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Opening Statement

by James R. Lucas*

I. Introduction

Opening statement is a short, concise outline of what an attorney intends or expects to prove in the trial through the evidence,[1] including the theory of the case,[2] either prosecution or defense, respectively. It has been compared to an offer of proof.[3] It is not argument.[4]

"As a general rule, a full statement of facts expected to be proven on the trial, with a statement of the law relied upon, would seem to be sufficient."[5] This definition, correct so far as it goes, fails to acknowledge the notice function of the opening statement. The case

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* Mr. Lucas, a 1974 graduate of Wayne State University Law School, is a sole practitioner in Las Vegas, Nevada. He is a member of the Nevada, California and Michigan bars.

[1] United States v. Dinitz, 424 U.S. 600, 612 (1976); People v. Isby, 30 Cal.2d 879, 186 P.2d 405, 415 (1947); State v. Hanes, 103 N.J.L. 534, 138 A. 203, 204 (1927); People v. Kurtz, 414 N.E.2d 699, 702, 434 N.Y.S.2d 200, 202-03 (1980); State v. Campbell, 103 Wash. 2d 1, 691 P.2d 929, 938 (1984).

See ABA Standards for Criminal Justice, The Defense Function, Standard 4-7.4 (2d ed. Supp. 1986).

[2] Wright v. United States, 508 F.2d 915, 920 (D.C. Cir. 1986); People v. Arnold, 199 Cal. 471, 250 P. 168, 170 (1926); Oesby v. United States, 398 A.2d 1, 5 (D.C. 1977); Ontai v. Straub Clinic & Hosp., 66 Haw. 237, 252, 659 P.2d 734, 745 (1983); State v. Sejuelas, 94 N.J. Super. 576, 229 A.2d 659, 660 (1967); People v. Benham, 160 N.Y. 402, 55 N.E. 11, 21 (1899).

[3] Spicer v. Bonker, 45 Mich. 630, 8 N.W. 518, 519 (1881).

[4] *Dinitz*, 424 U.S. at 612 (Burger, C.J., concurring); United States v. Rivera, 778 F.2d 591, 594 (10th Cir. 1985); Leonard v. United States, 277 F.2d 834, 841 (9th Cir. 1960); United States v. Salovitz, 701 F.2d 17, 21 (2d Cir. 1983); Turley v. State, 48 Ariz. 61, 73, 59 P.2d 312, 317 (1936); People v. Bezy, 67 Cal. 223, 7 P. 643 (1885); State v. Byrnes, 433 A.2d 658, 664 (R.I. 1981).

[5] McDonald v. People, 126 Ill. 150, 153, 9 Am.St.Rep. 547, 549 (1888).

law adverts to the notice function to the court and opposing party.[6] However, the real importance of the opening statement is to provide notice to the jury: to apprise the jurors of a factual context in which to assimilate and integrate the evidence as it unfolds during the trial and to enable them to perform better their sworn role as deciders of the facts.[7]

Nothing else in the course of the trial does the same.

II. The Nature of the Opening Statement

Although opening statement resembles closing argument, it differs in both function and object.[8] Closing argument deals with *persuasion*

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[6] United States v. Freeman, 514 F.2d 1184, 1192 (10th Cir. 1985); Chatman v. State, 164 Ind. App. 97, 101-02, 326 N.E.2d 839, 842 (1975); Douglas v. Whittaker, 324 Mass. 398, 86 N.E.2d 916, 918 (1949).

[7] State v. Stamberger, 209 N.J. Super. 579, 508 A.2d 1140, 1141 (1985) (the indictment notifies the defendant; the opening statement notifies the jury); State v. Portock, 205 N.J. Super. 499, 501 A.2d 551, 554 (1985)("[b]ut we conclude that the prosecutor's opening statement should be part of orderly trial procedure provided for the benefit of the jury, not the defendant"); West v. Martin, 11 Kan. App. 2d 55, 713 P.2d 957, 959 (1986); Fossum v. Zurn, 78 S.D. 260, 265, 100 N.W.2d 805, 808 (1960) (purpose of opening is to assist jury to understand the evidence).

As a District of Columbia court has expressed: "The purpose of an opening statement for the defense is to explain the defense theory of the case, to provide the jury an alternative interpretative matrix by which to evaluate the evidence, and to focus the jury's attention on the weaknesses of the government's case." Oesby v. United States, 398 A.2d 1, 5 (D.C. 1977). *See also* United States v. Stanfield, 521 F.2d 1122, 1125 (9th Cir. 1975).

As Angela Davis said in her opening statement:

> We are not going to present to you the totality of our defense. That is not the purpose of an opening statement. We will give you a skeletal outline of the evidence with which we intend to contest and disprove the prosecutor's charges. This will be the skeleton so to speak. The flesh will be added to the bones as the trial progresses and, basically, the purpose of this opening statement is to give you some material and categories in the form of evidence with which you can view the case as it progresses, and, in this way, you will have a more comprehensive view and you will be able to see the prosecution's evidence in a more, from a more comprehensive perspective.

Barker, *Evidence: Did Angela Davis Testify?* 37 Alb. L. Rev. 1, 8 (1972).

The opening statement has often been compared to showing the jury the picture on a jigsaw puzzle box, fitting the expected pieces of evidence together. *See, e.g.*, People v. Barron, 195 Colo. 390, 392, 578 P.2d 649, 650 (1978). See also November 15, 1990, opening statement of special counsel, Robert S. Bennett, concerning the Keating Five savings and loan scandal to the Senate Ethics Committee, in which he used the jigsaw puzzle metaphor to preface lengthy hearings and presentation of evidence. (C-SPAN Television Broadcast, Nov. 17, 1990).

[8] Some cases blur the distinction between opening statement and argument. *See* Wilhelm

and, hence, advocacy. It follows that argument should be tied to the right to counsel and the sixth amendment. Opening statement, on the other hand, does not have as its purpose persuasion, but notice to the jury. It logically ties into the right to jury trial.[9]

Analytically the most salient feature of the opening statement to the trial is that it comes first. Being first, it exploits the psychological principle of primacy.[10]

> Being human, the first thing the jurors do is form first impressions, and, as one author notes, 'in the opening, the narrative, the outline of the flesh and bones of the case, the juror's first impressions harden like cement. No amount of instruction from the court that minds should not be made up until the conclusion of the case can prevent people from forming first impressions.' And what happens after the jurors have formed their first impression? 'Most jurors have made up their mind about the outcome and do not change it through the balance of the trial.'[11]

First impressions count.[12]

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v. State, 272 Md. 404, 411, 326 A.2d 707, 713-14 (1974); People v. Planagan, 65 Cal. App. 2d 371, 150 P.2d 927, 946 (1944).

[9] It has been recognized, however, that "[t]he timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics . . . ." United States v. Rodriguez-Ramirez, 777 F.2d 454, 458 (9th Cir. 1985). *See also* Karikas v. United States, 296 F.2d 434, 438 (D.C. Cir. 1961) (reserving opening statement is "probably a good trial tactic"); People v. Hampton, 78 Ill. App. 3d 238, 397 N.E.2d 117, 121 (1979) (the defendant has the right to have his attorney present the facts he intends to prove in opening statement without unreasonable restrictions); White v. State, 11 Md. App. 423, 430, 274 A.2d 671, 675 (1971) (opening statement deemed tactical consideration of counsel).

Opening statement must be delivered by counsel; it may not be given by the court. *Stanfield*, 521 F.2d at 1125.

[10] *See, e.g.*, A.S. JULIEN, OPENING STATEMENTS § 1-01; W.W. DANIEL, GEORGIA CRIMINAL TRIAL PRACTICE 225 (SUPP. 1988); R. A. NIEMANN, OPENING STATEMENTS, PROSECUTION OF THE CRIMINAL CASE § 8-5 (1975); F.X. BUSCH, 2 LAW AND TACTIC IN JURY TRIALS 812 (1959).

[11] Note, *Opening Statement: A Constitutional Right?* 7 AM. J. TR. ADVOC. 624, 628-29 (1984).

[12] Maleh v. Florida East Coast Properties, 491 So. 2d 290, 291 (Fla. App. 1986) ("[O]pening statement is frequently the most critical stage in the trial of a lawsuit, as here the jury forms its first and often lasting impression of the case."). *See also* Binegar v. Day, 80 S.D. 141, 148, 120 N.W.2d 521, 525 (1963) ("At this stage of the trial, the jury is peculiarly alert and impressionable . . . .").

The idea is to "hook" the jury, to catch their interest and predisposed favor. "[B]ring

Indirectly, the courts have admitted as much. For example, they have frequently held curative instructions ineffectual to dispel the injection of prejudice into the jury's mind through the opening statement.[13] In one such case, the court observed, "[a]ny lawyer engaged in trial work is well aware of the initial interest displayed by jurors when first informed of the cause which they are to determine."[14]

The relationship to closing argument is timing. The opening sets up the close. One may not argue as a matter of law. The proficient trial lawyer will not be tempted to argue. He will stick to the short, succinct exposition of facts, because he knows he is striking the theme of the case, setting up the argument. He is setting the bait. He does not need to resort to misconduct in opening statement, because the trap closes at the end. If it springs too soon the prey will shy.[15]

The principles governing opening statement are the same in both civil and criminal trials:[16] one can announce the facts of what he intends or expects to prove in his side of the case and through his

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in a touch of suspense. . . . A byword of writers is that anticipation turns pages. When we are glued to a book, this is the reason. The opening statement [should] convey . . . a sense that something significant is just about to happen." Wilkins, *The Art of the Opening Statement*, 25 TRIAL, Nov. 1989, at 56, 58.

The "hook" is called the *exordium*, "that part of the opening intended to make the listeners heed you and to prepare them for that which is to *follow*." *Wilhelm*, 326 A.2d at 728 (emphasis in original). *See* M.J. ADLER, How To SPEAK How To LISTEN 36-37 (1983).

[13] Smith v. State, 205 Ark. 1075, 172 S.W.2d 248, 251 (1943) ("Just as ink cannot be erased from snow . . . ."); Post v. State, 315 So. 2d 230, 232 (Fla. App. 1975) ("The die was cast . . . ."); McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 N.E. 957, 960 (1908) (statement of family status "manifestly improper"); Kakligian v. Henry Ford Hosp., 48 Mich. App. 325, 210 N.W.2d 463, 465 (1973) ("[n]o remedy could be had which would end the prejudice in the minds of the jurors"); State v. Fenton, 499 S.W.2d 813, 816-17 (Mo. App. 1973) ("all those who have ever engaged in active practice know how difficult it is for the court, by some such . . . simple reprimand, to eradicate . . . from the memories of the jurors the evils of such illegitimate statements"); Cohn v. Meyers, 125 A.D. 2d 524, 509 N.Y.S.2d 603, 606 (1986); State v. Fronhofer, 38 Nev. 448, 465, 150 P. 846, 851 (1915) ("Statements may be made by the prosecuting attorney of such an objectionable character that an instruction to disregard will not be held to cure the prejudicial effect thereof."); Sasse v. State, 68 Wis. 530, 32 N.W. 849, 850 (1887) ("[W]hat avail was it for the court to instruct the jury [to disregard the statement]? They had already regarded it.").

