . . The compensation acts were not intended to and never had granted complete protection to injured workers . . . ."[51] Workers' compensation acts, McCoid noted, do not destroy or affect the rights or liabilities of parties outside of the employer-employee relationship. Third parties will not share any of the burden of the worker's injury, nor the worker receive full compensation for his injury unless third-party actions are allowed.[52]

The 1963 revision made the independent contractor responsible for paying the workers' compensation premiums for a subcontractor's employees when a subcontractor failed to procure workers' compensation coverage.[53] This is what the revised HWCA referred to as "secondary liability."[54] The *Fonseca* court held that unless the independent contractor was put in the position of having to pay for the coverage of a subcontractor's employees because the subcontractor had failed to obtain workers' compensation insurance, there was no quid pro quo, and thus the independent contractor could still be sued as a third party under section 386-8.[55] The *Fonseca* majority addressed only the situation of the independent contractor and the subcontractor. Justice Marumoto in his dissent, which was relied upon heavily by the court in *Makaneole*, pointed out that the premises owner, likewise, was not included within the shielded group.[56] According to Justice Marumoto, this was because the legislature purposely left the premises owner out of the definition of parties who were required to provide workers' compensation coverage.[57]

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ity under this chapter shall be entitled to indemnity against loss from the employer primarily liable.

Act of May 31, 1963, No. 116, § 97-1, 1963 Haw. Sess. Laws 103.

[47] 54 Haw. 578, 513 P.2d 156 (1973).

[48] *Id.* at 584, 513 P.2d at 160.

[49] *Id.* at 583-86, 513 P.2d at 159-161.

[50] McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEX. L. REV. 389 (1959).

[51] *Id.* at 445, *quoted in Fonseca*, 54 Haw at 584, 513 P.2d at 160.

[52] *Id.*

[53] Act of May 31, 1963, No. 116, § 97-1, 1963 Haw. Sess. Laws 103.

[54] *Id.*

[55] 54 Haw. at 585, 513 P.2d at 160.

[56] *Id.* at 593-94, 513 P.2d at 164-65 (Marumoto, J., dissenting).

[57] *Id.* at 593, 513 P.2d at 165 (Marumoto, J. dissenting).

It is interesting to note that Justice Marumoto believed, contrary to the majority's reasoning in *Fonseca*, that the independent contractor should always be shielded from third-party suits because its secondary liability made it a "statutory employer," that is, for the purposes of the statute, it would always be the injured employee's employer. Marumoto didn't think an explicit quid pro quo was necessary. Rather, he felt that just the potential for having to pay for the workers' compensation insurance was enough to qualify the independent contractor for immunity from suit.[58]

IV. ANALYSIS OF MAKANEOLE

The Hawaii Supreme Court held in *Makaneole* that a premises owner who hires an independent contractor to do work on the premises is vicariously liable for the negligence of the independent contractor and/or the independent contractor's employees, when the injury caused by the negligence arose from dangers which the owner contemplated or should have contemplated at the time the independent contractor was hired.[59]

A. Makaneole is Consistent with the General Trend.

The *Makaneole* decision indicates that Hawaii is consistent with jurisdictions which follow the Restatement's reasoning and reject the *Jones* rationale on the issue of the vicarious liability of a premises owner.

Professor Stefan Riesenfeld, who conducted the study underlying the 1963 legislative revisions to the HWCA, did a survey of other jurisdictions in 1977 in an attempt to evaluate the consistency of the majority decision in *Fonseca* with the prevailing line of thought among other jurisdictions. At that time, the legislature considered revising the HWCA if Hawaii's law, as interpreted by *Fonseca*, was contrary to the general trend.[60]

Professor Riesenfeld found that the general trend was in line with the *Fonseca* majority's holding,[61] despite contrary forebodings earlier by Professor Larson.[62] Professor Riesenfeld found that: 1) in the major industrial states, the general

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[58] *Id.* at 589, 513 P.2d at 162, (Marumoto, J. dissenting).

[59] 70 Haw. 501, 777 P.2d 1183 (1989).

[60] S. Riesenfeld, *Report on the Re-Examination of the Hawaii State Workers' Compensation System*, June 1977. At that time, Professor Riesenfeld was a professor of law at the University of California.

[61] *Id.* at II-13.

[62] *Id.* (citing Larson, *The Role of Subsequent-Injury Funds in Encouraging Employment of Handicapped Workers*, in 2 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 403).

contractor was not immunized from tort liability to the employees of an insured subcontractor; 2) in states where the contrary had been the rule, the rule was changed by subsequent legislation; and 3) even the federal government, in revising its Longshoremen and Harbor Workers Compensation Act, left untouched the general contractor's liability in tort.[63]

The general rule now, therefore, is that contrary to *Jones* and the rejected Restatement note, contractors are liable for negligence when there is no actual quid pro quo.

In *Colon Nunez v. Horn-Linie*,[64] a case which *Fonseca* credits as turning the tide on contractor liability, the United States Circuit Court of Appeals for the First Circuit dismissed the argument put forth by the *Jones* reasoning—that the premises owner has already paid for the subcontractor's employee's workers' compensation benefits because it is included in the cost of the job, and that therefore the owner should be immunized from suit.

> It is true . . . that the principal contractor does "insure" his subcontractor's workers in the sense that he must ultimately bear the burden of his subcontractor's insurance premiums in the form of higher costs. In this respect, however, the burden on the principal contractor is no different than that on any other Puerto Rican businessman or consumer. Puerto Rico's compensation scheme, unlike many others, applies to every worker engaged in the business of his employer. The expense of insurance under such a pervasive scheme is simply a cost of doing business to be borne by all who participate in Puerto Rico's economy. Thus we conclude that the principal contractor who does not himself assume the reporting obligations and pay the premiums does not insure his subcontractor's employees within the meaning of the Compensation Act.[65]

B. *Makaneole is Consistent with the Legislative History of the Third-party Liability Provision.*

Moreover, contrary to the *Jones* rationale that injured employees should receive workers' compensation benefits or be allowed to sue in tort, the *Fonseca-Makaneole* interpretation that the worker is allowed to sue anyone in tort other than his benefit-paying employer is consistent with the history of section 386-8 of the Hawaii Revised Statutes, the third-party liability provision.

When the Hawaii Workers' Compensation Act was first enacted in 1915,

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[63] *Id.*

[64] 423 F.2d 952 (1st Cir. 1970). The federal district court's interpretation of Puerto Rican law was later rejected by the Puerto Rican Supreme Court in Lugo Sanchez v. Puerto Rico Water Resources Authority, 105 P.R.R. 850 (1977).

[65] 423 F.2d at 955-56 (citations omitted).

the third-party liability provision read:

> When any injury for which compensation is payable under this Act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employee may, at his option, either claim compensation under this Act *or* obtain damages from or proceed at law against such other person to recover damages; and if compensation is claimed and awarded under this Act any employer having paid the compensation or having become liable therefor shall be subrogated to the rights of the injured employee to recover against that person, provided, if the employer shall recover from such other person damages in excess of the compensation already paid or awarded to be paid under this Act, then any such excess shall be paid to the injured employee less the employer's expenses and costs of action.[66]

In 1951, the section was amended to allow the employee to recover workers' compensation *and* to sue in tort. The Senate committee report specifically stated:

> Under the provisions of Section 4409 as it has been construed by our Supreme Court, when an employee has sustained injuries while working, for which he is entitled to compensation from his employer, but which injuries have been caused by a third person who would likewise be liable to him for damages under common law, the injured employee must elect whether to claim compensation or claim his damages, and if he claims one, he loses the other. This often results in an injustice to the injured employee, and it is not the rule under the federal compensation Act and in many States.
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> Under this Bill, the injured employee would have a right to proceed against the third person and also claim his benefits under the Workmen's Compensation Act without waiving his rights to either.[67]

As the *Fonseca* court noted: "There is no evidence that the legislature ever intended to make workmen's compensation benefits representative of full monetary recovery in the absence of essential prerequisites for coverage."[68]

C. Makaneole Fails to State Why a Premises Owner in Hawaii Should be

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[66] Act of Apr. 28, 1915, No. 221, § 5, 1915 Haw. Sess. Laws 323-35 (emphasis added).

[67] S. STAND. COMM. REP. NO. 195, 1951 HAW. LEG. SESS., SENATE J. 588-89.

[68] 54 Haw. at 585, 513 P.2d at 160.

Vicariously Liable for the Acts of His Independent Contractor.

1. The Hawaii Supreme Court's approach.

The Hawaii Supreme Court's opinion in *Makaneole* pointed out that the parties, as well as the ICA, had failed to recognize that before the issue of whether the premises owner should be liable is ever reached, the issue of whether the premises owner can be liable must be addressed first.[69] In doing this however, the Hawaii Supreme Court answered the "can" question, but never got to the "should" question; that is, the reason why, in light of the 1963 revision, the premises owner should be liable.

The answer to the "should" question is important because the foundation for the *Makaneole* holding is far from stable. *Makaneole* is supported by the negative explanation of what was not left in the statute—the premises owner as a statutory employer. *Fonseca*, similarly, is hardly a firm basis upon which to impose vicarious liability on a premises owner. Although Justice Marumoto's opinion interpreted the 1963 amendment, it was stated in the *dissenting* opinion. The case itself did not even present the issue of the premises owner's liability but only concerned a non-benefit-paying contractor's liability. Moreover, in what could possibly be inconsistent with the reasoning in *Makaneole*, Justice Marumoto insisted that a non-benefit-paying contractor should still receive immunity under section 386-8.[70]

Before the 1963 revision, the Hawaii Supreme Court had on many occasions explained why the premises owner *should not* be liable in tort, but rather should be made to provide workers' compensation coverage via the status of a statutory employer.[71]

Since the revision, the court has dealt only with the division of liability between the independent contractor and the subcontractor. *Makaneole* is the first decision since the revision to address the role of the premises owner.

The post-1963 legislative history of the pertinent provisions is silent on the matter. The most that one could observe by the change in the language of the statute, as Justice Marumoto did in his *Fonseca* dissent and as the court did in *Makaneole*, is that revision removed the premises owner from the statute. The *Makaneole* court, finally faced with the issue of the premises owner's liability for injuries to an employee of a contractor or subcontractor, should have explained why a premises owner should be liable.

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[69] 70 Haw. at 505, 777 P.2d at 1186.

[70] 54 Haw. at 593, 513 P.2d at 165 (Marumoto, J., dissenting).

[71] In re Ichijiro Ikoma, 23 Haw. 291 (1916); Uyeno v. Chun Kim Sut, 31 Haw. 102 (1929); Wright Minors v. City and County of Honolulu, 41 Haw. 603 (1957).

2. Possible theories why a premises owner should be vicariously liable.

a. Safety

The most obvious reason why a premises owner should be vicariously liable for the acts of his contractor is the reason suggested by the Restatement: the particularly dangerous nature of the work which the premises owner has hired the contractor to do and the consequent concern for safety in the work place. This reasoning was used by Justice Bistline of the Idaho court in his dissenting opinion in *Peone v. Regulus Stud Mills.*[72]

As in *Makaneole*, Justice Bistline first discussed whether a logging rights owner could be sued in tort under the Idaho workers' compensation laws.[73] In *Peone*, an employee of a logging contractor was injured by a falling tree.[74] He filed suit against the owner of the logging rights asserting that it had violated the state safety standards for logging.[75]

Justice Bistline noted that the logging rights owner could be sued under the Idaho safety statute pertaining to logging.[76] Bistline pointed out that the duty under the safety statute was much like the non-delegable duty imposed by the Restatement for inherently dangerous work.[77] He therefore reasoned that the logging rights owner could be held vicariously liable for the acts of the logging contractor.[78] Justice Bistline's theory provides a good rationale for holding a premises owner in Hawaii vicariously liable because of an earlier decision of the Hawaii Supreme Court which held that a premises owner has a duty to provide a safe work place to "whomever he requires or permits to perform work on his premises."[79]

In *Michel v. Valdastri, Inc.*,[80] the Hawaii Supreme Court noted that a premises owner's duty to provide a safe work place had traditionally existed in Hawaii by common law and currently is reaffirmed by Chapter 396 of the Hawaii Revised Statutes, the Occupational Safety and Health Law. Moreover, the court noted that this duty, unlike the obligations under the workers' compensation law, is not dependent upon an employer-employee relationship, but runs to "whomever he requires or permits to perform work on his premises."[81]

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[72] 113 Idaho 374, 744 P.2d 102 (1987).
[73] *Id.* at 385, 744 P.2d at 113.
[74] *Id.* at 375, 744 P.2d at 103.
[75] *Id.* at 380, 744 P.2d at 108.
[76] *Id.* at 385-87, 744 P.2d at 113-15.
[77] *Id.* at 387, 744 P.2d at 115.
[78] *Id.*
[79] Michel v. Valdastri, Ltd., 59 Haw. 53, 57, 757 P.2d 1299, 1302 (1978).
[80] 59 Haw. 53, 757 P.2d 1299 (1978).
[81] *Id.* at 57, 757 P.2d at 1302.