[14] Lybarger v. State Dept. of Roads, 177 Neb. 35, 128 N.W.2d 132, 139 (1964).

[15] *See* R.T. OAKES, CRIMINAL PRACTICE GUIDE §§ 13-2, 13-9 to 13-10 (1989).

[16] Jackson v. United States, 515 A.2d 1133, 1135, n.3 (D.C. 1986).

evidence.[17] He can assert reasonable inferences deducible from that evidence.[18] He may not anticipate the opponent party's evidence or expected evidence.[19] He can tender his theory of the case.[20] He is

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[17] The prosecutor has the "right to show the circumstances under which the crime was committed and to state to the jury his intention and ability to prove those circumstances," including the facts surrounding the actual crime, even if they be not any element of the offense. People v. Clayberg, 26 Cal. App. 2d 614, 147 P. 994, 997 (1915); *see also* People v. Emme, 120 Cal. App. 9, 7 P.2d 183, 184 (1932).

He can advert to collateral bad acts when admissible to prove intent, motive, common plan, etc., Green v. State, 172 Ga. 635, 158 S.E. 285, 288 (1931); State v. McKeever, 339 Mo. 1066, 1079, 101 S.W.2d 22, 28 (1936); State v. Distefano, 70 Utah 586, 262 P. 113, 114 (1927). He can comment on relevant matters which have transpired as the case has unfolded. Waits v. Hardy, 214 Ga. 41, 102 S.E.2d 590, 593 (1958).

For example, in State v. Stahl, 236 La. 362, 368, 107 So. 2d 670, 672 (1959), the prosecutor could declare in opening statement that the defendant smuggled a meat cleaver into the dormitory, waited, then the next day hacked the victim and another person to death, beating their brains out.

And, in People v. Simmons, 109 N.Y.S. 190, 193-95 (A.D.2 Dept. 1908), the prosecutor in his opening statement could term the defendants "bunco men" and "confidence men," describe their *modus operandi*, including the characteristic flashing of money and use of street jargon, since it was based on the evidence. He can explain the meaning of "clean-up statement" when there is testimony referring to it at trial. Henaley v. State, 497 N.E.2d 1053, 1057 (Ind. 1986). *See also* People v. Polk, 61 Cal. 2d 217, 390 P.2d 641, 645, 37 Cal. Rptr. 753, 757 (1964) (terming defendant homosexual not improper when he testified he was a "queen"); People v. Brown, 86 Ill. App. 2d 163, 229 N.E.2d 922, 926 (1967) (ever been "f——d by a nigger?" allowed as based on testimony).

In Graves v. State, 84 Nev 262, 267-68, 439 P.2d 476, 479 (1968), the prosecutor could tout the murder victim's favorable community reputation, asserting that he was "a young boy about 18 years of age, well liked, a young high school graduate." Likewise in United States v. Rivera, 778 F.2d 591, 594 (10th Cir. 1985), the court permitted defense counsel to relate where the accused grew up, his family members and background, even his work history.

Correspondingly, "[i]f the evidence would be admissible in court a defense attorney has the right to outline such evidence in his opening statement." State v. Burruell, 98 Ariz. 37, 401 P.2d 733, 738 (1965).

Thus, in People v. McDowell, 284 Ill. 504, 120 N.E. 482 (1918), the Court held it was an abuse of discretion contributing to reversal to block defense counsel from relating the victim's threats against the defendant to support his claim of self-defense. The trial court had sustained the prosecutor's objection that defense counsel was arguing and rebuked counsel before the jury. *See also* State v. Miller, 359 N.W.2d 508 (Iowa App. 1984).

[18] State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180, 183 (1986); State v. Kendall, 200 Iowa 483, 203 N.W. 806, 807 (1925); State v. Seddens, 680 S.W.2d 364, 365 (Mo. App. 1984); State v. McGill, 510 S.W.2d 782, 785 (Mo. App. 1974).

[19] Hallinan v. United States, 182 F.2d 880, 886 (9th Cir. 1950); Kansas City S. Ry. Co. v. Murphy, 74 Ark. 256, 85 S.W. 428 (1905); State v. Corbin, 117 W. Va. 241,

afforded some license for figurative language, so long as based on the evidence.[21] He can refer to matters of common knowledge.[22] But he may not read long narratives of expected testimony,[23] or expound the law,[24] or express his opinion.[25] He may use charts, props or blackboard for illustration.[26]

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186 S.E. 179, 182 (1936); Baker v. State, 69 Wis. 32, 33 N.W. 52, 56 (1887). *Cf.* Mulligan v. Smith, 32 Colo. 404, 410, 76 P. 1063, 1065 (1904) (plaintiff may address defenses of record).

[20] *See supra* note 2.

[21] United States v. Correa-Arroyave, 721 F.2d 792, 795 (11th Cir. 1983) ("a big-time, high-stakes narcotics dealer" permitted as based on the evidence); United States v. DeRosa, 548 F.2d 464, 470 (3d Cir. 1977) (unnecessary, overdramatic characterization not permitted); United States v. Somers, 496 F.2d 723, 737 n.25 (3d Cir. 1974) (overly dramatic characterization disapproved); United States v. Singer, 482 F.2d 394, 400 (6th Cir. 1973) (Aesop fable disallowed); State v. Lafferty, 749 P.2d 1239, 1253 (Utah 1988) ("[He, the defendant] slashed [the victim's] throat . . . stood over her and he grabbed her hair, and he pulled her head back so that the blood from her heart would pump freely to the kitchen floor."); People v. Chester, 142 Cal. App. 2d 567, 298 P.2d 695, 700 (1956) (prosecutrix' "moral background . . . should not keep the jury from believing she was made of flesh and blood and holds life as dear as anyone else" held permissible comment on the evidence); Blue's Truck Line Inc. v. Harwell, 59 Ga. App. 305, 200 S.E. 500, 502 (1938) ("road hog" allowed); Waits v. Hardy, 102 S.E.2d at 592-93 ("trumped-up lawsuit" allowed).

[22] Wilhelm v. State, 326 A.2d 707, 728-29 (1974).

[23] *DeRosa*, 548 F.2d at 470; Lichtenwalter v. United States, 190 F.2d 36 (D.C. Cir. 1951); People v. Weller, 123 Ill. App. 2d 421, 258 N.E.2d 806, 809 (1970); People v. Hampton, 78 Ill. App. 3d 238, 397 N.E.2d 117, 121 (1979); People v. Hamilton, 268 Ill. 390, 109 N.E. 329, 332 (1915); Scripps v. Reilly, 35 Mich. 371 (1877); McBride v. State, 110 Tex. Crim. 308, 7 S.W.2d 1091, 1094 (1928).

[24] Leonard v. United States, 277 F.2d 834, 842 (9th Cir. 1960) (analysis of elements of crime); Coleman v. Paderick, 382 F. Supp. 253, 254 (E.D. Va. 1974) (defendant sought to make opening statement declaiming presumption of innocence alone); People v. Goldenson, 76 Cal. 328, 19 P. 161, 170 (1888); McDonald v. People, 126 Ill. 150, 154, 9 Am.St.Rep. 547 (1888); Maynard v. State, 81 Neb. 301, 116 N.W. 53, 60 (1908); Cranford v. State, 76 Nev. 113, 118, 349 P.2d 1051 (1960) (elements of crime).

Cf. People v. Smith, 177 Mich. 358, 143 N.W. 12, 13 (1913) (defendant in opening statement has right to state the law on which he relies); State v. Moon, 167 Iowa 26, 148 N.W. 1001, 1003 (1914) (defendant permitted to explain burden of proof).

[25] Hallinan v. United States, 182 F.2d 880, 885 (9th Cir. 1950); Williams v. State, 712 S.W.2d 835, 839 (Tex. App. 1986).

[26] United States v. DePeri, 778 F.2d 963, 978-79 (3d Cir. 1985); Coats v. State, 101 Ark. 51, 141 S.W. 197, 201 (1911); Lewyn v. Morris, 135 Ga. App. 289, 217 S.E.2d 642, 643 (1975); West v. Martin, 11 Kan. App. 2d 55, 713 P.2d 957, 958 (1986); 4-County Elec. Power Ass'n v. Clardy, 221 Miss. 403, 429-30, 73 So. 2d 144, 151 (1954); Walsh v. People, 88 N.Y. 458, 463-64 (1882). *See also* Rogers, *Revising Outdated Trial*

Like argument, opening statement is not evidence.[27] Counsel's remarks do not constitute admission.[28] Furthermore, counsel cannot be held to his opening statement, and a defendant may abandon the defense he raised in his opening.[29] What counsel says in opening statement may be attacked by his adversary in closing argument.[30] The cases warn about the danger of rash predictions made in opening statement, never fulfilled.[31] At the same time, cases hold that a prosecutor may not remark on the defendant's failure to give an opening statement.[32] What counsel announces in opening statement does not bar him from introducing evidence not mentioned.[33] A defendant need not announce his defense in opening statement, and

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Tactics, 25 TRIAL 73 (July 1989); THE SACCO-VANZETTI CASE, I.54 (New York, Henry Holt & Co.) (1928).

By way of illustration, in the Keating Five Senate ethics inquiry, Sen. Riegle of Michigan, one of the target senators, in his own opening statement mocked the special counsel's jigsaw metaphor by holding up his own jigsaw puzzle and emptying the pieces out of the box. N.Y. Times, Nov. 17, 1990, at 9 (nat'l ed.).

[27] *DePeri*, 778 F.2d at 978; Webb v. United States, 191 F.2d 512, 515 (10th Cir. 1951); People v. Wozniak, 235 Cal. App. 2d 243, 45 Cal. Rptr. 222, 233 (1965); People v. Ramsey, 172 Cal. App. 2d 266, 342 P.2d 287, 291 (1959); Sterling v. State, 89 Ga. 807, 15 S.E. 743, 745 (1892); State v. Campbell, 210 Kan. 265, 500 P.2d 21, 32 (1972).

[28] People v. Stoll, 143 Cal. 689, 77 P. 818, 819 (1904); State v. Thomas, 136 Kan. 400, 15 P.2d 723, 726 (1932); Allen v. Webb, 87 Nev. 261, 266, 485 P.2d 677, 680 (1971); State v. Olivieri, 49 Nev. 75, 77, 236 P. 1100, 1101 (1925); *Cf.* McLhinney v. Lansdell Corp, 254 Md. 7, 11-14, 254 A.2d 177, 179-80 (1969).

[29] Spaziano v. State, 429 So. 2d 1344, 1346 (Fla. App. 1983).

[30] State v. Adams, 1 Ariz. App. 153, 155-56, 400 P.2d 360, 362-63 (1965); Lafrenz v. Stoddard, 50 Cal. App. 2d 1, 122 P.2d 374, 378 (1942); Whitted v. State, 362 So. 2d 668, 673 (Fla. 1978); People v. Williams, 26 Ill. App. 3d 381, 324 N.E.2d 707, 711 (1975); People v. Durso, 40 Ill. 2d 242, 239 N.E.2d 842, 848 (1968); State v. Feger, 340 S.W.2d 716, 724-25 (Mo. 1960).

[31] People v. Reitz, 86 Cal. App. 791, 261 P. 526, 529 (1927); People v. Gleason, 127 Cal. 323, 59 P. 592, 593 (1899); State v. Nebinger, 412 N.W.2d 180, 191 (Iowa 1987); Herndon v. State, 82 Tex. Crim. 232, 198 S.W. 788, 789-90 (1917).

[32] People v. Fuerback, 66 Ill. App. 2d 452, 214 N.E.2d 330, 332 (1966); People v. Matthews, 33 A.D.2d 679, 305 N.Y.S.2d 919, 920 (1969).

[33] People v. Lopez, 93 Cal. App. 664, 209 P.2d 439, 441 (1949); People v. Mihaly, 95 Cal. App. 563, 272 P. 1103, 1104 (1928); People v. Rial, 23 Cal. App. 713, 139 P. 661, 664 (1914); Hengel v. Thompson, 176 Kan. 632, 272 P.2d 1058, 1061 (1954).

The rule is different in Louisiana. LA. CODE CRIM. P. art. 769 (West 1989). *But see* State v. McLean, 211 La. 413, 438-40, 30 So. 2d 187, 195-96 (1947); State v. Lester, 482 So. 2d 15, 17 (La. App. 1985). Such a rule is probably unconstitutional because it denies the right to make a defense. *See* Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967).

it has been held improper for the prosecution to remark on the absence of any claim of self-defense in the defense opening.[34]

Ordinarily an effective opening statement can be delivered in fifteen to twenty minutes, even as little as five.[35] However, it has been held in a complex conspiracy case that permitting the prosecutor to deliver a four-hour opening statement was not an abuse of discretion.[36] Conversely, it has been held reversible error to restrict the plaintiff to a five-minute opening statement in a two-and-a-half day medical malpractice trial, hearing sixteen witnesses.[37] Furthermore, in complex multiple-defendant cases the prosecutor must compartmentalize the evidence bearing on each individual defendant.[38]

III. The Origins of the Opening Statement

The origins of opening statement are obscure.

> It has been said to be 'well settled that the jury must be fairly apprised of the nature of the charges against the defendant.' Aside from statutory provisions, however, the origin and scope of this principle appear to be rather obscure. In an 1835 English murder trial, Rex v. Orrell, counsel for the prosecution, after stating the facts, indicated that there was evidence of previous expressions and declarations of the prisoner which he (the prosecutor) would not detail, whereat the presiding judge, upon consultation with an associate, ruled as follows: 'We think the fair course toward the prisoner is to state all that is intended to be proved.'[39]

The Second Circuit has declared that opening statement did not exist at common law in 1789; consequently it was not guaranteed by

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[34] People v. Smith, 94 Ill. App. 3d 969, 419 N.E.2d 404, 408 (1981).

[35] T. Oakes, Criminal Practice Guide § 13-10. *See* State v. Fie, 80 N.C. App. 577, 343 S.E.2d 248, 252 (1986), *rev'd on other grounds*, 359 S.E.2d 774 (1987); Keene v. Wake County Hosp. Systems Inc., 74 N.C. App. 523, 525-26, 328 S.E.2d 883, 885 (1985).

[36] People v. Tenerowicz, 266 Mich. 276, 253 N.W. 296, 301-02 (1934). *See also* Barker, *Evidence: Did Angela Davis Testify* 37 Albany L. Rev. 1, 10 (1972).

[37] Maleh v. Florida East Coast Properties, 491 So. 2d 290 (Fla. App. 1986). *See also* Quarrel v. Minervini, 510 So. 2d 977 (Fla. App. 1987); Bullock v. Mt. Sinai Hosp., 501 So. 2d 738 (Fla. App. 1987).

[38] People v. Gray, 303 N.Y. 660, 101 N.E.2d 765 (1951).

[39] Calhoun v. Commonwealth, 378 S.W.2d 222, 223 (Ky. 1964) (citations omitted).

the sixth amendment right to counsel.[40] The *Salovitz* court proclaimed that there is no common or predominant legal rationale among the various jurisdictions of the United States that justifies the opening statement.[41] The court pointed out that the diffuse legal authority

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[40] *See* United States v. Salovitz, 701 F.2d 17, 18-19 (2d Cir. 1983), where the court said:

> We hold, however, that a defendant's unfettered right to make an opening statement, unlike his right to a closing argument, is not one of the 'traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments. . . . [T]he making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge.'

Id. at 19-21 (quoting Herring v. New York, 422 U.S. 853 (1975)).

As in *Calhoun*, the *Salovitz* trial court read the indictment aloud at the onset of the trial. In other words, each case furnished a rudimentary equivalent of the notice function. However, the stilted language of a complaint or indictment can hardly be deemed tantamount to an opening statement. The answer or plea, even if read, will hardly suffice to present either the theory of the defense or the organization of the expected evidence. Rather than affording the jury a picture of the finished puzzle by which to piece together the disjointed evidence, such a reading of the charging document by the court clerk will likely leave the jury more puzzled than before the document was read. Besides, the giving of opening statements by the respective parties helps the jury to follow the legal requirements of the respective burdens of proof, in a way that the reading of an indictment cannot. *See* People v. Kurtz, 51 N.Y.2d 380, 414 N.E.2d 699, 702, 434 N.Y.S.2d 200, 202 (1980) (recognizing that reading the indictment cannot satisfy the function of giving the opening statement); Fenton Country House Inc. v. Auto-Owners Ins. Co., 63 Mich. App. 445, 234 N.W.2d 559, 561 (1975) ("[The opening statement] must be made using simple language a jury will likely understand.").

[41] Some states provide that the defendant may open after the prosecution has completed presentation of its case. *See* LA. CODE CRIM. PROC. ANN. art. 765 (West 1989); MO. ANN. STAT. § 546.070 (Vernon 1989); OKLA. STAT. ANN. tit. 22, § 831 (1989).

Others provide that the defense may open immediately following the prosecution opening. *See* ILL. ANN. STAT. ch. 110A, para. 235, 432 (Smith-Hurd 1988); IND. CODE ANN. § 35-37-2-2 (Burns 1988); N.Y. CRIM PROC. LAW § 260.30 (McKinney 1989); OHIO REV. CODE ANN. § 2945.10 (1982); VA. CODE ANN. § 19.2-265 (1988).

Still others permit the defense the option of opening either before or after the presentation of the prosecution's proof. *See* ARIZ. R. CRIM. P. 19.1; CAL. PENAL CODE § 1093 (West 1989); IOWA CODE ANN. § 813.2 (West 1989); KAN. STAT. ANN. § 22-3414 (Vernon 1989); KY. R. CRIM. P. 9.42; MICH. CT. R. 6001 MICH. R. CIV. P. 2.507; MINN. R. CRIM. P. 26.03 (11); MO. R. CRIM. P. 27.02; MONT. CODE ANN. § 46-16-401 (1987); NEV. REV. STAT. § 175.141 (1987); N.M. R. CRIM. P. 5-607; N.C. GEN. STAT. § 15A-1221 (1988); PA. R. CRIM. P. 1116; R.I. SUPER. CT. R. CRIM. P. 26.2; TEX. CRIM. P. CODE ANN. § 36.01 (Vernon 1989); UTAH CODE ANN. § 77-35-17 (1988); UTAH R. CRIM. P. 17.

Some states require the prosecutor to make an opening statement. New York, Ohio, Indiana, Michigan, Missouri, Oklahoma, Montana, Pennsylvania, Kentucky, Texas, for

supporting opening statement, where it exists, is based upon statutes which differ in pattern.[42] However, these discrepancies concern mostly the timing of the presentation of statements during trial, not the substantive right to give them.

Indeed, the trend of legislation is to grant the defendant more freedom toward opening, with an increasing number of states permitting the option to open immediately or to reserve.[43] Some recent cases hold that the defendant ought to be allowed to make opening statement, regardless of whether he intends to adduce evidence affirmatively or not.[44]

Today the opening statement is a forensic fact of the trial. As one District of Columbia court has declared:

> Despite the absence of a statute or rule of court in this jurisdiction and the lack of any local case authority directly holding that a defendant has the right to make an opening statement, we take judicial notice that for many years both trial and appellate courts have assumed the

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example, all have such statutes. However, except for Missouri, and perhaps New York, they are not strictly applied. *Compare* State *ex rel.* Westfall v. Gerhard, 676 S.W.2d 37 (Mo. App. 1984), and People v. Levine, 297 N.Y. 144, 77 N.E.2d 129 (1948), with People v. Nicen, 123 Mich. App. 258, 333 N.W.2d 243 (1983); People v. Bonner, 49 Mich. App. 153, 211 N.W.2d 542 (1973); People v. Calhoun, 19 Mich. App. 571, 172 N.W.2d 922 (1969); Sanders v. State, 688 S.W.2d 676 (Tex. App. 1985); McClendon v. State, 119 Tex. Crim. 29, 44 S.W.2d 724 (1931); State v. Scott, 80 Ohio App. 3d 1, 455 N.E.2d 1363 (1983).

Most states do not require an opening statement.

Some jurisdictions, including the federal government, Connecticut, South Carolina, Florida and Alabama, provide no statute or rule assuring the presentation of opening statement during trial. United States v. Salovitz, 701 F.2d at 20.

Although there is some case law declaring that a defendant may not open unless he intends to put on evidence, the better and more modern view is to the contrary. Compare *Salovitz*, 701 F.2d at 20 n.4, with current North Carolina and Iowa statutes. *See particularly* State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986). First, opening statement is not evidence; it is notice. Second, as a matter of the right to defend, one ought to be able to rely upon the presumption of innocence and the prosecution's failure to make its burden of proof. After all, one of the features of opening statement is to deliver the *theory* of the case. Finally, denying the right to make an opening skews the balance of the respective burdens of proof. *See* Imwinkelried, *The Compulsory Process Clause*, 14 CHAMPION 15 (Sept 1990); Imwinkelried, *The Constitutional Right to Present Evidence*, 62 MIL. L. REV. 225 (1973).