In light of *Michel* and the Hawaii Occupational Safety and Health Law, the result of leaving the premises owner without the protection of the exclusivity clause is justified. When compared to the pre-1963 holdings of the court,[82] whereby the premises owner was immune from suit and the severely injured employee was allowed to recover only the limited sums provided by workers' compensation benefits, the result is understandable.

However, when the court fails to explain why the harsh effects of vicarious liability should fall upon a premises owner because of a less than clear legislative deletion, the *Makaneole* ruling, when viewed from a *Jones*-type perspective, seems like a cold, counterproductive blow to business activity.

b. Enterprise liability

Another possible explanation for imposing vicarious liability upon a premises owner could be the failure of the theory of "enterprise liability," as explained by Professor McCoid.[83] Professor McCoid states that the failure of enterprise liability system is one of the reasons tort suits should be allowed in addition to workers' compensation.[84] Professor McCoid's theory is therefore consistent with the *Makaneole-Fonseca* explanation for why the premises owner, because of the lack of quid pro quo, is still liable.

According to McCoid, under the system of enterprise liability, it is fair to make the "enterprise" assume the cost of a worker's injuries because the enterprise benefits from the worker's labor, and the enterprise can best spread the cost of injury as one of the costs of production.[85] McCoid points out, however, that "[w]hile many industrial or commercial accidents are typical of the enterprise in which the worker is employed, it is not always true that accidents which occur through the intervention of someone outside the employment relation should be classified as 'typical' or inherent risks of the enterprise."[86] Logically, therefore, in such a third-person situation, it is not fair to have the enterprise pay for the injury.

This is consistent with how the provisions of the HWCA work. When a worker files suit against a third party under section 386-8 of the Hawaii Revised Statutes, the benefit-paying employer is subrogated for any benefits that have been paid out to the worker. This way the law determines who should

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[82] In re Ichijiro Ikoma, 23 Haw. 291 (1916) (lost an eye); Uyeno v. Chun Kim Sut, 31 Haw. 102 (1929) (injuries from an explosion); Wright Minors v. City and County of Honolulu, 41 Haw. 603 (1957) (death).

[83] McCoid, *supra* note 50, at 396-403.

[84] *Id.*

[85] *Id.* at 397-98.

[86] *Id.* at 398.

bear the cost. In the case of a premises owner that has not directly provided workers' compensation benefits and therefore is not part of the "enterprise," it is fair to leave the premises owner exposed to tort liability.

IV. IMPACT

The message of *Makaneole* is that a premises owner is vicariously liable for the negligent acts of his independent contractors. Without an explanation, however, it is difficult to understand why that should be the rule in Hawaii.

In 1963, the legislature did not explicitly state that the premises owner is vicariously liable for the negligence of its subcontractors and/or the subcontractors' employees. The legislature simply omitted premises owner and the statutory employer language from the HWCA. The decision that the premises owner is vicariously liable is the interpretation of the Hawaii Supreme Court in *Makaneole*. The court in *Makaneole* looks to the *dissenting* opinion in *Fonseca* to support this position. *Fonseca*, however, dealt with an entirely different issue, and one which is directly addressed by the 1963 revision—the immunity of a contractor who has not provided workers' compensation benefits. The court in *Makaneole* made the interpretive leap that the premises owner is vicariously liable based upon a void left by the 1963 revision and a dissenting opinion. The harsh end result—the imposition of *vicarious* liability—deserves more of an explanation.

Implied in the *Makaneole* court's action is that all this already existed in the statute and was the intent of the legislature. If clear vicarious liability has always been the rule in Hawaii, and it only needed to be brought up to refresh everyone's memory, then perhaps the *Makaneole* ruling is fair. Looking at the ICA's holding, the rule of vicarious liability does not seem to be all that apparent.

The ruling in *Makaneole* may have repercussions in the construction industry such as rising costs and increased insurance premiums. As it is now posed by *Makaneole*, the premises owner does nothing but hire the contractor, and the owner becomes exposed to liability. If the Court wishes to turn the liability of premises owners in a construction context into traditional premises liability, perhaps this new doctrine should be limited by the same defenses such as notice, obvious dangers, and reasonable care under the circumstances.[87] If the court, however, has just reaffirmed its position on work place safety, as first stated in *Michel*, and as reflected in the Hawaii safety statutes, perhaps the construction industry is already coping with this problem through safety procedures and the costs of such procedures. By not indicating the reason for its holding, the Hawaii Supreme Court has left unanswered the question of whether this is a new

[87] PROSSER, *supra* note 20, at §§ 58-64.

problem or an old problem which is already being addressed.

V. CONCLUSION

The impact and meaning of the *Makaneole* ruling is far from clear. The construction industry may be left with a new duty and a new responsibility. On the other hand, the court may just have reaffirmed an old duty that the industry is already handling on a day to day basis. The court by its silence, has left the implications of its holding in a state of confusion. Further decisions or future legislative action will be necessary to resolve this quandary.

Linda Harada-Stone

Sandy Beach Defense Fund v. City and County of Honolulu: The Sufficiency of Legislative Hearings in an Administrative Setting

I. INTRODUCTION

In *Sandy Beach Defense Fund, et. al. v. The City and County of Honolulu and Kaiser Development, et. al.*,[1] the Hawaii Supreme Court ruled that the Honolulu City Council (City Council), acting as the special management area (SMA) use permit granting authority[2] under the Hawaii Coastal Zone Management Act (HCZMA),[3] was exempt from the contested case hearing[4] requirements of the Hawaii Administrative Procedures Act (HAPA).[5] The court found (1) that HAPA exempted the City Council from its requirements, (2) that the HCZMA did not require the City Council as the City and County of Honolulu's (City) SMA use permit granting authority to hold contested case hearings, (3) that the City Council's permit procedures did not violate due process, and (4) that the City's permit procedures did not violate the participants' rights to equal protection.

This recent development will concentrate primarily on three areas of the court's decision: HAPA, the HCZMA, and due process. Part II summarizes the relevant facts of the case; Part III reviews statutory and case law background;

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[1] 70 Haw. 361, 773 P.2d 250 (1989) [hereinafter *Sandy Beach*].

[2] *See infra* notes 72-81 and accompanying text.

[3] HAW. REV. STAT. ch. 205A (1985). *See infra* notes 68-103 and accompanying text.

[4] HAW. REV. STAT. § 91-1(5) (1985) defines a contested case as "a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Generally, HAPA's contested case hearing provisions provide for "(1) reasonable notice, (2) the opportunity to present evidence and argument, (3) an agency decision on the record, (4) rules of evidence, including the right of cross-examination, (5) a written decision accompanied by findings of fact and conclusions of law, and (6) a prohibition against ex parte communication." *Sandy Beach*, 70 Hawaii 361, 368 n.5, 773 P.2d 250, 253 n.5 (1989). *See also* HAW. REV. STAT. §§ 91-9 to 91-14 (1985).

[5] HAW. REV. STAT. ch. 91 (1985). HAPA sets forth minimum requirements of process for all state and county administrative agencies that promulgate rules and adjudicate contested cases. *See infra* notes 25-67 and accompanying text.

Part IV analyzes the Hawaii Supreme Court's reasoning; Part V comments on the decision; and Part VI evaluates the decision's impact.

II. FACTS OF THE CASE

On February 3, 1986, Kaiser Development Company (Kaiser) applied for a SMA use permit with the City's Department of Land Utilization (DLU). Kaiser intended to build approximately 211 single-family detached homes in a "cluster" development[6] in Kalama Valley, Hawaii Kai across Kalanianaole Highway from Sandy Beach Park.[7] Part of the development site fell within a special management area that the City Council had designated in 1974[8] and readopted in 1984 pursuant to the HCZMA.[9] On April 1, 1986, the DLU held a public hearing on Kaiser's permit application.[10] Twelve people attended.[11] On April 15, 1986, the Director of Land Utilization transmitted his findings and recommendation of approval[12] to the City Council, which referred the application to

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[6] HONOLULU, HAW., REV. ORDINANCES § 21-2.80 (1983). A cluster development is a type of subdivision development which allows higher than normal densities in certain sections of the development so that other areas of the development can remain as open space. Ultimately, densities on average for the entire development area as a whole meet zoning standards. The classification allows developers to transfer densities within a development subject to certain conditions. *Id.*

[7] Honolulu, Haw., Director's Report, Department of Land Utilization, 85/SMA-94(PR), at 1 (Apr. 15, 1986).

[8] Honolulu, Haw., Ordinance No. 4529 (1974).

[9] Honolulu, Haw., Ordinance No. 84-4 (1984). *See* HONOLULU, HAW., REV. ORDINANCES, ch. 33 (Supp. 1986) for the text portions of these ordinances.

[10] The City and County's current permit procedures require the Department of Land Utilization to receive applications for special management area permits, hold public hearings and issue advisory reports to the City Council. HONOLULU, HAW., REV. ORDINANCES §§ 33-5.1-33-5.5 (Supp. 1986).

[11] *Sandy Beach*, 70 Haw 361, 366, 773 P.2d 250, 254 (1989).

[12] The Director recommended that the City Council approve the permit subject to conditions set forth in the Honolulu, Haw., Director's Report, Department of Land Utilization, 85/SMA-94(PR), at 7-8 (Apr. 15, 1986):

> A. In order to protect views and open space along the scenic coastal highway, the applicant shall provide for additional building setbacks and landscaping of the embankment. A revised site plan and detailed landscaping plan shall be submitted for DLU approval prior to action on the cluster development application; upon approval, these shall be incorporated in the cluster development decision and order.
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> B. Prior to issuance of the building or grading permits, two copies of a reconnaissance report, with subsurface testing data, must be submitted for approval of the Historic Sites Office, Department of Land and Natural Resources. The report shall recommend mitigative actions, as necessary.
>
> C. If, during construction, any previously unidentified sites or remains (such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, pavings, or walls) are encountered, the applicant shall stop work and contact the State DLNR Historic

its Planning and Zoning Committee for consideration. During the following year, the City Council discussed the matter publicly at least ten times.[13]

In response to increasing public concern over imminent development in the Sandy Beach area, the City Council held a public hearing on April 1, 1987. Over 80 people offered written and oral testimony expressing concern about the proposed development's impact on coastal views, preservation of open space, traffic, potential flooding, and sewage treatment.[14] Several of the appellants, residents of the area and community groups, participated in this hearing and in earlier public discussions.[15] After accepting further public testimony on April 15, 1987, the City Council made findings of fact based on DLU's recommendations, and written and oral testimony from the hearings. The City Council subsequently granted Kaiser the SMA use permit subject to a number of conditions which attempted to address the concerns expressed during the hearings.[16]

On May 12, 1987, the appellants[17] filed two complaints in the First Circuit Court of the State of Hawaii challenging the City Council's grant of the SMA use permit.[18] In both complaints, the appellants contended that the City and County of Honolulu failed to provide them with a contested case hearing, i.e., a

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Sites Office at 548-7460 immediately. Work in the immediate area shall be stopped until the office is able to assess the impact and make further recommendations for mitigative activity.