[42] *Salovitz*, 701 F.2d at 19-20.

[43] *Compare, e.g.*, CAL. PENAL CODE § 1093 with statutes cited in *Salovitz*, 701 F.2d at 19 n.1.

[44] *See* United States v. Hershenow, 680 F.2d 847, 858 (1st Cir. 1982); *Paige*, 343 S.E.2d at 859.

right of both the prosecutor and defense counsel to make opening statement to the jury.[45]

The legal rationale supporting opening statement lacks absolute unity precisely because it is a creature of the common law under our federal system, featured in fifty-one slightly differing varieties, but essentially identical in function. Instead of focusing on the differences, one should marvel at the similarity of purpose found in every opening statement given in every courthouse in the land. Such uniformity in and of itself testifies to the basic role it plays in the American trial.[46]

IV. Directed Verdict

More evidence of the notice function of the opening statement can be gleaned from one its most peculiar features: the doctrine of directed verdict or acquittal upon opening statement. This archaic doctrine reflects the pre-1960 era before meaningful discovery was allowed in criminal cases. It also evinces the inter-relationship between the civil and criminal procedure law, since it appears to have begun as a civil doctrine. Analysis of this legal curiosity is significant because it reveals that the function of the opening statement is notice to the jury.

For instance, in *Oscanyan v. Winchester Repeating Arms Co.*,[47] a contract action, the trial court granted the defendant a directed verdict at the conclusion of the plaintiff's opening statement. Part of the rationale appeared to be predicated upon an attorney admission theory that the plaintiff could not prevail on the stated facts; therefore, there was no sense in proceeding to try the case.

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[45] Hampton v. United States, 269 A.2d 441, 442 (D.C. 1970) (footnote omitted). *See also* United States v. Stanfield, 521 F.2d 1122, 1125 (9th Cir. 1975) ("The practice of permitting attorneys to make opening statements is a practice long accepted as established and traditional in jury trials."); Garner v. State, 78 Nev. 366, 370, 374 P.2d 525, 528 (1962) ("After the jury has been selected and sworn, every criminal trial has three phases—the opening statement, the proof and the summation."); Baker Matthews Lumber Co v. Lincoln Furniture Mfg. Co., 148 Va. 413, 418-19, 139 S.E. 254, 256 (1927).

[46] Besides, there is evidence of opening statements being given in trials as early as 1799, only ten years after the adoption of the constitution, which of itself suggests even earlier practice. *See* F. Wharton, State Trials of the United States, 347, 357 (1849) (reporting the trial of Duane, Reynolds, Moore & Cumming for seditious riot (Philadelphia Co. Ct. of Oyer & Terminer (1799))); Trial of Selfridge (Boston, Russell & Cutler et. al.) (1806) (reporting Commissioner v. Selfridge (Suffolk, Mass. Sup. Jud. Ct. (1806)), prosecution for murder).

[47] 103 U.S. 261 (1880).

The leading criminal case for this outmoded rule of law is *United States v. Dietrich*,[48] a bribery case brought against a United States senator. Upon the conclusion of the Government's opening statement it became evident that the alleged bribe occurred before the bribee had been sworn into office. His federal status was essential to prosecution under the statute. Justice Van Devanter pointedly rebuked, "It would be a waste of time to listen . . . ,"[49] suggesting that one excuse for the doctrine is judicial economy. As the justice keenly observed, the federal court was a court of limited, not general, criminal jurisdiction.[50] The anomalous case can be readily explained on jurisdictional grounds.

In theory the doctrine persists, yet in such crippled form that it is hard to imagine its application to a criminal case.[51] Where the doctrine survives, the court can only direct an acquittal upon the prosecution's opening statement when there is an affirmative showing that the prosecution cannot gain a conviction under any conceivable view of the evidence, and then only when the prosecutor has had an opportunity to patch the holes in his statement.[52] The rule is only available where the prosecutor *must* make an opening statement at the start of the trial.[53] Its inefficacy is summed up by an Indiana court:

"If the prosecutor, the defense attorney, and the court discharge their pretrial discovery responsibilities, it would appear next to impossible for a case to come to trial in which the prosecutor might have occasion to admit the truth of a fact which constitutes a complete defense . . . ."[54]

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[48] 126 F. 676 (D. Neb. 1904).

[49] *Id.* at 678.

[50] *Id.*

[51] *See, e.g.*, State v. Simpson, 64 Haw. 363, 368, 641 P.2d 320, 323-24 (theoretically upholding the judgment of acquittal upon the prosecution's opening statement, while admitting that the motion is rarely granted).

[52] Rose v. United States, 149 F.2d 755, 758 (9th Cir. 1945); United States v. Donsky, 825 F.2d 746, 751-52 (3d Cir. 1987); White v. State, 11 Md. App. 423, 427, 274 A.2d 671, 672-73 (1971); People v. Kurtz, 434 N.Y.S. 2d 200, 202-03, 414 N.E.2d 699, 702 (1980); State v. Protock, 25 N.J. Super. 499, 501 A.2d 551, 554-55 (1985).

[53] People v. Barron, 195 Colo. 390, 391, 578 P.2d 649, 650 (1978). The doctrine does not exist in criminal cases in California. People v. Kerrick, 86 Cal. App. 542, 261 P. 756 (1927).

[54] Chatman v. State, 164 Ind. App. 97, 102, 326 N.E.2d 839, 842 (1975).

Under the Roman Remmian Law a prosecutor who failed to make his case could be branded on the forehead with the letter K, for the Roman word, *calumniator*. This deprived him of political rights. CICERO, MURDER TRIALS 59 (M. Grant, trans. 1975).

Additionally, in jurisdictions where counsel is permitted to voir dire the jury directly, a defective opening statement will be overlooked.[55] However, this seems reasonable only if counsel was given a fair chance to get his theory of the case before the jury.

The doctrine suffers like disfavor in the civil law.[56] As expressed by a District of Columbia court, "equitable considerations require that litigants not be denied their day in court merely because they fail to allege in their opening statements that which is sufficiently alleged in their pleadings."[57]

The doctrine is not jurisdictional in the manner of due process notice of the indictment.[58] Both civil and criminal cases rather uniformly hold that if the pleadings are sound, no motion to dismiss on opening statement will be, or should be, allowed.[59] Thus, the real value of the rule lies in furnishing an enforceable mechanism to assure that a legally minimum factual notice of the evidence gets to the jury. As the New York Court of Appeals has stated, "certainly the jury

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[55] People v. Joseph, 24 Mich. App. 313, 180 N.W.2d 291, 293-94 (1970); People v. Clayton, 236 Mich. 692, 211 N.W. 42, 43 (1926).

[56] Michael E.L. v. County of San Diego, 183 Cal. App. 3d 515, 522, 228 Cal. Rptr. 139, 142 (1986); Hurn v. Woods, 132 Cal. App. 3d 896, 903, 183 Cal. Rptr. 495, 497 (1982); John Norton Farms v. Todagco, 124 Cal. App. 3d 149, 172, 177 Cal. Rptr. 215, 221-22 (1981); Ucello v. Laudenslayer, 44 Cal. App. 3d 504, 509, 118 Cal. Rptr. 741, 744-45 (1975); Ontai v. Straub Clinic & Hosp., 66 Haw. 237, 252, 659 P.2d 734, 745 (1983); Douglas v. Whittaker, 324 Mass. 398, 86 N.E.2d 916, 918 (1949); Fenton Country House, Inc. v. Auto Owners Ins. Co., 63 Mich. App. 445, 234 N.W.2d 559, 561; Haynes v. Monroe Plumbing & Heating Co., 48 Mich. App. 707, 211 N.W.2d 88, 92 (1973); Spicer v. Bonker, 45 Mich. 630, 8 N.W. 518 (1881); Allen v. Webb, 87 Nev. 261, 266, 485 P.2d 671, 680 (1971); Kley v. Healy, 127 N.Y. 555, 28 N.E. 593, 594 (1891); Acuri v. Great Amer. Ins. Co., 342 S.E.2d 177, 182-83 (W. Va. 1986).

[57] Hentz v. CBI-Fairmac Corp., 445 A.2d 1004, 1005 (D.C. 1982).

[58] State v. Simpson, 64 Haw. at 369, 641 P.2d at 324.

[59] Lampka v. Wilson Line of Wash. Inc., 325 F.2d 628, 629 (D.C. Cir 1963); *Hentz*, 445 A.2d at 1005; Crawford v. Palomar, 7 Mich. App. 21, 151 N.W.2d 236, 239 (1967); State v. Stamberger, 209 N.J. Super. 579, 508 A.2d 1140, 1141 (1985). *Cf.* Bell v. Merritt, 118 Mich. App. 414, 325 N.W.2d 443, 445 (1982); Makuck v. McMullin, 87 Mich. App. 82, 273 N.W.2d 595, 597 (1979); *Kley*, 28 N.E. at 593.

In California, statute sanctions nonsuit on plaintiff's opening statement, irrespective of pleadings. Loral Corp. v. Moyes, 174 Cal. App. 3d 268, 272, 219 Cal. Rptr. 836, 838 (1985); Willis v. Gordon, 20 Cal. 3d 629, 633, 143 Cal. Rptr. 723, 725, 574 P.2d 794, 796 (1978); Timmsen v. Olson, Inc., 6 Cal. App. 3d 860, 867-68, 86 Cal. Rptr. 359, 363-64 (1970); Young v. Desert View Mgmt. Corp., 275 Cal. App. 2d 294, 79 Cal. Rptr. 848, (1969); Goff v. County of Los Angeles, 254 Cal. App. 2d 45, 61 Cal. Rptr. 840, 841 (1967). *See* CAL. CODE CIV. P. § 581(c) (1989).

must hear sufficient evidence to intelligently understand the nature of the case they have been chosen to decide."[60]

V. Forensic Misconduct

The power of first impressions has its dark side: forensic misconduct.[61] Volumes have been written about misconduct in closing argument; little about misconduct in opening statement. Yet the scale of closing argument has declined in recent times. A hundred years ago, before the advent of the electronic era, trial rhetoric was ac-

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[60] People v. Kurtz, 434 N.Y.S. 2d 200, 203, 414 N.E.2d 699, 702 (1980).

[61] Forensic misconduct invariably involves appeals of *ethos*, the injection of personal *persona* of the speaker, or appeals to *pathos*, or emotion, of the audience. These are two of the Aristotelian components of persuasive speech; the third is the appeal to reason based on the facts—or *logos*. J. Adler, How to Speak How to Listen 30 (1983).

The inherent contradiction of the legal theory of opening statement is that it is supposed to be only an appeal to the *logos*, whereas in reality it is another form of persuasive speech. As such, it necessarily involves all three components: *ethos*, *pathos* and *logos*.

> Of the three factors in persuasion—*ethos*, *pathos*, and *logos*—ethos always should come first. Unless you have established your credibility as a speaker and made yourself personally attractive to your listeners, you are not likely to sustain their attention, much less to persuade them to do what you wish. Only after they are persuaded to trust you, can they be persuaded by what you have to say about anything else.

Id. at 33.

"In most sales talks, the opening should attempt to establish the speaker's *ethos* first. That should be followed by bringing *pathos* into play. *Logos* should be left until the end." *Id.* at 63. "With *ethos* and *pathos* fully operative, *logos* remains the winning trump in the persuader's hand." *Id.* at 42.

The law of forensic misconduct prohibits the overt or clumsy appeals of *ethos* and *pathos*. In jurisdictions in which counsel personally conducts voir dire, the preliminary establishment of *ethos* and *pathos* may be accomplished then. Opening statement more easily may track the legal theory of a *logos* exposition. In jurisdictions, such as federal court, in which the bench conducts voir dire, counsel must be more creative and subtle to meet the Aristotelian predicate for effective speaking in opening statement.

> *Logos*—the marshalling of reasons—comes last. Just as you cannot bring motivating passions into play, feeling in favor of the end result you are seeking to produce, until you have first aroused favorable feelings toward your own person, so there is little point in resorting to reasons and arguments until you have first established an emotional mood that is receptive of them.
>
> Reasons and arguments may be used to reinforce the drive of passions, but reasons and arguments will have no force at all unless your listeners are already disposed emotionally to move in the direction that your reasons and arguments try to justify.

Id. at 37.

knowledged as a high art; closing arguments took hours, even days.[62] Today closing arguments of more than a few hours are rare; most are shorter. This decline in the empirical importance of argument, coupled with the twentieth-century scientific discovery of the nature of cognitive processes, such as the primacy principle, has enhanced the importance of the opening statement to the truth-finding function of the trial. Consequently, dirty tricks in the opening statement are probably much more lethal than hidebound legal theory can concede.

All the prohibitions which apply to misconduct during argument apply to opening statement.[63] In fact, misconduct in opening statement is often a prelude to misconduct in closing argument.[64] However, there is an important tactical distinction between opening and argument: prosecutors enjoy a special luxury in the opening statement—the good faith rule.[65]

> The only legitimate purpose of an opening is to explain to the jury the nature and elements of the issue they are to try that they can understand the bearing of the testimony which is thereafter put in. They usually have no knowledge of the precise issues, except as thus presented. Any misrepresentation of what is covered by the issues has a tendency to prevent them from giving to the testimony when put in a proper comprehension of its bearings, or of its real force. The prosecuting attorney is supposed when he files an information, to know

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[62] See the words of Lumpkin, J., in Berry v. State, 10 Ga. 511, 521-22 (1851).

[63] *See* Wilhelm v. State, 272 Md. 404, 326 A.2d 707 (1974); ABA STANDARDS, *supra* note 1, comment to Standard 4-7.4.

[64] *See, e.g.*, City of Cleveland v. Peter Kiewit & Sons Co., 624 F.2d 749, 752 (6th Cir. 1980); State v. Troy, 688 P.2d 483, 485 (Utah 1984).

[65] United States v. Moran, 194 F.2d 623, 625 (2d Cir. 1952); McFalls v. State, 66 Ark. 16, 48 S.W. 492, 493 (1898); Ricardo v. State, 481 So. 2d 1296, 1297 (Fla. App. 1986); Daniels v. State, 58 Ga. App. 599, 199 S.E. 572, 576 (1938); Yedor v. Centre Properties Inc., 173 Ill. App. 3d 132, 527 N.E.2d 414, 421 (1988); People v. Rogers, 303 Ill. 578, 136 N.E. 470, 473 (1922); People v. Smith, 121 A.D.2d 754, 504 N.Y.S.2d 463, 465 (1986); People v. DeTore, 34 N.Y.2d 199, 356 N.Y.S.2d 598, 603 (1974); State v. Roden, 380 N.W.2d 520, 525 (Minn. 1986); State v. Allen, 100 Iowa 7, 69 N.W. 274 (1896); Ossenkop v. State, 86 Neb. 539, 126 N.W. 72, 75 (1910); State v. Kenny, 128 N.J. Super. 94, 319 A.2d 232, 241 (1974).

Yet, since there is no evidence adduced at the start of the trial, when the prosecutor commits misconduct in opening statement and gets away with it, he distorts the constitutional balance of burden of proof and presumption of innocence.

California has abrogated the good faith rule, holding the prosecutor's intent irrelevant to a finding of prejudice. People v. Bolton, 23 Cal. 3d 208, 215-16, 152 Cal. Rptr. 141, 144-45 (1979).

> what testimony he can rely upon to support it, and is prepared to try his case upon. He is also presumed to know the rules of evidence. There is no reason for attempting to influence the jury in advance by false or exaggerated statements, which he knows he cannot prove or will not be able to introduce.[66]

The good faith rule provides that a prosecutor may state in his opening statement facts he intends to prove by competent evidence.[67] But mere failure to prove what he said he intended "is not ground for reversal unless allegations in the opening statement are completely unsupported by the evidence and there is a showing of prejudice to the defendant and bad faith by the prosecutor."[68] The prosecutor should refrain from mentioning facts he cannot, or will not be permitted to, prove. However, the mere failure to offer evidence does not necessarily signal prejudice.[69] Without a showing of bad faith or lack of intent to introduce evidence, there is no misconduct.[70]

The Supreme Court has explained the traditional rationale for the rule: "Many things might happen during the course of the trial which

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[66] People v. Montague, 71 Mich. 447, 39 N.W. 585, 588 (1888). In *Montague* the defendant was prosecuted for adultery with the prosecutor's wife. In addition to making improper remarks in opening statement, including referring to the "imaginary defense," interjecting inadmissible hearsay, and inciting rich-poor class prejudice, the prosecutor furnished the jurors with cigars and liquor during trial.

See also Watson v. State, 137 Ga. App. 530, 224 S.E.2d 446, 448 (1976) ("of course the experienced prosecuting attorney knows much damage may be done in an opening statement"); People v. Hamilton, 121 A.D.2d 176, 502 N.Y.S.2d 747, 749 (1980) ("What was clearly 'important' to the trial assistant was to use the opening as a vehicle for assuring jurors who might be hesitant to convict on the basis of an identification by a single witness that there was other evidence connecting the defendant with the crime . . . .").

[67] The loose constraint of the good faith rule can be gauged tellingly in People v. Ney, 238 Cal. App. 2d 785, 48 Cal. Rptr. 265 (1965), a mayhem prosecution, in which the prosecutor asserted in opening statement that the defendant admitted cutting off the penis and flushing it down the toilet. At trial the prosecutor did not introduce the confession. *See also* State v. Stillman, 310 S.W.2d 886 (Mo. 1958) (abortion case in which the prosecutor declaimed that the aborted fetus was dropped in the sewer); Reynolds v. State, 147 Ind. 3, 46 N.E. 31 (1897) (prosecutor anticipated defendant's alibi by citing the false alibi of his *co-defendant*); Melchor-Gloria v. State, 99 Nev. 174, 660 P.2d 109 (1983) (conviction for second degree murder affirmed despite fact prosecutor had not fully reviewed transcripts).

[68] State v. Hipplewith, 33 N.J. 300, 164 A.2d 481, 486 (1960).

[69] In People v. Barajas, 145 Cal. App. 3d 804, 193 Cal. Rptr. 750 (1983), the court employed a three-prong test to determine prejudice: (1) Did the defendant make a motion *in limine* or object? (2) Did the prosecutor or court disclaim that the opening statement is not evidence? (3) Did the opening statement violate the defendant's right of confrontation? *Id.* at 809, 193 Cal. Rptr. at 753.

[70] People v. Ramsey, 172 Cal. App. 2d 266, 342 P.2d 287, 291-92 (1959).

would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error . . . .'"[71]

Elsewhere, the Kansas Supreme Court has expressed it thusly:

> Counsel should be allowed considerable latitude in his opening statement and its general nature and character rests largely with the discretion of the district court, which must necessarily rely on the good faith of counsel properly to confine his remarks within the bounds of propriety and good faith. Since whatever counsel states in his opening statement as to what he expects to prove is subject to the further action of the court in permitting him to introduce testimony, it is not necessarily misconduct for him to claim something he does not later prove.[72]

Consequently instances of demonstrable bad faith are rare,[73] and the unscrupulous prosecutor will hardly be deterred.[74] Although re-

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[71] Frazier v. Cupp, 394 U.S. 731, 736 (1969).

[72] Miller v. Braun, 196 Kan. 313, 411 P.2d 621, 625 (1966)(citation omitted).

[73] *See* Charpentier v. City of Chicago, 150 Ill. App. 3d 988, 502 N.E.2d 385 (1986).

[74] See M.J. ADLER, HOW TO SPEAK, HOW TO LISTEN 28:

> The sophist, in contrast, is always prepared to employ any means that will serve his purpose. The sophist is willing to make the worse appear the better reason and to deviate from the truth if that is necessary in order to succeed.
>
> In ancient Greece, the sophists were teachers of rhetoric for the purpose of winning lawsuits. Each citizen who engaged in litigation had to act as his own lawyer—his own prosecutor or defense attorney. To those who regarded success in winning a lawsuit as an end that justified the use of any means, whether honorable or not, the sophistical misuse of rhetoric recommended itself.
>
> That is how rhetoric first got a bad name . . . .

Id. See also Underwood, *Adversary Ethics: More Dirty Tricks*, 32 DEF. 585, 586 n.7 (1983):

> Unfortunately, the view seems to be that 'dirty tricks' pay due to an absence of meaningful remedies for the aggrieved party. From the viewpoint of the plaintiff's lawyer, J. O'Connell opines in THE LAWSUIT LOTTERY 40 (1979) that:
>
> It is true that [in the cases discussed] the illicit conduct of the lawyers resulted in a reversal of the trial court's decision in his favor. But to the extent that the trickery helped gain a verdict in the first place - with the realization that it might or might not be appealed and with the certainty that any verdict can be used as a lever in bargaining over settlement pending appeal - a lawyer could well conclude that such tricks are worth a try.

Id.