D. Prior to implementation of the projects, the applicant must meet the requirements and obtain approval of all government agencies normally required for such projects.

[13] *Sandy Beach*, 70 Haw. at 366, 773 P.2d at 254.

[14] *Id.*

[15] *Id.*

[16] Honolulu, Haw., Resolution No. 87-65 (1987). The conditions included those in the DLU Director's recommendation, *supra*, note 12. The Council added several more conditions requiring adequate wastewater treatment facilities, additional drainage basins, increased setbacks, increased lot sizes, elimination of nine ocean view lots to increase open space, increased side yard setbacks, increased lot sizes for houses along the highway, decreased height allowances for houses along the highway, construction of an earth berm to soften the appearance of the development, landscaping that used indigenous Hawaiian trees and flora fronting the homes and covering the banks, and architectural design focused on enhancing views from the highway. Honolulu, Haw., Resolution No. 87-65 (1987).

[17] Appellants included individuals and community groups whose members reside in the area or use the shoreline and open space resources near the proposed development: Sandy Beach Defense Fund, Friends of Queen's Beach, Life of the Land, Shirley M. Lum, Phillip I. Estermann, Elizabeth Matthews and Ursula Retherford. *Sandy Beach*, 70 Haw. at 366, 773 P.2d at 254.

[18] Plaintiffs filed two complaints: Civil Nos. 87-1596 and 87-1597. Both complaints dealt with substantially the same issues. One of the complaints sought judicial review based on an administrative appeal pursuant to HAW. REV. STAT. § 91-14(g) (1985) which provides for judicial review of agency decisions in "contested cases." The other complaint sought review under HAW. REV. STAT. § 205A-6 (1985) which accords a person aggrieved by a county agency's failure to comply with the HCZMA a right to initiate a civil action against the non-complying party. *Sandy Beach*, 70 Haw at 367, 773 P.2d at 255.

trial-type adjudicatory hearing,[19] which they alleged was required by HAPA, the HCZMA, due process, and equal protection.[20] Kaiser Development Company and Kaiser Hawaii Kai Development Company (Kaiser) intervened as defendants, and the court consolidated the cases.[21]

The appellants filed a motion for summary judgment, arguing that the HCZMA, Hawaii Revised Statutes section 205A-29(a), required the City Council to hold a contested case hearing in compliance with HAPA.[22] On December 29, 1987, Judge Robert G. Klein denied the motion, finding that the HCZMA did not require a legislative body like the City Council, otherwise exempt from HAPA, to conduct a contested case hearing when processing SMA use permit applications.[23]

On January 29, 1988, Judge Klein granted Kaiser's motion to dismiss based on the argument that the sole issue — whether the law required the City Council to hold contested case hearings when granting SMA use permits — had already been decided when the court denied the appellant's motion for summary judgment.[24] The Sandy Beach Defense Fund and other appellants subsequently appealed to the Hawaii Supreme Court.

III. BACKGROUND

A. Hawaii Administrative Procedure Act (HAPA)

1. HAPA: The Act

In 1961, the state legislature enacted the Hawaii Administrative Procedure Act (HAPA), Hawaii Revised Statutes Chapter 91, "to provide uniform administrative procedures for all state and county boards, commissions, departments or offices which would encompass the procedure of rulemaking and the adjudication of contested cases."[25] The legislature hoped to "resolve[] doubts concerning the preservation and protection of constitutional rights and due pro-

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[19] *See infra* notes 29-30 and accompanying text.

[20] *Sandy Beach*, 70 Haw. at 367, 773 P.2d at 255.

[21] *Id.* at 366, 773 P.2d at 255.

[22] *Id.* at 367, 773 P.2d at 255.

[23] Judge Klein stated, "They're acting as a legislature; they have legislative hearings. People are given notice, they're allowed to show up and be heard, and then the politics decide the issue, whichever way they go." *Id.* at 390, 773 P.2d at 267-68 (Nakamura, J., dissenting) (quoting Transcript of Proceedings, January 7, 1988 before Judge Robert G. Klein, Fourth Judge of the First Circuit Court of the State of Hawaii).

[24] *Id.* at 367-68, 773 P.2d at 255.

[25] H.R. STAND. COMM. REP. NO. 8, 1961 HAW. LEG. SESS., HOUSE J. 653.

cess requirements which a person is entitled to."[26]

HAPA is divided into two sections: The procedures for rulemaking[27] and the procedures for contested case hearings.[28] HAPA defines a "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."[29] HAPA's contested case procedures provide for reasonable notice; hearings; opportunities to present evidence and argument; a formal or documentary record of agency decisions; rules of evidence, including the right to cross examine witnesses; a written decision accompanied by findings of fact and conclusions of law; and a prohibition against ex parte communication.[30] Rulemaking procedures, on the other hand, require an agency to provide notice, consider the public's oral or written comments, and render a decision at a public hearing.[31]

HAPA's rulemaking and contested case hearing requirements apply to all state and county agencies.[32] The statute defines an "agency" as any "state or county board, commission, department or officer authorized by law to make rules or adjudicate contested cases, except those in the *legislative* or judicial branches."[33]

The legislature believed that requiring both state and county agencies to comply with HAPA would "provide for more uniformity of rule making and adjudications of cases . . . ."[34] The legislature, however, exempted legislative bodies such as the Honolulu City Council from HAPA's requirements:

> It is also the intention of your Committee that the definition of agency does not include the state legislature, *city council* and board of supervisors of the state and county governments as well as the various courts including those which by statute the Supreme Court of the State of Hawaii is given rule-making authority over.[35]

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[26] *Id.* at 654.

[27] HAW. REV. STAT. §§ 91-2 to 91-8 (1985). HAW. REV. STAT. § 91-1(4) (1985) of HAPA defines a "rule" as:

> [E]ach agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedure available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

[28] HAW. REV. STAT. §§ 91-9 to 91-15 (1985).

[29] HAW. REV. STAT. § 91-1(5) (1985).

[30] HAW. REV. STAT. §§ 91-9 to 91-14 (1985). *See also Sandy Beach*, 70 Haw. 361, 368 n.5, 773 P.2d 250, 253 n.5 (1989).

[31] HAW. REV. STAT. § 91-3 (1985).

[32] HAW. REV. STAT. § 91-1(1) (1985).

[33] *Id.* (emphasis added).

[34] H.R. STAND. COMM. REP. NO. 8, 1961 HAW. LEG. SESS., HOUSE J. 656.

[35] *Id.* (emphasis added).

2. *HAPA: Case law*

a. The quasi-judicial/legislative distinction

Before *Sandy Beach*, the Hawaii Supreme Court had never directly addressed the issue of whether the City Council's SMA use permit process was quasi-judicial or legislative in character.[36] The court's characterization of the City Council's SMA use permit process as quasi-judicial or legislative would probably determine the type of processes that the court would require the City Council to provide. When a government entity acts in a quasi-judicial fashion, courts generally require that government entity to provide the interested parties with trial-type or evidentiary hearings.[37]

In two earlier cases, the Hawaii Supreme Court defined "legislative," "non-legislative," and "quasi-judicial" acts. In *Life of the Land v. City and County of Honolulu*,[38] the court characterized the City Council's grant of a variance or modification pursuant to an interim development control,[39] as a non-legislative act.[40] The court first noted that the city charter granted the City Council legislative and non-legislative power.[41] The court stated that "[a] *legislative act* prede-

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[36] "Quasi-judicial" is defined as "[a] term applied to the action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action and to exercise discretion of a judicial nature." BLACK'S LAW DICTIONARY 1121 (5th ed. 1979). The United States Supreme Court has characterized quasi-judicial government actions as proceedings designed to adjudicate disputed facts in particular cases. United States v. Florida East Coast Ry. Co., 410 U.S. 224, 245 (1973). "Administrative" is defined as "the execution, application or conduct of persons or things. Particularly, having the character of executive or ministerial action." BLACK'S LAW DICTIONARY 42 (5th ed. 1979) (citations omitted). This article will use the terms "quasi-judicial" and "administrative" in opposition to the word "legislative" which refers to general policy-making rather than the application of law to an individual situation. "Legislative" is defined as "[m]aking or giving laws; pertaining to the function of law-making or to the process of enactment of laws. Actions which relate to subjects of permanent or general character are 'legislative.' Making or having the power to make a law or laws." *Id.* at 810 (citations omitted). *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW, § 5.6 at 210-11 (1984).

[37] B. SCHWARTZ, ADMINISTRATIVE LAW § 5.6 at 210-211 (1984).

[38] 61 Haw. 390, 606 P.2d 866 (1980).

[39] Honolulu, Haw., The Kakaako Special Design District Ordinance, Ordinance No. 80-58 (1980). *See generally* CALLIES, REGULATING PARADISE 67-71 (1984) (discussion of the state Kakaako Community Development District and the Honolulu County Kakaako Special Design District). An interim development control temporarily freezes certain types of development in an area. *Id.* at 36.

[40] *Life of the Land*, 61 Haw. 390, 424, 606 P.2d 866, 887 (1980).

[41] The court quoted the Charter of the City which provided the City Council with the power to make legislative and non-legislative acts: " 'Every legislative act of the council shall be by ordinance' . . . 'Non legislative acts of the council may be by resolution, and except as otherwise provided, no resolution shall have force or effect as law.' " *Id.* at 423, 606 P.2d at 887 (quoting

termines what the law shall be for the regulation of future cases falling under its provisions . . . . A *non-legislative act* executes or administers a law already in existence."[42] The City Council's approval of the variance pursuant to the interim development control, the court concluded, was clearly a non-legislative act since it executed or administered an existing law.[43] Although the court found that the City Council was acting in a non-traditional, non-legislative manner, the court did not address the question of whether the City Council would have had to comply with the contested case hearing procedures set forth in HAPA.

In *Town v. Land Use Commission*,[44] an adjacent landowner objected to a proposed zoning boundary amendment from an agricultural to a rural designation. The court held that the adjacent landowner had a property interest that entitled him to a contested case hearing in compliance with HAPA.[45] The court characterized the state Land Use Commission's boundary amendment process as "quasi-judicial" because it "is adjudicative of legal rights or property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature."[46] The court found that the boundary amendment proceedings were contested cases as defined by HAPA.[47] According to the court, the adjacent landowner had a property interest in the general plan amendment process.[48] The court cited two cases to support this proposition — *Dalton v. City and County of Honolulu*[49] and *East Diamond Head Association v. Land Board*.[50]

Dalton and *East Diamond Head*, however, dealt with issues of standing — whether the plaintiffs, adjacent landowners and residents of the area living across from proposed developments, could file civil suits challenging a government agency's action or decision. In *Dalton*, the court granted standing to individuals who lived across the street from a proposed high rise development to challenge a general plan amendment from a rural/residential zoning designation to an apartment designation.[51] The individuals alleged that the proposed devel-

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HONOLULU, HAW., REVISED CHARTER § 3-201 (1984)).

[42] *Life of the Land*, 61 Haw. at 423-24, 606 P.2d at 887 (emphasis added).

[43] *Id.* at 424, 606 P.2d at 887.

[44] 55 Haw. 538, 524 P.2d 84 (1974) [hereinafter *Town*].

[45] *Id.* at 548, 524 P.2d at 91.

[46] *Id.*

[47] "We are of the opinion that the instant case is a 'contested case' within the definition [of a contested case hearing]." *Id.* HAPA defines a contested case as a "proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HAW. REV. STAT. § 91-1(5) (1985); *see supra* notes 29-30 and accompanying text.

[48] *Town*, 55 Haw. at 548, 524 P.2d at 91.

[49] 51 Haw. 400, 462 P.2d 199 (1969) [hereinafter *Dalton*].

[50] 52 Haw. 518, 479 P.2d 796 (1971) [hereinafter *East Diamond Head*].