Compare J. JEANS, TRIAL ADVOCACY 27 (1975):

> When such a transgression occurs by the plaintiff in a civil case or a prosecutor in a criminal matter, the opponent may seek appropriate relief from the trial court. But if the defense attorney has injected the poison there is little, if any, antidote

ported cases of misconduct during opening statement do not compare with the legion of cases recounting misconduct during closing argument, they are yet no small number.[75]

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available. Mistrials are, from a practical point of view, undesirable (who wants to abort a year of docket waiting, and the expense of an unfinished trial?) and that admonition to disregard the testimony is meaningless.

Id.

[75] Kinds of misconduct occurring in opening statement include:

1. Inflammatory Appeals:

United States v. Somers, 496 F.2d 723, 737 n.26 (3d Cir. 1974) ("Their greed could never be satiated. . . . These defendants ruled Atlantic City, New Jersey, as if it were their private kingdom. They enforced a total feudal system of corruption upon that society, and they acted as the lords of corruption. . . . This Charlatan lied whenever it pleased him, secretly collected tens of thousands of dollars for himself and other members of this conspiracy."); United States v. Stahl, 616 F.2d 30, 32 (2d Cir. 1980) ("This case is also about money, tremendous amounts of money. . . . You are going to hear proof . . . about the unchecked flow of corruption in various Park Avenue offices, in the IRS, and in the offices of a major real estate company in this city . . . [I]t will deal with the man whose illegal conduct in business made him a major corrupt bribe-giver in the City of New York."); Kakligian v. Henry Ford Hosp., 48 Mich. App. 325, 210 N.W.2d 463, 465 (1973) ("This lawsuit is started for one thing and one thing only and that is for revenge."); Lickliter v. Commonwealth, 249 Ky. 95, 60 S.W.2d 355, 356-57 (1933) (prosecutor referred to letter found in the defendant's sister's jail cell from a Negro man and letters from the sister to the Negro); State v. Kennedy, 177 Mo. 98, 75 S.W. 979, 984 (1903) ("She couldn't have been led aside . . . from the path of virtue."); People v. Reimann, 266 A.D. 505, 42 N.Y.S.2d 599, (1943) (prosecutor proclaimed defendant boasted of his German blood, gave the Nazi salute and shouted, "Heil Hilter!"); People v. Silverman, 252 A.D. 149, 297 N.Y.S. 449, 472 (1937) (needless recital of gruesome murder details in obstruction of justice case); People v. Luberto, 212 A.D. 691, 209 N.Y.S. 544, 547 (1925) (reference to defendant's confession, never introduced into evidence, deemed inflammatory, wrecking the jury's "mental poise"); People v. Wolf, 183 N.Y. 464, 76 N.E. 592, 595 (1906) (prosecutor asserted crimes committed on the victim, by persons other than the defendant, of rape and seduction, which he knew he could not prove); Smith v. State, 205 Ark. 1075, 172 S.W.2d 248, 251 (1943) (prosecutor detailed defendant's confession, knowing it had been repudiated); Maggio v. City of Cleveland, 15 Ohio 136, 83 N.E.2d 912, 915 (1949) (plaintiff's attorney disclosed plaintiff's nine miscarriages, husband's disabling head injury ten years earlier in unrelated accident, her lack of formal schooling and immigration from Italy when five years old, in blatant grab at sympathy); Fields v. Commonwealth, 2 Va. App. 300, 343 S.E.2d 379, 383 (1986) (attack on defendant's relation with "his women"); State v. Smith, 75 N.C. 307 (1876) ("The defendant was such a scoundrel that he was compelled to move his trial from Jones County to a county where he was not known. . . . The bold, brazen faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me that if I did he would get the legislature to impeach me."); McDonald v. People, 126 Ill. 150, 9 Am.St.Rep. 547 (1888) (prosecution interjected the "Boodle prosecutions in New York

Occasionally the courts splutter an effete litany, scolding such misconduct.[76] Unfortunately, in the real courtroom, counsel is advised

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City," the defendant's change of venue, and declared purpose of defense taking exceptions "was to get error in the record"); State v. Kenny, 128 N.J. Super. 94, 319 A.2d 232, 240 (1974) ("a story of corruption . . . the only way you could do business in Hudson County"); State v. Troy, 688 P.2d 483, 485 (Utah 1984) (prosecutor accused defendant of using alias, when he knew otherwise, and referred to defendant's participation in federal witness protection program).

2. Facts Not In Evidence:

United States v. Sawyer, 799 F.2d 1494, 1507 (11th Cir. 1986) (mention of defendant's confession, never introduced or offered); Government of Virgin Islands v. Turner, 409 F.2d 102, 103 (3d Cir. 1969) (reference to $4,000 of unrelated other credit card fraud); United States v. Brockington, 849 F.2d 872, 874 (4th Cir. 1988) (prejudicial photographs of defendant in gold jewelry, associating him with flashy drug dealers); Minker v. United States, 85 F.2d 425, 426 (3d Cir. 1936):

> The evidence will show that the Government could have included one hundred more in this indictment, but we chose to eliminate the minor men and put in about sixty-two that we felt were necessary and that could be convicted.
>
> . . . .
>
> I will say this, the Government has made very diligent search and spent thousands of dollars in attempting to apprehend men that are fugitives from Justice in this case. They have flown to Canada and other parts.
>
> The conspirators in this case also involve each other. Many statements were given in writing voluntarily by many of these conspirators involving the rest of them. We have all those statements in writing. They involve and give the whole intricate detailed operation of the conspiracy.

Id.

Myres v. United States, 174 F.2d 329, 338 (8th Cir. 1949) ("I am going to tell you where the cash went. I am going to show that the defendant was cheating his dying partner."); United States v. Hernandez, 779 F.2d 456, 460 (8th Cir. 1985) (claim an unindicted co-conspirator "admits everything"); United States v. Simmons, 567 F.2d 314, 321 (7th Cir. 1977) (reference to accomplice's arrest statement fingering the defendant); Leonard v. United States, 277 F.2d 834, 841 (9th Cir. 1960) (40 minute dissertation of 83 collateral bad acts held inadmissible at trial); United States v. Singer, 482 F.2d 394, 398 (6th Cir. 1973) (claim in tax evasion case that defendant got money out of a building and loan like using an acetylene torch, mask, and blew the vault open); Manuel v. United States, 254 F.2d 272 (8th Cir. 1918) (reference to defendant's prior murder conviction); State v. Serrano, 17 Ariz. App. 473, 498 P.2d 547, 549 (1972) ("This is not the first time these officers have seen Stanley Serrano."); Marshall v. State, 71 Ark. 415, 75 S.W. 584, 584-85 (1903) (defendant had reputation in New York, St. Louis, and Chicago of being a professional pickpocket and thief). People v. Purvis, 60 Cal. 2d 323, 33 Cal. Rptr. 104, 116 (1963) (reference defendant involved in knifing in Washington State); State v. Stafford, 213 Kan. 152, 515 P.2d 769, 778 (1974) (claim defendant refused polygraph); Goldstein v. Gontarz, 364 Mass. 800, 309 N.E.2d 196, 202 (1974) (mention that plaintiff had not sought workmen's compensation); Walker v. Fogliani, 83 Nev. 154, 425 P.2d

to display quick reflexes and sight-recognition to the forms of mis-

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794, 795 (1967) (reference to defendant being apprehended at Oklahoma State Prison); Garner v. State, 78 Nev. 366, 374 P.2d 525, 528-29 (1962) (defendant's criminal record); State v. Fronhofer, 38 Nev. 448, 150 P. 846, 851-52 (1915) (dying declaration); State v. Williams, 28 Nev. 325, 82 P. 353, 356 (1905) (confession); Watson v. State, 137 Ga. App. 530, 224 S.E.2d 446, 449-50 (1976) (reference to drug problem in the county, polygraph); People v. Williams, 159 Ill. App. 3d 612, 513 N.E.2d 415, 419 (1987) (prosecutor claimed S would testify defendant beat him; S never testified); Charpentier v. City of Chicago, 502 N.E.2d at 391 (defense counsel claimed the driver was drunk, having "split a fifth of whiskey," but then never introduced any such evidence at trial); People v. Washington, 54 Ill. App. 2d 467, 204 N.E.2d 25, 28-29 (1964) (mention that deceased was married with four children); People v. McCollum, 298 Ill. App. 630, 19 N.E.2d 227 (1939) (defendant's flight); Colmar v. Greater Niles Township Publishing Corp., 13 Ill. App. 3d 267, 141 N.E.2d 652, 655 (1975) (charges of financial interest, never proved); McCarthy v. Spring Valley Coal Co., 83 N.E. 957, 960 (Ill., 1908) (reference to plaintiff's wife and five children in gain for sympathy); State v. Moon, 167 Iowa 26, 141 N.W. 1001, 1005 (1914) (prosecutor declared defendant admitted performing many other abortions); People v. Jansson, 116 Mich. App. 674, 323 N.W.2d 508, 515 (1982) (hearsay remark, "If he did this to you, he'll do it to someone else"); Post v. State, 315 So. 2d 230, 232 (Fla. App., 1975) (defendant's prior robbery conviction); Linder v. Commonwealth, 714 S.W.2d 154, 155 (Ky. 1986) (prosecutor related accomplice had pleaded guilty); Brummit v. Commonwealth, 357 S.W.2d 37, 41 (Ky. 1962) (defendant living in sin); Nantz v. Commonwealth, 243 S.W.2d 1007, 1010 (Ky. 1951) (reference to murder of deceased's step-father hours before deceased was killed); Turner v. Commonwealth, 240 S.W.2d 80, 81-82 (Ky. 1951) (claim without proof that defendant went to the home for the purpose of committing rape and assault on Mrs. Thacker); Mills v. Commonwealth, 310 Ky. 240, 220 S.W.2d 376, 378 (1949) ("improprieties," facts not in evidence); State v. Fenton, 499 S.W.2d 813, 816 (Mo. App. 1973) (prosecutor declared accomplices had pleaded guilty); State v. Stewart, 218 Mo. 177, 212 S.W. 853, 858 (1919) (claim deceased had said, "make her let me alone"); State v. Banks, 10 Mo. App. 111 (1881) (dying declaration, "Banks has shot me"); Lybarger v. State Dept. of Roads, 177 Neb. 35, 128 N.W.2d 132, 136-37 (1964) (naked claim to value of land, right of state to condemn); Shafer v. H.B. Thomas Co., 53 N.J. Super. 19, 146 A.2d 483, 487 (1958) (claim defendant made settlement offer); Herhal v. State, 243 A.2d 703, 706 (Del. 1968) (assertion defendant was in habit of carrying knife, approached victim before murder and was rebuffed); People v. Hamilton, 121 A.D.2d176, 502 N.Y.S.2d 747, 748 (1980) (prosecutor injected hearsay of arrest from police investigation); Shaw v. Manufacturer's Hanover Trust Co., 95 A.D.2d 738, 464 N.Y.S.2d 172, 173 (1983) (bank defendant attorney in negligent shooting case declared police officer defendant had been cleared by police administrative review board of acting unreasonably); People v. Smith, 162 N.Y. 520, 56 N.E. 1001, 1003 (1900) (reference to seven other fires in buildings in which defendant had an interest, owned by defendant's mother and family); People v. Milks, 55 A.D. 372, 66 N.Y.S. 889, 891-92 (1900) (reference to six other fires); Sasse v. State, 68 Wis. 53, 32 N.W. 849 (1887) ("The defendant committed a crime in the old country—in Germany—and he fled from justice. . . . He knocked a hole in a man's head in the old country, and by his admission fled and committed a crime in Philadelphia, a crime on one of the citizens of this

conduct, objecting timely, moving for the mistrial, asking for the

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country."); State v. Peters, 82 R.I. 292, 107 A.2d 428, 430 (1954) (the reason the joint defendant is not on trial is because he was "sentenced as of yesterday to a year in the Providence County Jail on this particular indictment"); State v. Clark, 231 La. 807, 93 So. 2d 13, 15 (1957), overruled by State v. Lee, 346 So. 2d 687 (1977), (reference to defendant's prior conviction); State v. Sang, 184 Wash. 444, 51 P.2d 414, 414-15 (1935) (in perjury case prosecutor interjected defendant had a general reputation as a gambler in Tacoma).

3. Shifting or Lightening the Burden of Proof/Comment on the Defendant's Silence:

Manofsky v. State, 354 So. 2d 1249, 1250 (Fla. App. 1978) ("the testimony may be different if the [defendant] testifies."); Barnes v. State, 375 So. 2d 40, 41 (Fla. App. 1979) (comment on defendant exercising Fifth Amendment rights after *Miranda* warning); Roberts v. State, 443 So. 2d 192 (Fla. App. 1983) ("but there is one piece of evidence that will be present that he will not be able to explain and that will be the evidence that links that defendant to the crime"); State v. Thomas, 136 Kan. 400, 15 P.2d 723, 726 (1932) (state may not rely on defendant's opening statement as party admission to prove crime); People v. Bigge, 288 Mich. 417, 285 N.W. 5, 6 (1939) (prosecutor injected admission by silence); City of Seattle v. Hawley, 13 Wash. 2d 357, 124 P.2d 961, 962 (1942) (defendant gave opening statement personally, but did not testify, triggering brouhaha before the jury concerning his right to silence); State v. Corbin, 117 W. Va. 241, 186 S.E. 179, 182 (1936) (prosecutor declared if defendant put on good character defense, he would show the contrary).

4. Vouching/Bolstering:

Quig v. United States, 33 F.2d 820, 821 (3d Cir. 1929) (the accomplice witness "pleaded guilty . . . and is here today to do the right thing by telling the truth about this matter"); State v. Thomas, 130 Ariz. 432, 636 P.2d 1214, 1219 (1981) (interjection of prosecutrix' religious beliefs); Commonwealth v. Trigones, 397 Mass. 633, 492 N.E.2d 1146, 1152 (1986) (claim witness "always told the truth"); Watson v. State, 224 S.E.2d at 448-49 (prosecutor vouched for key undercover witness).

5. Personal Opinion of Guilt:

Minker v. United States, 85 F.2d at 426 ("I will say this, that in all these conspiracy cases, I don't know of one where they have made any mistake and got the wrong man when they placed an extension on the wire."); State v. Vickroy, 205 N.W.2d 748, 749 (Iowa 1973) (prosecutor "knew" defendant was guilty).

6. Jury Nullification:

Weaver v. United States, 379 F.2d 799, 802 (8th Cir. 1967) ("[A] grand jury, sitting in secret here in Kansas City that was selected from the same group of people that you were selected from, sat and heard the Government's evidence in the case and then determined that there was probable cause to make a charge."); McDonald v. People, 126 Ill. 159 (1888):

> That everything said is taken down by the stenographers; that in case the defendants are found guilty, they have a right to take an appeal to the supreme court; that the whole record goes up to the supreme court; that if the judge has made a remark which he ought not to have made, and which very likely he has, those seven wise men down at Ottawa, if it shall appear to them that any remark was made which might have prejudiced the case of these gentlemen who have been found guilty, will

cautionary instruction.[77] Otherwise, he will be foiled by the doctrines of: harmless error,[78] failure to object,[79] failure to object fast enough,[80]

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consider whether or not they will grant them a new trial; that errors may be run all through the case.

Id.

7. Long Narrative Recitations:

United States v. DeRosa, 548 F.2d 464, 467 (3d Cir. 1977) (prosecutor read 22 pages of transcript of electronic wiretap); People v. Weller, 123 Ill. App. 2d 421, 258 N.E.2d 806, 808-09 (1970) (long narrative purporting to recite facts in evidence not proven at trial); Scripps v. Reilly, 35 Mich. 371 (1877) (plaintiff's counsel read verbatim over two dozen newspaper articles).

8. Lying:

Smith v. Covell, 100 Cal. App.3d 947, 958, 161 Cal. Rptr. 377, 383 (1980) (lie that doctor did not want plaintiff as a patient); Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347, 352 (1971) (plaintiff's counsel asserted joint liability of all three co-defendants without disclosing non-adversarial relationship of two of them whose interests were allied with plaintiff under "Mary Carter" maintenance agreement); Cohn v. Meyers, 125 A.D. 2d 524, 509 N.Y.S.2d 603 (1986) (defense counsel falsely asserted the defendant was wrongfully arrested and jailed for three days as a result of the fight with the plaintiff, when actually it was the defendant's ex-wife who had him arrested in an unrelated matter); Archina v. People, 135 Colo. 8, 307 P.2d 1083, 1097-98 (1957) (prosecutor asserted the accused killed two more people, which was factually untrue).

[76] *See, e.g.*, Chief Justice Burger's admonishment in *Dinitz* to trial judges that they have a duty to stem such misconduct. United States v. Dinitz, 424 U.S. 600, 612 (1976). Similar refrains appear in: Kansas City S. Ry. Co. v. Murphy, 74 Ark. 256, 85 S.W. 428, 429 (1905); State v. Ferrone, 96 Conn. 160, 113 A. 452, 453 (1921); Bailey v. State 440 A.2d 997, 1003 (Del. 1982); McDonald v. People, 126 Ill. at 153; Wilhelm v. State, 272 Md. 404, 326 A.2d 707, 723 (1974); People v. Bigge, 285 N.W. at 7; People v. Hamilton, 121 A.D.2d 176, 502 N.Y.S.2d at 748 (1986).

[77] Leonard v. United States, 277 F.2d at 835-41; People v. Washington, 54 Ill. App. 2d 467, 204 N.E.2d 25, 29-30 (1964); State v. Vickroy, 205 N.W.2d at 749; Post v. State, 315 So. 2d at 232; Brummit v. Commonwealth, 357 S.W.2d 37, 40 (Ky. 1962); State v. Peters, 107 A.2d at 430; Smith v. State, 172 S.W.2d at 252; Sasse v. State, 32 N.W. at 849-50 (cases where counsel saved the error).

[78] Weaver v. United States, 379 F.2d 799 at 802-03; United States v. Stone, 472 F.2d 909 (5th Cir. 1978); United States v. DeRosa, 548 F.2d at 473; United States v. Badalamenti, 794 F.2d at 829; Marshall v. State, 493 N.E.2d 1317, 1318 (Ind. App. 1986); Wolak v. Wolczak, 125 Mich. App. 271, 335 N.W.2d 908, 911 (1983); Gehrke v. State, 96 Nev. 580, 613 P.2d 1028, 1030 (1980); State v. Del Castillo, 411 N.W.2d 602, 605 (Minn. 1987); State v. Fader, 358 N.W.2d 42, 47 (Minn. 1984); Ladd v. State, 489 So. 2d 708, 711 (Ala. Crim. App. 1986); Commonwealth v. Cannon, 386 Pa. 62, 123 A.2d 675, 679-80 (1956); Albert v. Commonwealth, 2 Va. App. 734, 347 S.E.2d 534, 538 (1986).

[79] United States v. Sawyer, 799 F.2d at 1507; United States v. Schindler, 614 F.2d 227, 228 (9th Cir. 1980); United States v. Brockington, 849 F.2d at 875; United States

failure to move for the mistrial and for the curative instruction,[81] the waiver doctrine,[82] the curative instruction,[83] overwhelming evidence of guilt[84] and judicial discretion.[85] In addition, the courts sometimes give credence to a disclaimer by the prosecutor that what he says is not evidence.[86]

Of course, the same standards of conduct apply to defense counsel.[87]

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v. Wright-Barker, 784 F.2d 161, 176 (3d Cir. 1986); People v. Wozniak, 235 Cal. App. 2d 243, 45 Cal. Rptr. 222, 233 (1965); Brantley v. State, 177 Ga. App. 13, 388 S.E.2d 694, 696 (1985); Lussier v. Mau-Van Dev. Inc. I, 4 Haw. App. 359, 394, 667 P.2d 804, 827 (1983); Hamlet v. State, 84 Nev. 699, 447 P.2d 492 (1968); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, 685 (1986); State v. Dibello, 780 P.2d 1221, 1226-27 (Utah 1989).

[80] *DeRosa*, 548 F.2d at 471-72; United States v. Moran, 194 F.2d 623, 625 (2d Cir. 1952); Sutton v. State, 495 N.E.2d 253, 259 (Ind. App. 1986); Brooks v. State, 88 Tex. Crim. 520, 227 S.W. 673, 674 (1920); Watts v. State, 630 S.W.2d 737, 730 (Tex. App. 1982).

[81] United States v. Sawyer, 799 F.2d at 1507; People v. Bustos, 725 P.2d 1174, 1177-78 (Colo. 1986); Marshall v. State, 493 N.E.2d at 1318; People v. Smith, 504 N.Y.S.2d 463, 465 (A.D. 2 Dept. 1986); People v. DeTore, 356 N.Y.S.2d 598, 604 (1974); State v. Welch, 426 N.W.2d 550, 553 (N.D. 1988).

[82] People v. Palmer, 47 Ill. 2d 289, 265 N.E.2d 627 (1970); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286, 294 (1980).