[51] 51 Haw. at 402-03, 462 P.2d at 202.

opment, authorized by the general plan amendment, restricted scenic views and increased the density of the population.[52] The court found that these interests were concrete and created a legal relation that justified granting the individuals standing.[53]

In *East Diamond Head*, the court granted standing to a private unincorporated organization of individuals who owned or lived upon land neighboring the subject parcel to challenge a zoning variance.[54] The court stated that in *Dalton*, it had found that an adjacent landowner had "a legal interest worthy of judicial recognition should he seek redress in our courts to preserve the continued enjoyment of his realty by protecting it from threatening neighborhood change."[55] According to the court, the neighborhood association and its individual members asserted the same interests as the adjacent landowners in *Dalton* — the interest in preserving the character of their neighborhood.[56] Consequently, the court granted each individual standing.

By citing *Dalton* and *East Diamond Head* to support the proposition that an adjacent landowner had a property interest in re-zoning, the court in *Town* appeared to suggest that an interest sufficient to satisfy standing, even an aesthetic or neighborhood interest in preventing change, was for the purposes of HAPA, a property interest entitled to the protection of HAPA's contested case hearing procedures.[57] After it found that the adjacent landowner in *Town* had a property interest, the court concluded that the adjacent landowner had a legal right as a specific and interested party and was entitled by law to have a determination of those rights in the general plan amendment process.[58] Thus, the court required that the adjacent landowner be afforded a contested case hearing in compliance with HAPA.[59]

The court's statements in *Life of the Land* and *Town* seem to indicate that the City Council, when granting a SMA use permit pursuant to the HCZMA, acts in a non-legislative, administrative, and quasi-judicial fashion. Courts usu-

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[52] *Id.*

[53] *Id.*

[54] 52 Haw. at 521-22, 479 P.2d at 798.

[55] *Id.*

[56] *Id.*

[57] To attain standing, a person must "be specially, personally and adversely affected . . . . There must be a special injury or damage to one's personal or property rights as distinguished from the role of being only a champion of causes." *Id.* at 522, 479 P.2d at 798 (quoting Hattem v. Silver, 19 Misc. 2d 1091, 190 N.Y.S.2d 752 (Sup. Ct. 1959) which cited Blumberg v. Hill, 119 N.Y.S.2d 855 (Sup. Ct. 1953)).

[58] *Town*, 55 Haw. 538, 548, 524 P.2d 84, 91 (1974). The court parroted the words of HAPA, HAW. REV. STAT. § 91-5 (1985), which defines a contested cases as a "proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

[59] 55 Haw. at 548, 524 P.2d at 91.

ally require a governmental entity acting in a non-legislative, administrative, and quasi-judicial fashion to provide interested parties with adjudicatory or trial type hearings.[60] *Town* also indicated that contested case hearings pursuant to HAPA are required for proceedings that determine legal interests or property rights of an adjoining landowner in a re-zoning action. The City Council, however, is an elected legislative body and expressly exempt from the scope of HAPA's contested case hearing requirements.[61] Before *Sandy Beach*, the court had never addressed the question of whether HAPA's exemption applied when the City Council was acting non-legislatively or quasi-judicially.

b. The scope of the City Council's exemption from HAPA

In *Kailua Community Council v. City and County of Honolulu*,[62] the court broadly interpreted the City Council's exemption from HAPA. The court extended the exemption to administrative or executive agencies that performed some of the council's fact-finding duties and advised the council in making its final decisions.[63] The *Kailua* case involved Honolulu's general plan amendment procedures which required the city's planning department and chief planning officer to submit findings and recommendations regarding each proposed amendment to the City Council for consideration. The City Council, after reviewing the findings, decides whether or not to amend the city's general plan.[64]

Although the planning department and the chief planning officer were executive administrative entities subject to the requirements of HAPA, the court expanded the City Council's exemption from HAPA to include those agencies and officers that advise the City Council and provide the council with information to assist council members in making their final decisions.[65] The court reasoned that the role of the planning department and the chief planning officer in the amendment process was "closely analogous to that of a legislative committee."[66] The court exempted the planning department and the chief planning officer from the contested case hearing requirements of HAPA in the amendment process since "[t]o hold otherwise, would, by indirection, extend the application of HAPA to the actions of the city council which by its terms the Act has excluded from its operation."[67] Thus, the court broadly interpreted HAPA's exemption of the City Council in *Kailua Community Council*, employ-

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[60] B. SCHWARTZ, *supra* note 37, § 5.6, at 210-11.

[61] *See supra* notes 33-35 and accompanying text.

[62] 60 Haw. 428, 591 P.2d 602 (1979).

[63] *Id.* at 433-34, 591 P.2d at 606.

[64] *Id.* at 432-33, 591 P.2d at 605-06.

[65] *Id.* at 433-34, 591 P.2d at 606.

[66] *Id.* at 433, 591 P.2d at 605.

[67] *Id.* at 434, 591 P.2d at 606 (citation omitted).

ing a functional analysis. By using this functional approach, the court expanded the City Council's statutory exemption from HAPA so that administrative agencies performing legislative functions were exempt from HAPA's contested case procedures as well.

B. Hawaii Coastal Zone Management Act (HCZMA)

1. The HCZMA: The Act

The Hawaii State legislature enacted the HCZMA to comply with the Federal Coastal Zone Management Act of 1972 (FCZMA).[68] Through the FCZMA, Congress intended "to preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone"[69] by encouraging the development and implementation of state coastal zone management programs through federal management program development grants.[70] State compliance with the FCZMA is entirely voluntary. States that choose to participate in the program must develop comprehensive coastal management plans pursuant to criteria set forth in the act.[71]

Hawaii is one of many states that chose to participate in the FCZMA program.[72] To comply with the FCZMA, the Hawaii state legislature enacted the HCZMA which sets forth the state's coastal zone management program. The state implements the program by "networking."[73] Under this system, the counties administer the bulk of the program subject to state coordination and control.[74]

The heart of the state coastal zone management program is the protection of special management areas (SMAs). SMAs are areas near the shoreline that require special protection because of unique environmental, ecological, geological, hydrological, recreational and other concerns.[75] Each county designates an "authority" responsible for identifying and mapping SMAs and for granting SMA

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[68] 16 U.S.C. §§ 1451-1464 (1988). The Secretary of Commerce administers the FCZMA through the National Oceanic and Atmospheric Administration's (NOAA) Office of Coastal Zone Management.

[69] 16 U.S.C. § 1452(1) (1988).

[70] 16 U.S.C. § 1454 (1988). *See also* 16 U.S.C. § 1452(2) (1988).

[71] The criteria for state management programs are set forth in 16 U.S.C. § 1454(b) (1988).

[72] Currently, twenty-nine of thirty-five eligible coastal states and territories participate in the program. Lawrence, *Towards a National Coastal Policy*, 17 ENVTL. L. REP. 10404, 10408 (1987).

[73] CALLIES, REGULATING PARADISE 91 (1984).

[74] Mahuiki v. Planning Comm'n, 65 Haw. 506, 517-18, 654 P.2d. 874, 881-82 (1982).

[75] *See* Special Management Area Guidelines, 15 C.F.R. § 923.21(b)(l)(i) (1988). HAW. REV. STAT. § 205A-22(4) (1985) defines SMA as "the land extending inland from the shoreline as delineated on the maps filed with the authority . . . ." *See also* HONOLULU, HAW., REV. ORDINANCES §§ 33-2.1 to 33-2.2 (Supp. 1986).

use permits pursuant to the guidelines set forth in the HCZMA.[76] Anyone who wants to develop[77] in a SMA must obtain a SMA use permit from the county authority.[78] The authority may not approve a SMA use permit unless it finds:

> (1) That the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests . . . .
>
> (2) That the development is consistent with the objectives, policies, and special management area guidelines of this chapter [the HCZMA, Hawaii Revised Statutes Chapter 205A] and any guidelines enacted by the legislature; and
>
> (3) That the development is consistent with the county general plan and zoning . . . .[79]

The HCZMA defines the county "authority" as "the county planning commission, except in counties where the county planning commission is advisory only, in which case 'authority' means the county council or such body as the council may by ordinance designate. The authority may, as appropriate, delegate the responsibility for administering [the SMA use permit process]."[80] The HCZMA also mandates in Hawaii Revised Statutes section 205A-29(a) that the county authority "shall establish and may amend pursuant to chapter 91 [HAPA], by rule or regulation the special management area use permit allocation procedures, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permits shall occur."[81]

Although Hawaii Revised Statutes section 205A-29(a) expressly mandates

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[76] HAW. REV. STAT. §§ 205A-22(2), 205A-27 (1985). *See also* HAW. REV. STAT. §§ 205A-23 to 205A-26 (1985).

[77] HAW. REV. STAT. § 205A-22(3) (1985) of the HCZMA defines "development" broadly:

> (i) The placement or erection of any solid material or any gaseous, liquid, solid or thermal waste;
>
> (ii) Grading, removing, dredging, mining, or extraction of any materials;
>
> (ii) Change in the density or intensity of use of land, including, but not limited to the division or subdivision of land;
>
> (iv) Change in the intensity of use of water, ecology related thereto, or of access thereto; and
>
> (v) Construction, reconstruction, demolition, or alteration of the size of any structure.

HAW. REV. STAT. § 205A-22(3)(B) (1985) lists statutory exemptions from the definition of "development" such as construction of a single family home not part of a larger development, repair and maintenance of roads, certain zoning variances etc.

[78] HAW. REV. STAT. § 205A-28 (1985).

[79] HAW. REV. STAT. § 205A-26(2) (1985). *See also* Mahuiki v. Planning Comm'n, 65 Haw. 506, 654 P.2d 874 (1982) (the county authority must make statutorily required findings before issuing a SMA permit).

[80] HAW. REV. STAT. § 205A-22(2) (1985).

[81] HAW. REV. STAT. § 205A-29(a) (1985).

compliance with HAPA, it is unclear whether it mandates compliance with HAPA's rulemaking provisions, the contested case hearing requirements, or both. Some of the statute's legislative history expresses concern over public participation in the permit process and indicates that the legislature intended to require public hearings and not contested case hearings.[82] The legislature also indicated that it intended to use existing county permitting agencies to implement the HCZMA and to require county agencies to comply with state guidelines.[83] The legislature did not, however, express a clear intention to require the counties to comply with the contested case hearing requirements of HAPA.

In 1979, the legislature amended the HCZMA and found that "present procedures regarding public hearings" were adequate.[84] Each county, however, employed different SMA permit procedures.[85] Thus, it was not clear what procedures the legislature had approved. Nevertheless, the legislature appeared to grant the counties more control and flexibility over the SMA permit process.[86]

The county authority responsible for granting or denying SMA use permits in Honolulu is the city's elected legislative body, the City Council.[87] In contrast, the counties of Kauai, Maui, and Hawaii have delegated the SMA use permit grant-

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[82] S. STAND. COMM. REP. NO. 143, 1975 HAW. LEG. SESS., SENATE J. 917 states:

> Improved means for participation by the public in decisions affecting the coastal zone are necessary and desirable. Although public hearings afford the opportunity for public participation in certain agency decisions, many agency actions on permits affecting the coastal zone may now occur without the requirement for a public hearing. To afford the public an adequate opportunity to participate in all major decision making affecting the coastal zone during the interim until the program is implemented, provision should be made for public hearings on required permits where such hearings would otherwise not be required.

[83] The legislative history states:

> Rather than implement a new permit system to achieve interim control of development in the coastal zone, such control could be achieved expeditiously by requiring existing agencies to adopt guidelines pursuant to policy established by the Legislature. Such guidelines would apply to all agency actions including the granting of permits for actions within the coastal zone.

Id.

[84] In H.R. STAND. COMM. REP. NO. 629, 1979 HAW. LEG. SESS., HOUSE J. 1422, the legislature stated:

> Your Committee heard testimony that present procedures regarding public hearings in connection with SMA permit applications are adequate. Therefore, the bill has been amended to allow the county authorities to determine the conditions under which hearings must be held, instead of requiring hearings in cases where they are requested by any person or agency.

[85] *See infra* note 87-88 and accompanying text.

[86] The prior version of the statute mandated a hearing twenty-one to ninety days after the date of the application filing, and when possible, a hearing held jointly or concurrently with any applicable environmental impact statement hearing. The prior version of the statute also required the county authority to render a decision on the application within thirty days after the conclusion of the hearing. HAW. REV. STAT. §§ 205A-29(b) to 205A-29(c) (1976 replacement).

[87] HONOLULU, HAW., REV. ORDINANCES § 33-1.3(3) (Supp. 1986). *See also* CALLIES, REGULATING PARADISE 93 (1984).

ing function to their respective planning commissions, executive administrative agencies that are subject to the procedural requirements of HAPA.[88] This difference is important because HAPA excludes legislative entities from its scope[89] and because the delegation of the permitting function to a legislative or executive agency may affect whether or not the permit process is subject to initiative and referendum.[90]

In Honolulu, the city's Department of Land Utilization (DLU) handles many of the day to day administrative responsibilities of the SMA use permit process.[91] The DLU processes SMA use permits and submits its findings and recommendations to the City Council.[92] A developer seeking a SMA use permit must file an application along with other information regarding the development with the DLU.[93] The director of the DLU assesses the application and decides whether the proposed development requires a SMA use permit.[94] If the proposed development requires a SMA use permit, the applicant must submit additional information and filing fees to the DLU.[95] The DLU then holds a public hearing or a series of public hearings. Once the public hearings have concluded, the DLU transmits its findings and recommendations to the City Council.[96] The City Council may hold additional hearings and ultimately grants or denies the permit application.[97] No other county agency will grant a prospective developer any other permit if a SMA use permit is pending before the DLU or the City Council.[98]

2. *HCZMA: Case law*

Before *Sandy Beach*, the Hawaii Supreme Court had never addressed the issue of whether the HCZMA required a SMA use permit granting authority to conduct contested case hearings in accordance with HAPA or at the very least, hearings more adjudicatory in nature. In prior cases, the Hawaii Supreme Court found that contested case hearings in accordance with HAPA were appropriate

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[88] MAUI, HAW., CHARTER § 8-8.4(4) (1987); CALLIES, REGULATING PARADISE 93 (1984).

[89] *See supra* notes 32-35 and accompanying text.

[90] Legislative actions are subject to initiative and referendum. Quasi-judicial actions are not. CALLIES, REGULATING PARADISE 39-40 (1984).

[91] HONOLULU, HAW., REV. ORDINANCES §§ 33-1.3(1), 33-3 to 33-5 (Supp. 1986).

[92] *Id.*

[93] *Id.*

[94] *Id.* An applicant may waive this preliminary procedure and proceed directly to the permit process. *Id.* at § 33-3.3(1). The DLU director may issue a SMA minor permit if the development proposal is valued at $65,000 or less or if the director finds that the development proposal will not significantly affect the SMA. *Id.* at § 33-3.3(2)(C)(iii).

[95] *Id.* at § 33-5.1.

[96] *Id.* at § 33-5.4.

[97] *Id.* at §§ 33-1.3(3), 33-5.5.

[98] *Id.* at § 33-6.2.

where the county SMA use permit authority was a county planning commission, as opposed to an elected county council.[99]

In *Chang v. Planning Commission*,[100] the court observed that the Maui County Planning Commission's SMA use permit proceedings were contested case proceedings under HAPA and that "[t]he state Coastal Zone Management Act and corresponding planning commission rules specifically make HRS § 91-9 and planning commission contested case procedures applicable to proceedings on SMA use permit applications in Maui County."[101] Although the court found that SMA use permit proceedings were contested cases within the meaning of HAPA,[102] the court noted in dicta that the HCZMA appeared to require compliance with only the rulemaking provisions of HAPA and was silent on the manner in which SMA use permit hearings were to be conducted.[103]

In sum, the court had required county authorities under the HCZMA to comply with HAPA's contested case hearing procedures prior to *Sandy Beach*, but only where the county authority was the county *planning commission* and not an elected county council. County planning commissions are executive branch agencies that are "agencies" within the scope of HAPA, while county councils are elected legislative bodies and expressly exempt from HAPA's scope. How the court would respond to Honolulu's SMA use permit scheme, in which the Honolulu City Council is the SMA use permit granting authority, was a question of first impression in *Sandy Beach*.

C. Due Process

The appellants in *Sandy Beach* claimed that their rights to procedural due process under both the United States Constitution and the Hawaii Constitution entitled them to a trial-type adjudicatory hearing that the City Council had

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[99] Chang v. Planning Comm'n, 64 Haw. 431, 643 P.2d 55 (1982); Mahuiki v. Planning Comm'n, 65 Haw. 506, 513, 654 P.2d 874, 879 (1982).

[100] 64 Haw. 431, 643 P.2d 55 (1982). The Maui Planning Commission granted a SMA use permit to a developer of a 184 unit condominium project. *Id.* at 433, 643 P.2d at 58. The plaintiff argued that the planning commission had violated various notice provisions of several statutes and had failed to comply with the Hawaii Sunshine Law by closing its final deliberations to the public. *Id.* The court did not find a violation of HAPA, the HCZMA, or Hawaii's Sunshine Law. Although it did find a violation of county charter and planning commission rules, it did not void the SMA use permit in the absence of harm or prejudicial effect to the plaintiff. *Id.* at 444-43, 643 P.2d at 64-65.

[101] *Id.* at 436, 643 P.2d at 60.

[102] *Id.*

[103] The court stated that "HRS § 205A-29(a) refers the county authority to chapter 91 [HAPA] in its promulgation of rules governing SMA use permit hearings but is otherwise silent on the manner in which the hearings must be conducted." *Id.* at 441 n.11, 643 P.2d. at 63 n.11.

failed to provide.[104] The court applied the federal law of due process.

1. *The federal law of due process*

Analysis of federal procedural due process centers on two questions: (1) does a constitutionally cognizable property or liberty interest exist for the purposes of due process, and (2) if such an interest exists, was the process provided sufficient to satisfy the minimum requirements of procedural due process?[105]

a. Goldberg v. Kelly *and the doctrine of statutory entitlement.*

During the early 1970's, the United States Supreme Court significantly widened "the circle of interests sufficient to create 'liberty' or 'property' for the purposes of due process"[106] from the common law and constitutional liberty interests it had recognized in the past.[107] In the landmark case of *Goldberg v. Kelly*,[108] the Court recognized that "[i]t may be realistic today to regard welfare entitlement as more like property than a 'gratuity.' "[109] The Court found in that case that the welfare laws created a statutory entitlement of benefits to persons who met the statute's qualifications.[110] The state could not take this entitlement away from individuals without due process.[111] After considering the extent of the welfare recipient's potential loss and weighing his interest in avoiding that loss against the government's interest in summary adjudication,

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[104] *Sandy Beach*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

[105] Mathews v. Eldridge, 424 U.S. 319 (1976). *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10, at 629-768 (1988).

[106] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-9, at 685 (1988).

[107] *See generally id.* at § 10-8, at 678-685.

[108] 397 U.S. 254 (1970).

[109] *Id.* at 262 n.8. The Court also noted that:

> "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlement now flow from government: subsides to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuitous; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlement, although recognized by public policy, have not been effectively enforced."

Id. (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)). *See also* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[110] Goldberg v. Kelly, 397 U.S. at 262.

[111] *Id.*

the Court found that due process in this case required a pre-termination evidentiary hearing.[112] The pre-termination hearing, the court declared, "need not take the form of a judicial or quasi-judicial trial."[113] The court, nevertheless, required a "minimum of procedural safeguards"[114] which, in the case's context, included "timely and adequate notice detailing the reasons for a proposed termination,"[115] "an effective opportunity to defend by confronting any adverse witnesses,"[116] a chance to orally present his own arguments and evidence,[117] a decision based solely on the legal rules and evidence adduced at the hearing,[118] a decision that stated the reasons for the determination and the evidence relied upon,[119] and an impartial decision maker.[120]

b. Property interests after Goldberg

After *Goldberg*, the Court recognized a variety of interests as entitlement or property interests that were protected by due process. These interests included, for example, a parolee's liberty interest,[121] a prisoner's interest in "good behavior" credits that shortened prison terms sentences,[122] a de facto tenured professor's employment interest,[123] customers' interests in continued utility service,[124] a person's interest in earned wages,[125] a consumer's interest in goods purchased under a conditional sales contract,[126] and a person's interest in continued receipt of Social Security disability benefit payments.[127]

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[112] *Id.* at 262-66. The Court found that welfare recipient's interests were exceptional:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care . . . . [T]ermination of aid pending resolution of a controversy over eligibility . . . may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Id. at 264 (emphasis in original).

[113] *Id.* at 266.

[114] *Id.* at 267.

[115] *Id.* at 267-68.

[116] *Id.* at 268.

[117] *Id.*

[118] *Id.* at 271.

[119] *Id.*

[120] *Id.*

[121] Morrissey v. Brewer, 408 U.S. 471 (1972).

[122] Wolff v. McDonnel, 418 U.S. 539 (1974).

[123] Perry v. Sindermann, 408 U.S. 593 (1972).

[124] Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[125] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[126] Fuentes v. Shevin, 407 U.S. 67 (1972).

[127] Mathews v. Eldridge, 424 U.S. 319 (1976).

The Court restricted its recognition of protected entitlement in *Board of Regents of State Colleges v. Roth*.[128] In *Roth*, the Court found that an non-tenured professor's appointment did not secure an interest for re-employment for the next year.[129] "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[130] The Court also attempted to define the sources of such protected property interests:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[131]

c. *The process that is due*

Once the Court finds an entitlement, it inquires into the adequacy of process. In *Mathews v. Eldridge*,[132] the Court found that though individuals had a statutory entitlement to social security disability benefits, existing administrative procedures were sufficient to satisfy due process even though they did not provide for an evidentiary hearing prior to termination of benefits.[133] The Court stated that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "[134] Since due process was "flexible" and required only "such procedural protections as the particular situation demands,"[135] the Court required a balancing of governmental and private interests affected.[136] Thus, once the Court finds that an entitle-

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[128] 408 U.S. 564 (1972).

[129] *Id.* at 578.

[130] *Id.* at 577.

[131] *Id.*

[132] 424 U.S. 319 (1976).

[133] *Id.* at 349.

[134] *Id.* at 333 (quoting Armstrong v. Manzo, 380 U.S. 545 (1965)).

[135] *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[136] The Court required a balancing of several factors:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

ment exists, it balances the various interests involved to determine whether the procedures utilized satisfy due process in light of the particular circumstances of the case.

2. *Hawaii law of due process*

The Hawaii Supreme Court adopted the federal law of due process in *Aguiar v. Hawaii Housing Authority*.[137] In *Aguiar*, the Hawaii Housing Authority (HHA) used federal funds to construct low cost housing. HHA's tenant's rules provided for rent increases if HHA discovered that a tenant's income surpassed a maximum level.[138] The court applied the federal test: "(1) is the particular interest which the claimant seeks to protect by a hearing 'property' within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is 'property,' what specific procedures are required to protect it."[139]

The court first found that the tenants of a federally funded low cost housing project had an interest in avoiding erroneous rent increases and that this interest rose to the level of a "property" interest protected by due process.[140] After finding a protected property interest, the court required HHA to provide the tenants with a hearing in compliance with HAPA's contested case hearing provisions prior to such rent increases.[141]

The court has recognized protected property interests and granted trial type adjudicatory hearings or contested case hearings in compliance with HAPA in other contexts as well.[142] In general, where the court has found a protected property interest, it has required a trial type hearing or a contested case hearing in accordance with HAPA.[143] Therefore, if a protected property interest is es-

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Id. at 335.

[137] 55 Haw. 478, 522 P.2d 1255 (1974).

[138] *Id.* at 479-80, 522 P.2d at 1257-58.

[139] *Id.* at 495, 522 P.2d at 1266.

[140] *Id.* at 496, 522 P.2d at 1267.

[141] *Id.* at 498-99, 522 P.2d at 1268.

[142] In Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972), the court required a hospital, before revoking surgery privileges, to provide a neurosurgeon with an adjudicatory hearing, including notice, formal charges before the hearing date, an opportunity to call his own witnesses and to prepare a written statement, and hearing officers untainted by ex parte communication. *Id.* at 484-86, 497 P.2d at 571-72. The court found that the doctor had interest in pursuing his profession with the necessary facilities and that this interest rose to the level of a property interest protected by due process. *Id.* at 484, 497 P.2d at 571. In Mortensen v. Board of Trustees, 52 Haw. 212, 473 P.2d 866 (1970), the court found that a person's entitlement to disability retirement benefits was a property interest protected by due process and required a contested case hearing in accordance with HAPA. *Id.* at 219, 221, 478 P.2d at 871, 872.

[143] *See supra* notes 137-142 and accompanying text.

tablished, the Hawaii Supreme Court seems likely to require a contested case hearing.

IV. THE COURT'S REASONING

A. HAPA

The appellants in *Sandy Beach* conceded that HAPA did not apply to the "legislative" functions of the City Council, but argued that when the council acted in a "quasi-judicial" or "administrative" capacity, it was subject to HAPA's contested case hearing procedural requirements.[144] In response, the court first emphasized HAPA's exemption of legislative bodies such as the City Council from the statutory definition of "agency."[145] The court could find "no indication in the language of [HAPA] that legislative bodies are excepted from the statutory definition of 'agency' only when they are performing 'legislative' activities, but are otherwise included in that definition."[146] Although the court characterized the City Council's action as quasi-judicial or administrative,[147] the court concluded that "the City Council, as the legislative branch of the County, is not subject to the procedural requirements of HAPA when acting in either a legislative or non-legislative capacity."[148] The court also noted that the city charter granted the City Council both legislative and non-legislative power.[149]

The court pointed to the legislative history of the statute, which indicated that the legislature intended to exempt the City Council from the requirements of HAPA.[150] Finally, the court said that it had already recognized the City Council's statutory exemption from HAPA in *Kailua Community Council v. City and County of Honolulu*,[151] in which the court found that the chief planning officer and the planning commission of the county were exempt from HAPA

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[144] *Sandy Beach*, 70 Haw. 361, 368, 773 P.2d 250, 256 (1989).

[145] *Id. See also* HAW. REV. STAT. § 91-1 (1985); *supra* notes 33-35 and accompanying text.

[146] *Sandy Beach*, 70 Haw. at 369, 773 P.2d at 256.

[147] The court stated: "The issuance of an SMA use permit involves the application of general standards to specific parcels of real property. Therefore, the City Council's approval of Kaiser's SMA use permit application was a non-legislative act because it administered a law already in existence, the Coastal Zone Management Act." *Id. See supra* notes 38-46 and accompanying text.

[148] *Sandy Beach*, 70 Haw. at 370, 773 P.2d at 257.

[149] 70 Haw. at 369, 773 P.2d at 256. *See* HONOLULU, HAW., REV. CHARTER § 3-201 (1984): "Every legislative act of the council shall be made by ordinance. Non-legislative acts of the council may be by resolution, and except as otherwise provided, no resolution shall have force or effect as law." *See also Life of the Land*, 61 Haw. 390, 423, 606 P.2d 866, 887 (1980); *supra* notes 38-43 and accompanying text.

[150] *Id.* at 369-70, 773 P.2d at 256. *See supra* note 35 and accompanying text.

[151] 60 Haw. 428, 591 P.2d 602 (1979).

when acting in an advisory capacity to the statutorily exempt City Council.[152]

B. HCZMA

The appellants contended that the HCZMA expressly mandates compliance with HAPA, overriding HAPA's statutory exemption of the City Council from HAPA's contested case hearing procedures. Appellants argued that (1) the HCZMA's definition of "agency" included the SMA permit granting "authority" under Hawaii Revised Statutes Section 205A-1,[153] and (2) Hawaii Revised Statutes section 205A-29(a) of the HCZMA, which sets forth SMA permit procedures, required compliance with HAPA.[154]

1. "Agency" definition

Hawaii Revised Statutes section 205A-1 of the HCZMA defines "agency" as "any agency, board, commission, department, or officer of a county government or the state government, including the authority as defined in Part II."[155] According to the appellants, by including the broad term "authority" in the HCZMA's definition of "agency," the legislature intended that all "authorities" under the HCZMA were to be "agencies" within the meaning of HAPA. Thus, the appellants argued, Honolulu's "authority," the Honolulu City Council, was subject to the procedural requirements of HAPA, regardless of its statutory exemption.[156]

The court rejected this interpretation. "Section 205A-1 defines 'agency' for the purposes of Chapter 205A [the HCZMA], not for the purposes of Chapter 91 [HAPA] . . . Chapter 91 provides its own definition of 'agency' which excludes the legislative branch."[157] In short, the court concluded that although the City Council was an "agency" for the purposes of the HCZMA, it was not an "agency" under HAPA and was not subject to HAPA's contested case hearing requirement. To support its conclusion, the court cited legislative history which indicated that the legislature intended SMA use permit proceedings to be less adjudicatory and more informational in nature.[158]

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[152] *Sandy Beach*, 70 Haw. at 370, 773 P.2d at 256-57. *See supra* notes 62-67 and accompanying text.

[153] *Sandy Beach*, 70 Haw. at 370, 773 P.2d at 256.

[154] *Id.* at 371, 773 P.2d at 257.

[155] HAW. REV. STAT. § 205A-1 (1985). Part II is the section of the HCZMA dealing with SMAs.

[156] *Sandy Beach*, 70 Haw. at 370-71, 773 P.2d at 257.

[157] *Id.* at 371, 773 P.2d at 257.

[158] *Id.* at 371, 773 P.2d at 258. The court stated:

> the legislature intended the hearing held by the county authority in conjunction with the

The court distinguished the prior cases of *Chang v. Planning Commission*[159] and *Mahuiki v. Planning Commission*.[160] In those cases, the court had approved of contested case hearing procedures for the SMA use permit proceedings of county planning commissions. The court reasoned that county planning commissions clearly fell within HAPA's definition of "agency."[161] Thus, *Chang* and *Mahuiki* did not apply to *Sandy Beach*, in which the county SMA use permitting authority was the city council, a legislative body that HAPA expressly exempted from its definition of "agency."[162]

2. *Hawaii Revised Statutes section 205A-29(a)*

Appellants also argued that the HCZMA's SMA use permitting guidelines mandated compliance with the contested case hearing procedures of HAPA. Hawaii Revised Statutes section 205A-29(a) sets forth the state guidelines for SMA use permit procedures:

> The authority in each county, upon consultation with the central coordinating agency, *shall establish and may amend pursuant to chapter 91 [HAPA]*, by rule or regulation the special management area use permit application procedures, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permits shall occur.[163]

The appellants asserted that the plain language of this section mandated county compliance with HAPA's contested case hearing procedures.[164] The court, however, found that this section of the HCZMA mandated compliance with HAPA's rulemaking provisions, not the contested case provisions.[165] Since the city had complied with HAPA's rulemaking provisions when it promul-

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> application for an SMA use permit be informational in nature in order to permit members of the public to present their views and relevant data as an aid to the administrative decision on the particular application as well as long-term planning policy for the entire coastal zone.

Id. *See supra* notes 82-86 and accompanying text.

[159] 64 Haw. 431, 436, 643 P.2d 55, 60 (1982). *See supra* notes 99-103 and accompanying text.

[160] 65 Haw. 506, 513, 654 P.2d 874, 879 (1982) (SMA use permit proceedings are contested cases and subject to HAPA).

[161] The court stated, "County planning commissions are clearly 'agencies' as defined by HAPA . . . . These decisions, therefore, are not dispositive of the question in this case, whether a legislative body is subject to the contested case procedures of HAPA." *Sandy Beach*, 70 Haw. at 373, 773 P.2d at 258-59. *See supra* note 33 and accompanying text.

[162] *Sandy Beach*, 70 Haw. at 373, 773 P.2d at 258-59.

[163] HAW. REV. STAT. § 205A-29(a) (1985) (emphasis added).

[164] *Sandy Beach*, 70 Haw. at 372, 773 P.2d at 257.

[165] *Id.* at 374-76, 773 P.2d at 258-61.

gated its permit procedures, the court found that the City Council had not violated this section of the HCZMA.[166]

The court supported its finding with legislative history which suggested that the legislature intended that the counties conduct public hearings and retain some flexibility over the conditions under which hearings were to be held.[167] The court also cited *Chang v. Planning Commission*,[168] in which the court had noted in dicta that the HCZMA required compliance with the rulemaking provisions of HAPA, but was otherwise silent on the manner in which SMA use permit hearings should be conducted[169]

Thus, the court in *Sandy Beach* found that Hawaii Revised Statutes section 205A-1 and 205A-29(a) do not require the City Council to comply with the contested case hearing requirements of HAPA.

C. Due Process

In the alternative, the appellants argued that the city's permit procedures violated their constitutional right to procedural due process under the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawaii Constitution.[170] Even if the City Council was exempt from the requirements of HAPA, the appellants argued, the HCZMA and the Hawaii Constitution conferred constitutionally protected property interests which entitled them to an adjudicatory hearing under the due process clauses of the state and federal constitutions.[171]

The court applied the two-part due process analysis from *Aguiar v. Hawaii Housing Authority*[172] to address the appellants due process claims. The court first addresssed the issue of whether the appellants' interests were "property" interests within the meaning of the due process clause. Although the court had previously recognized the importance of aesthetic and environmental concerns such as those of the appellants in determining an individual's standing to sue,[173] it declined to find that such concerns rose to the level of constitutionally

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[166] *Id.*

[167] *See supra* notes 82-86 and accompanying text.

[168] 64 Haw. 431, 643 P.2d 55 (1982).

[169] *See supra* notes 102-103 and accompanying text.

[170] *Sandy Beach*, 70 Haw. at 376, 773 P.2d at 260.

[171] *Id.*

[172] 55 Haw. 478, 495, 522 P.2d 1255, 1266 (1974). *See supra* notes 137-143 and accompanying text.

[173] *See* Life of the Land, Inc. v. Land Use Comm'n, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979); East Diamond Head Ass'n v. Zoning Bd. of Appeals, 52 Haw. 518, 521-22, 479 P.2d 796, 798 (1971); Dalton v. City and County of Honolulu, 51 Haw. 400, 402-403, 462 P.2d 199, 202 (1969).

protected "property" interests in *Sandy Beach*.[174]

The court went on to state that even if the appellants could have established a property interest requiring due process protection, the City Council's SMA use permit procedures satisfied due process requirements.[175] The court balanced several factors:

> (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.[176]

Although the court did not explicitly weigh the private interest affected, it may have implicitly weighed the interest in its previous discussion of whether a constitutionally cognizable property interest existed. The court's discussion of protected property interests indicated that the court considered the environmental and aesthetic interests affected in *Sandy Beach* to be less significant than the private interests for which the court had required contested case or trial-type proceedings in the past.[177] Those prior cases involved basic needs such as housing and employment.[178]

The court found that the city had provided ample notice of the public hearings that it had held and provided the appellants with numerous occasions to present their grievances.[179] In light of the foregoing factors, the court concluded

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[174] *Sandy Beach*, 70 Haw. at 377, 773 P.2d at 261. *But see* Town v. Land Use Commission, 55 Haw. 538, 524 P.2d 84 (1974); *supra* notes 44-61 and accompanying text. In *Sandy Beach*, the court noted that the appellants were not owners of adjacent parcels and cited two California Supreme Court cases which recognized that land use decisions which substantially affect the property rights of owners of adjacent parcels may constitute deprivations of property within the context of procedural due process. *Sandy Beach*, 70 Haw. at 337 n.10, 773 P.2d at 261 n.10 (citing Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 1139, 156 Cal. Rptr. 718, 723 (1979); Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972)).

[175] *Sandy Beach*, 70 Haw at 378, 773 P.2d at 261.

[176] *Id.* at 378, 773 P.2d at 261 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Silver v. Castle Memorial Hosp., 53 Haw. 475, 484, 497 P.2d 564, 571 (1972)).

[177] *Id.* at 377, 773 P.2d at 260.

[178] *Id.* at 377, 773 P.2d at 260-61. *See supra* notes 106-142 and accompanying text.

[179] The City Clerk submitted an affidavit that listed sixteen separate meetings or hearings at which members of the public were permitted to address the DLU or City Council regarding the SMA use permit application. Although public notice for the April 1, 1987 hearing limited testimony to three minutes, the City Council permitted many persons, including plaintiffs-appellants, to speak at length. The City Council did not at any time deny anyone the opportunity to address the Council or to ask questions of other witnesses. *Sandy Beach*, 70 Haw. at 366, 379, 773 P.2d at 254, 262.

that the proceedings satisfied the requirements of procedural due process.

D. Dissent

Associate Justice Edward H. Nakamura vociferously dissented from the majority opinion.[180] Justice Nakamura argued that the appellants due process rights had been violated. He characterized the majority's interpretation of HAPA and the HCZMA as irrelevant: "It is immaterial whether the Council is subject to the procedural requirements of HAPA or not. The Council acted in a quasi-judicial capacity in administering a State law; it therefore was subject to the requirements of due process."[181] He contended (1) that the appellants possessed property interests protected by due process, and (2) that as such, the appellants were entitled to a trial type, adjudicatory hearing which the City Council failed to provide.

The legislature enacted the HCZMA "to preserve, protect, and where possible, to restore the natural resources of . . . Hawaii,"[182] including "recreational resources," "historic resources," "scenic and open space resources," and "coastal ecosystems."[183] In Nakamura's view, such resources constituted publicly owned "property" for which the appellants could properly demand constitutional protection under the due process clauses of the state and federal constitutions.[184] Nakamura also pointed to Hawaii Revised Statutes section 205A-4, a section of the HCZMA that gives any person or agency a right to commence a civil action to enforce the statute.[185] According to Nakamura, this section vested members of the public with protected interests in Hawaii's coastal resources.[186]

In Nakamura's opinion, when such constitutionally cognizable property interests are found to exist, due process requires "a hearing more in the nature of a judicial, rather than a legislative [] hearing."[187] Justice Nakamura reasoned that because the council was bound by law to render its decision based on questions of fact, "due process require[d] an opportunity to confront and cross-examine

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[180] "I cannot join my colleagues because their decision and opinion manifest a 'talismanic reliance on labels' rather than a 'sensitive consideration of the procedures required [in the circumstances] by due process.' " *Id.* at 382, 773 P.2d at 263 (Nakamura, J., dissenting) (quoting Board of Curators v. Horowitz, 435 U.S. 78, 106 (1978) (Marshall, J., dissenting) (footnote omitted)) (bracketed material added by J. Nakamura).

[181] *Id.* at 387-88, 773 P.2d at 266.

[182] HAW. REV. STAT. § 205A-21 (1985).

[183] *Id.* at § 205A-2.

[184] *Sandy Beach*, 70 Haw. at 389, 773 P.2d. at 267 (Nakamura, J. dissenting).

[185] *Id.*

[186] *Id.*

[187] *Id.* at 388, 773 P.2d at 266 (Nakamura, J. dissenting).

adverse witnesses."[188] In his opinion, due process also would have required that the opponents disclose their cases so that each side would have had an opportunity to prove that the other side's evidence was untrue.[189]

Nakamura also was troubled by evidence of numerous instances of ex parte communication between council members and persons interested in the outcome of the permit application.[190] Such contact was inappropriate, in Nakamura's opinion, when the City Council was acting in a non-traditional administrative capacity.[191] According to Nakamura, ex parte contacts breach the fundamental principle of exclusiveness of the record and taint a decisionmaker's conclusions.[192]

V. COMMENTARY

A. HAPA

The court was faced with a difficult problem in *Sandy Beach*: How to reconcile HAPA's clear and unambiguous exemption of the City Council,[193] with the fact that the City Council was performing a quasi-judicial function usually subject to HAPA?[194] The court resolved the conflict in favor of HAPA's exemption, relying almost exclusively on statutory interpretation of HAPA and the HCZMA. Thus, the City Council enjoys HAPA's blanket exemption regardless of the decisions the council makes or the functions it performs.

1. A talismanic reliance on labels: The quasi-judicial v. legislative distinction

The dissent's criticisms of the majority opinion are valid. The dissent objected to the majority's insistence that the plain language of HAPA required the court to find the City Council exempt from HAPA's contested case hearing

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[188] *Id.* at 390, 773 P.2d at 268 (Nakamura, J. dissenting) (quoting Goldberg v. Kelly, 397 U.S. 254, 269 (1970)).

[189] *Id.* (quoting Greene v. McElroy, 360 U.S. 474, 496 (1959)).

[190] Justice Nakamura stated, "It was conceded at oral argument that there were ex parte contacts between members of the Council and persons interested in the outcome of the proceeding. If the Council were acting in its customary role, this would have posed no problem; but it was not." *Id.*

[191] *Id.*

[192] *Id.* at 391, 773 P.2d at 268 (Nakamura, J. dissenting) (quoting B. SCHWARTZ, ADMINISTRATIVE LAW § 7.13, at 367-68 (1984)). *See also* Sussel v. City and County of Honolulu, Civ. No. 88-2509-08 (1989) (administrative decision maker should recuse himself if there is an appearance of impropriety).

[193] *See supra* notes 33-35 and accompanying text.

[194] *See supra* notes 36-61 and accompanying text.

procedures regardless of the function the City Council performed. The majority's reliance on the plain words and meaning of HAPA's exemption in *Sandy Beach* is at odds with the court's functional analysis in *Kailua Community Council v. City and County of Honolulu*,[195] a case that the majority cited to support its result.[196]

In *Kailua Community Council*, the court employed a functional analysis to the City Council's general plan amendment proceedings and extended the City Council's statutory exemption from HAPA to agencies performing advisory legislative functions.[197] The court reasoned that since the planning department and its chief planning officer were merely fact-finding and advising the City Council on proposed county general plan amendments, they were performing functions similar to those of a legislative committee and thus, were exempt from HAPA as well.[198]

Although the court's decision in *Kailua Community Council* expanded the City Council's exemption from HAPA, including advisory administrative agency functions, the court employed a functional analysis to reach this result that it ignored in *Sandy Beach*. It is surprising that the court in *Sandy Beach* declined to use or even to recognize the functional analysis that it had employed in *Kailua Community Council* to address the very same problem: the scope of the City Council's exemption from HAPA.

If the majority had employed *Kailua Community Council*'s functional analysis, the result in *Sandy Beach* may have been markedly different. In *Sandy Beach*, the court characterized the City Council's SMA use permit process as non-legislative.[199] Under a functional analysis, such non-legislative acts require compliance with non-legislative processes.[200] The City Council was also acting in a quasi-judicial manner — attempting to adjudicate disputed facts in a particular case.[201] Before the council grants a SMA use permit for a particular parcel of land, the HCZMA requires the Council to make several fact based findings.[202] In quasi-judicial proceedings, administrative law generally requires government agencies to hold adjudicatory or trial-type hearings similar to contested case

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[195] 60 Haw. 428, 591 P.2d 602 (1979) [hereinafter *Kailua Community Council*]. *See supra* notes 62-67 and accompanying text.

[196] *Sandy Beach*, 70 Haw. at 370, 773 P.2d at 256.

[197] *See supra* notes 62-67 and accompanying text.

[198] *Id. See supra* notes 62-67 and accompanying text.

[199] *Sandy Beach*, 70 Haw. at 369, 773 P.2d at 256.

[200] *See supra* notes 37-61 and accompanying text.

[201] *See supra* notes 36, 46 and accompanying text.

[202] To grant an SMA use permit, the county authority must make specific findings that (1) the development will have no substantial adverse environmental effect or that such adverse effect is outweighed by public health and safety and (2) the development is consistent with the findings and policies of the HCZMA. Mahuiki v. Planning Comm'n, 65 Haw. 506, 517-18, 654 P.2d 874, 881-82 (1982).

hearings under HAPA.[203] Under *Kailua's* functional analysis, the court should have required the City Council to comply with HAPA's contested case hearing procedures.

The majority's exclusive reliance on the plain language of the statute in *Sandy Beach* seems inconsistent in light of the court's prior interpretation of the same statute in *Kailua Community Council*.[204] In *Kailua Community Council*, the court freely expanded the City Council's exemption to an agency otherwise within the scope of the statute, disregarding the plain language of the same definition that it construed in *Sandy Beach*.[205] The court's disregard of the language of the statute in *Kailua Community Council* contradicts its deference to the language of the statute in *Sandy Beach*.[206]

2. *Entitlement to a contested case hearing under HAPA*

The majority's decision in *Sandy Beach* was also inconsistent with its prior decisions regarding entitlement to contested case hearings under HAPA. In *Town v. Land Use Commission*,[207] the court held that an adjacent landowner had a property interest that entitled him to a contested case hearing in compliance with HAPA.[208] *Town* cited *Dalton*[209] and *East Diamond Head*,[210] two cases which dealt with issues of standing.[211] The *Town/East Diamond Head/Dalton* line of cases implied that an interest sufficient to satisfy standing, even an aesthetic interest or an interest in protecting one's neighborhood from re-zoning, was a property interest entitled to the protection of HAPA's contested case hearing procedures.[212]

If the court had applied this standing analysis to the issue of whether the

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[203] *See supra* notes 37, 44-61 and accompanying text.

[204] 60 Haw. 428, 591 P.2d 602 (1979). *See supra* notes 62-67 and accompanying text.

[205] *Id. See supra* notes 62-67 and accompanying text.

[206] *See also* Life of the Land v. City and County of Honolulu, 61 Haw. 390, 425, 606 P.2d 886, 888 (1980). "There is no special virtue in the word 'legislative' merely because it stems from the same root as 'legislature.' It derives its qualifying meaning from the character of the thing done." *Id.* (quoting In re Addison, 385 Pa. 48, 57-58, 122 A.2d 272, 276 (1956)).

[207] 55 Haw. 538, 524 P.2d 84 (1974).

[208] *See supra* notes 44-48 and accompanying text.

[209] 51 Haw. 400, 462 P.2d 199 (1969). *See supra* notes 49-53 and accompanying text.

[210] 52 Haw. 518, 479 P.2d 796 (1971). *See supra* notes 54-56 and accompanying text.

[211] To attain standing, a person must "be specially, personally and adversely affected . . . . There must be a special injury or damage to one's personal or property rights as distinguished from the role of being only a champion of causes." East Diamond Head Ass'n v. Zoning Bd., 52 Haw. at 522, 479 P.2d at 798 (quoting Hattem v. Silver, 19 Misc. 2d 1091, 190 N.Y.S.2d 752 (Sup. Ct. 1959) which cited Blumberg v. Hill, 119 N.Y.S.2d 855 (Sup. Ct. 1953)); *see supra* notes 44-61 and accompanying text.

[212] *See supra* notes 44-61 and accompanying text.

appellants' interests in *Sandy Beach* entitled them to a contested case hearing, the result would have been markedly different. Although the appellants in *Sandy Beach* were not adjoining landowners,[213] the court admitted that it had in the past recognized environmental and aesthetic interests as sufficient to establish standing. Furthermore, the appellants' interests in *Sandy Beach* were similar to those interests which the court had recognized as sufficient for standing in *Dalton* and *East Diamond Head* - aesthetic, environmental, and neighborhood interests. Having met the *Town/East Diamond Head/Dalton* standing test, the appellants apparently were entitled to a contested case hearing in compliance with HAPA.

The court was understandably reluctant to recognize aesthetic, environmental and neighborhood interests as entitling the appellants to a contested case hearing because of the potential administrative burden such a decision would create. It specifically stated that such interests were not sufficient to rise to the level of a property interest protected by due process.[214] Yet, its decision was inconsistent with the *Town/East Diamond Head/Dalton* line of cases in which the court had applied a standing-type analysis to the question of entitlement to a contested case hearing.

There may be, however, another explanation for this line of cases. The *Town* cases involved parties who owned or resided in homes adjoining the property in issue.[215] In *Sandy Beach*, the court's implicit rationale may have been that adjoining landowners have a more specific and personal interest in land use/zoning matters than other parties and are thus, entitled to contested case hearings.[216] Under this rationale, the appellants were not entitled to a contested case hearing under HAPA because they did not own adjoining land.[217]

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[213] In *Sandy Beach*, appellant Elizabeth Matthews lived across a golf course from the proposed development. She alleged that the project would affect her view of the ocean and decrease the value of her property. Apparently, the court did not think this interest was equal to that of an adjoining property owner. *Sandy Beach*, 70 Haw. 361, 367, 773 P.2d 250, 255 (1989).

[214] *Id.* at 377, 773 P.2d at 261.

[215] *But see East Diamond Head*, 52 Haw. at 522, 479 P.2d at 798. In *East Diamond Head*, appellants were a neighborhood organization of residents of the area and individuals who were members of the organization. The court stated that "we held in [*Dalton*] that an owner whose property adjoins land subject to rezoning has a legal interest worthy of judicial recognition should he seek redress in our courts to preserve the continued enjoyment of his realty by protecting it from threatening neighborhood change. Each appellant here asserts just such a right." *Id.* at 521-22, 479 P.2d at 798. Some of the appellants may not have been adjacent landowners. The court implied that a neighborhood had an interest in preventing neighborhood change. *Id.*

[216] *See supra* note 174 and accompanying text.

[217] *See supra* note 213 and accompanying text.

B. HCZMA

The court found that Hawaii Revised Statutes section 205A-29(a),[218] the section setting forth state guidelines for SMA use permit hearing procedures, required the City Council to comply with only the rulemaking provisions of HAPA.[219] Hawaii Revised Statutes section 205A-29(a) states that the county authority "shall establish and may amend pursuant to Chapter 91 [HAPA], by rule or regulation the special management area use permit application procedures, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permits shall occur."[220]

The court could have interpreted this section as requiring the City Council to comply with HAPA's contested case hearing procedures. Arguably, this section refers the county authority to all of HAPA, not just to the rulemaking provisions. Therefore, all of HAPA's provisions, including the contested case hearing procedures, applied to the City Council. The court, however, relied on legislative history[221] which evinced an alleged legislative intention to provide informational, public hearings rather than adjudicatory, trial-type hearings. This legislative history, however, did not clearly express a conscious approval of public hearings or contested case hearings. Instead, the legislative history simply indicated that the varying hearing procedures among the counties were "adequate."[222]

C. Due Process

1. Property interest

The court found in *Sandy Beach* that although the appellants' environmental and aesthetic interests were sufficient for standing, these interests did not rise to the level of protected due process property rights or entitlements.[223] The dissent, however, contended that the HCZMA created publicly owned property interests that were protected by due process.[224]

Although the dissent's approach to the property interest issue initially seems novel, it is consistent with the *Town/East Diamond Head/Dalton* line of cases which used a standing analysis to determine whether a property interest existed

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[218] HAW. REV. STAT. § 205A-29(a) (1985). *See supra* notes 81-86 and accompanying text.

[219] *Sandy Beach*, 70 Haw. at 374, 773 P.2d at 259.

[220] HAW. REV. STAT. § 205A-29(a) (1985).

[221] *See supra* notes 81-86, 163-169 and accompanying text.

[222] *See supra* notes 84-86 and accompanying text.

[223] *See supra* notes 173-174 and accompanying text.

[224] *See supra* notes 182-189 and accompanying text.

that required HAPA protection.[225] To support his contention that a property interest existed, Justice Nakamura emphasized in his dissent that the HCZMA gave any person or agency the right file a civil suit to enforce the HCZMA's provisions.[226]

Based on the *Goldberg* line of cases and state statutory entitlement cases alone, however, the dissent's recognition of the public's property interest in coastal resources is inapposite. The federal and state entitlement cases, dealt with "basic needs"[227] — housing, employment, disability benefits, and welfare payments.[228] Environmental and aesthetic interests are arguably not basic needs.

But both the majority and the dissent ignored the Hawaii State Constitution, which arguably gives the people of Hawaii constitutionally protected interests in the environment and in coastal resources. Article XII, section 9 of the Hawaii State Constitution establishes environmental rights for the citizens of Hawaii:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.[229]

Furthermore, article XI, section 1 of the Hawaii State Constitution mandates governmental protection of natural resources and declares that the State holds all public natural resources in trust for the benefit of the people.[230]

The dissent's and the appellants' argument for finding a protected property interest in coastal resources would have been more persuasive had they argued that Hawaii affords greater constitutional protection to environmental interests than the United States Constitution. Arguably, these protected interests need not constitute "basic needs" since the Hawaii Constitution explicitly creates environmental rights worthy of due process protection.

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[225] *See supra* notes 44-67 and accompanying text.

[226] *See supra* notes 185-186 and accompanying text.

[227] *Sandy Beach*, 70 Haw. 361, 377, 773 P.2d 250, 260-61 (1989).

[228] *See supra* notes 108-143 and accompanying text.

[229] HAW. CONST. art. XII, § 9.

[230] HAW. CONST. art. XI, § 1:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the state.
>
> All public and natural resources are held in trust by the State for the benefit of the people.

2. The process that is due

The court could have limited its discussion of due process to the property interest issue since its finding that there was no property interest was determinative. The court continued, however, stating in dicta that even if a property interest had existed, the informational or public hearings that the City Council had provided were sufficient to satisfy due process.[231] The court applied a balancing test from *Mathews v. Eldridge*,[232] implicitly finding that the extra administrative burden on the City Council to provide an adjudicatory hearing over and above the numerous public hearings it had held outweighed the appellants interests in coastal resources, the risk of erroneous deprivation of these coastal resources, and the value of the more rigorous procedures under HAPA for contested case hearings.[233]

The *Mathews* balancing test, however, is unpredictable since it forces courts to make value judgments about the significance and importance of individual interests. The dividing line between interests that deserve greater procedural protection and interests that require only minimal protection will vary among judges, courts, and jurisdictions.[234] The disagreement between the dissent and the majority illustrates the inherent ambiguity of the test. The dissent gave much weight to the HCZMA's statutory mandate to preserve and protect the coastal resources of Hawaii. In the dissent's view, the legislature had created a statutory entitlement to these coastal resources, an entitlement so important that it required contested case hearing protection. The majority, however, mooted this controversy as far as *Sandy Beach* is concerned by finding that such environmental and aesthetic interests, even if they rose to the level of a protected property right, were not worthy of additional procedural protection. By reaching this conclusion, the majority reversed its trend in prior cases of granting contested case or adjudicatory hearings when it had found a protected property interest to exist.[235]

VI. IMPACT

In *Sandy Beach*, the court declined to invalidate the unique dual role that the

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[231] *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261.

[232] 424 U.S. 319 (1975).

[233] The court balanced several factors: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261 (citing Mathews v. Eldridge, 424 U.S. 319 (1975)).

[234] *See generally* L. TRIBE, *supra* note 106, at § 10-13, at 714-718.

[235] *See supra* notes 137-143 and accompanying text.

Honolulu City Council has played in the SMA use permit process — the role of both legislator and administrator. The decision reiterated the City Council's statutory exemption from the contested case procedures of HAPA and verified the Honolulu City Council's SMA use permit process under due process facially and as applied to the particular appellants in this case.

Landowners who own property adjacent to a proposed development may still have a chance to obtain a contested case hearing in spite of the *Sandy Beach* decision. Although the court did not recognize the appellants' interests in *Sandy Beach* as protected property rights entitled to the procedural protection of HAPA, the court noted that the appellants were not owners of adjacent parcels and cited two California Supreme Court cases which recognized that land use decisions which substantially affect the property rights of adjacent parcels may constitute deprivations of property protected by due process.[236] The court's distinction between adjacent landowners and non-adjacent landowners and its decision in *Town*[237] suggests that the court believes that adjacent landowners are more directly affected by re-zoning and are entitled to contested case hearings pursuant to HAPA.

The court's decision may significantly affect the administration of the HCZMA and other zoning/land use legislation in the other counties. The result in this case may encourage other counties to mimic Honolulu's Coastal Zone Management procedures. Public hearings are generally less expensive to administer than contested case hearings since they do not require discovery, the development of a formal record, or the opportunity to cross-examine witnesses. The economics of administration thus may encourage counties that delegate the SMA use permit process to planning commissions to amend their coastal zone ordinances and to vest the SMA use permit granting authority with their legislative body or council. Furthermore, if other zoning or land use enabling legislation does not specifically mandate contested case hearings pursuant to HAPA, the counties may consider administering such programs through its county council or other elected legislative body to avoid the administrative burden and cost of compliance with HAPA's contested case requirements.

The Honolulu SMA use permit scheme vests elected council members with extraordinary power and control over development in Hawaii's coastal areas. As the dissent indicates, the *Sandy Beach* holding may unduly politicize an already controversial area in which the public is showing growing mistrust of its elected representatives.[238] Perhaps the essential question is "whether procedures essen-

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[236] *See supra* note 174 and accompanying text.

[237] In *Town*, the court granted an adjacent landowner to a general plan amendment a contested case hearing pursuant to HAPA. *See supra* notes 44-48 and accompanying text.

[238] In a related case, the Hawaii Supreme Court found that zoning by initiative conflicts with the tenets of comprehensive planning. Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 777 P.2d 244 (1989). Pro-initiative groups are placing much pressure on the

tially 'political' in nature satisfy the demands of due process as they apply to administrative proceedings."[239] The City Council and county planning commissions wield the same power, yet must comply with different procedures. Possibly only the state legislature can resolve this incongruity by amending the HCZMA and explicitly requiring contested case hearings or some other procedural minimum.

The court's characterization of the City Council's permit process may also affect initiatives and referendums. Generally, quasi-judicial or administrative actions are not subject to initiatives and referendums, while legislative or quasi-legislative actions are.[240] In *Sandy Beach*, the court characterized the City Council action as non-legislative. As such, the SMA permit process would not be subject to initiatives and referendums. The court also held, however, that the City Council was exempt from HAPA in spite of the non-legislative character of the council's action. Consequently, the City Council enjoys the best of both worlds. Because the City Council is an elected legislative body, the court did not require the council to comply with HAPA's contested case procedures in *Sandy Beach*. Because the council was acting in a non-legislative manner, the court probably would invalidate any initiative or referendum on the matter. Thus, the Council eluded HAPA's greater procedural requirements and may elude the specter of initiative and referendum.

Ultimately though, the council did not escape the review and scrutiny of its constituents. Although the Hawaii Supreme Court later invalidated a successful initiative to re-zone the property to a preservation designation based on grounds unrelated to the quasi-judicial/legislative distinction, the Council capitulated and passed an ordinance mirroring the mandate of the initiative. In the future, however, the public will be unable to make their wishes concerning land use matters known to the City Council since such initiatives are invalid.[241]

VII. CONCLUSION

In *Sandy Beach*, the court reviewed Honolulu's SMA use permit process and upheld the City Council's practices as the SMA use permit granting authority against the appellants' statutory and constitutional challenges. The court exempted the City Council, the city's SMA use permitting authority, from the contested case hearing requirements of HAPA despite the fact that the City Council was acting in an non-legislative, administrative, and quasi-judicial

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Legislature to pass a bill that will allow initiatives in land use matters.

[239] *Sandy Beach*, 70 Haw. at 382, 773 P.2d at 263 (Nakamura, J., dissenting).

[240] *See, e.g.*, City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976).

[241] *See* J. Gordon & D. Magleby, *Pre-Election Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 312 (1989).

manner. The court also found that the HCZMA did not supercede HAPA's express exemption of the City Council from its scope and that the HCZMA did not require the City Council to comply with HAPA's contested case procedures. Moreover, the court held that the appellants did not possess property interests protected by due process. Even if the appellants possessed such protected rights, the court stated that the informational, public hearings which the City Council had provided satisfied due process. The court, thus, upheld the City Council's practice of providing legislative hearings when administering the HCZMA's SMA use permit guidelines.

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