[83] Frazier v. Cupp, 394 U.S. 731, 735 (1969); United States v. Sawyer, 799 F.2d at 1507; United States v. Lewis, 423 F.2d 457, 459 (8th Cir. 1970); Myres v. United States, 174 F.2d 329, 338-39 (8th Cir. 1949); United States v. Simmons, 567 F.2d 314, 321 (7th Cir. 1977); United States v. Badalamenti, 794 F.2d 821, 829 (2d Cir. 1986); United States v. Schindler, 614 F.2d at 228; United States v. Somers, 496 F.2d 723, 738 (3d Cir. 1974); United States v. Veltre, 591 F.2d 347, 349 (5th Cir. 1979); Brown v. State, 481 So. 2d 1173, 1175 (Ala. Cr. 1985); People v. Seiterle, 59 Cal. 2d 703, 31 Cal. Rptr. 67, 71-72 (1963); Matson v. Bryan, 92 Idaho 587, 448 P.2d 201, 207 (1960); People v. Jones, 47 Ill. 2d 135, 265 N.E.2d 125, 128 (1970); Commonwealth v. Trigones, 492 N.E.2d 1146, 1152 (Mass. 1986).

[84] United States v. Salovitz, 701 F.2d 17, 21 (2d Cir. 1983); United States v. Sawyer, 799 F.2d at 1507; People v. Clayton, 218 Cal. App. 2d 364, 32 Cal. Rptr. 679, 681-82 (1963).

[85] State v. Feger, 340 S.W.2d 716, 724 (Mo. 1960); Wilhelm v. State, 272 Md. 404, 326 A.2d 707, 723 (1974); Reynolds v. State, 146 Ind. 3, 46 N.E. 31, 32 (1897); Walsh v. People, 88 N.Y. 458, 465 (1882).

[86] United States v. Somers, 496 F.2d at 737 n.25; People v. Maese, 105 Cal. App. 3d 710, 719, 164 Cal. Rptr. 485, 490 (1980); People v. Wozniak, 45 Cal. Rptr. 222, 233 (1965); Rowley v. Cosens, 125 Kan. 431, 264 P. 1036, 1037 (1928); Wilhelm v. State, 326 A.2d at 712.

[87] Arizona v. Washington, 434 U.S. 497 (1978); United States v. Rivera, 778 F.2d 591, 593 (10th Cir. 1985); Hallinan v. United States, 182 F.2d 880; People v. Ashley, 59 Cal. 2d 339, 29 Cal. Rptr. 16 (1963); People v. Goldenson, 19 P. 161; People v. Bustos,

VI. Judicial Discretion

Since the jury notice principle does not flow from the constitutional principles of due process notice, such as the rights to know the charges in order to make a defense and to obtain protection against double jeopardy,[88] the state cannot be required to give an opening statement.[89] The jury notice principle demands, at least, however, that the defendant be afforded the opportunity to make his opening statement.

Yet, at this time, the defendant has no such right. Although co-equal in function and importance with the voir dire, presentation of the evidence, final argument, and all the other logical stages of the trial, the opening statement remains a poor step-child. Despite being a practice endorsed by the common law for two centuries, many states and the federal government provide no guarantee of the right to make opening statement. Even when given some protection by statute or court rule, the statutory right is often treated temperamentally, and the right to make opening statement is assigned to the precatory trust of the court, known as judicial discretion.[90]

This puts an awesome power in the hands of the trial judge.[91] A

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725 P.2d 1174, 1177 (Colo. App. 1986); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759, 763 (1987); Sefton v. State, 72 Nev. 106, 117, 295 P.2d 385 (1956); Newsted v. State, 720 P.2d 734, 738 (Okla. Crim. 1986); State v. Byrnes, 433 A.2d 658, 664 (R.I. 1981).

[88] *See* United States v. Simmons, 96 U.S. 360, 362 (1878); United States v. Cruikshank, 92 U.S. 542, 558-59 (1876). *Cf.* State v. Silsby, 176 La. 727, 146 So. 684, 688-89 (1933); State v. Locke, 625 S.W.2d 631, 633 (Mo. App. 1981); People v. Levine, 77 N.E.2d at 130; Walsh v. State, 85 Tex. 208, 211 S.W. 241, 242 (1919): (cases reflecting extreme minority view that either recognizes or implies due process notice element to opening statement).

[89] *See, e.g.*, Baldwin v. United States, 521 A.2d 650, 651 (D.C. 1987); People v. Nash, 216 Cal. App. 2d 491, 31 Cal. Rptr. 195, 196 (1963); People v. Barron, 578 P.2d 649, 650 (Colo., 1978); Johnson v. Commonwealth, 111 Va. 877, 69 S.E. 1104, 1105 (1911).

[90] Although "judicial discretion" is frequently invoked as a rule of decision in a broad range of cases at all levels of the judiciary, it is a particularly difficult concept to define. Furthermore, there appears to be a surprising dearth of scholarship discussing the concept. For one of the few serious treatments, see Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635 (1971).

[91] The trial judge has broad discretion over the length, timing and content of opening statements, and in jurisdictions with no statute or rule, whether they will be made at all. *See, e.g.*, United States v. Zielie, 734 F.2d 1447, 1455 (11th Cir. 1984) (timing and making of opening statement lie in court discretion); United States v. Rivera, 778 F.2d 591, 593 (10th Cir. 1985) (scope, extent and timing of statement discretionary); United

trial judge can shatter the *ethos* of the speaker and all chance for success with a few remarks at the outset.[92] In *United State v. Breedlove*,[93]

States v. Goode, 814 F.2d 1353, 1355 (9th Cir. 1987) (court has broad discretion to impose the order and timing of opening statements; approving trial court order that government give its opening before jury voir dire, while leaving the defense the option to respond either before or after voir dire); In re Yagman, 796 F.2d 1165, 1171 (9th Cir. 1986) (same, approving trial court order that all opening statements be given before voir dire); United States v. Salovitz, 701 F.2d 17, 18-20 (2d Cir. 1983) (making and timing lie in court discretion and these are not aspects protected by the sixth and fourteenth amendments); Coleman v. Paderick, 382 F. Supp. 253, 254 (E.D. Va. 1974) (making of statement at all lies in court discretion); Jennings v. United States, 431 A.2d 552, 560 (D.C. 1981) (scope and extent lie in court discretion); Burns v. State, 226 Ala. 117, 145 So. 436 (1932) (opportunity to make statement lies in court discretion); State v. Burruell, 98 Ariz. 38, 401 P.2d 733, 736 (1965) (how far counsel may go lies in court discretion); Bates v. Newman, 121 Cal. App. 2d 800, 264 P.2d 197, 203 (1954) (court discretion to limit opening statements to one-half hour for each side); State v. Ridley, 7 Conn. App. 503, 509 A.2d 546, 548-549 (1986) (whether to allow statement at all); Hawkins v. State, 199 So. 2d 276, 278 (Fla. 1967) (timing discretionary); Woods v. State, 154 Fla. 203, 17 So. 2d 112, 113 (1944) (absent statute, giving of opening held discretionary); Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185, 187 (1975) (when statement shall be made lies in court discretion); State v. Griffith, 97 Idaho 52, 539 P.2d 604, 608 (1975) (scope and extent lie in court discretion); People v. Cobbins, 516 N.E.2d 382, 395 (Ill. App., 1987) (scope and latitude of opening held largely within court discretion); People v. Robinson, 163 Ill. App. 3d 754, 515 N.E.2d 1292, 1308 (1987) (scope and extent discretionary); People v. Arnold, 248 Ill. 169, 93 N.E. 786, 787-88 (1910) (trial court refused to allow defendant to reserve statement; timing held discretionary); State v. Guffey, 205 Kan. 9, 468 P.2d 254, 260 (1970) (order discretionary); Smith v. Commonwealth, 473 S.W.2d 829, 833 (Ky. 1971) (court has discretion to order consecutive openings by multiple co-defendants); Wilhelm v. State, 272 Md. 404, 326 A.2d 707, 714-15 (1974) (discretion to control opening statement recognized to derive from court's general authority to control the conduct of the trial); Commonwealth v. Mahoney, 510 N.E.2d at 763 (court has discretion to limit opening statement to evidence counsel expects to prove); Commonwealth v. Murray, 22 Mass. App. 984, 496 N.E.2d 179, 180 (1986) (same); Haynes v. Monroe Plumbing & Htg Co., 211 N.W.2d at 92 (trial court permitted defendant to re-open opening and supplement by reading from pleadings; court has broad discretion regarding content and presentation); People v. Koharaski, 177 Mich. 194, 142 N.W. 1097, 1098 (1913) (giving statement at all lies in court discretion); People v. Van Zile, 73 Hun. 534, 26 N.Y.S. 390, 393 (1893) (scope and extent discretionary); State v. Elliot, 316 S.E.2d 632, 636 (N.C., 1984) (scope and extent lie in court discretion); State v. Scott, 455 N.E.2d 1363, 1366 (giving of opening statement discretionary); State v. Reynolds, 164 Or. 446, 100 P.2d 593, 596 (1940) (making of opening lies in court discretion); State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981) (both granting and timing of opening lies in court discretion); State v. Erwin,. 101 Utah 365, 120 P.2d 285, 313 (1941) (how far counsel may go lies in court discretion); State v. Sibert, 113 W. Va. 717, 169 S.E. 410 (1933) (court discretion to permit use of blackboard during opening).

[92] One can take notice that the jury is particularly sensitive to the judge's remarks, the

the accused was denied opening statement although the court had allowed him to reserve it. The appellate court murmured, "We do not sanction the harsh manner in which the opening was denied . . . ," and let the conviction stand. In *State v. Paige*,[94] the North Carolina trial court interrupted the defense counsel every other sentence. In *United States v. Gallagher*,[95] the trial judge abruptly stopped defense counsel and declared flatly in front of the jury, "Your statement is completely untrue." In another variation of error, in *United States v. Masters*[96] the reviewing court sanctioned a discovery breach by the prosecution that effectively destroyed the defendant's opening statement and probably his entire case. Defense counsel announced in his opening that the defendant would not be seen on the videotape. Later he learned to his dismay that the prosecutor had somehow neglected during pre-trial discovery to turn over the tape that showed the defendant. These kinds of errors are much easier to sweep aside when the opening statement is governed by the amorphous standard of judicial discretion than constitutional guarantee; yet the effect of a sabotaged opening can kill a case before it begins.

However, the integral importance of the opening statement to the truth-determination process of the trial as a whole has been recognized by at least one court. In *State v. Miller*[97] the Iowa court reversed in part because the trial court barred the defendant from mentioning in his opening statement the victim's pattern of violent behavior in support of his defense of self-defense. It recognized that the opening statement is a trial right integral to the right to make a defense to the jury.[98]

VII. Conclusion

It is somewhat ironic that the post-Warren Supreme Court, which in recent years has become increasingly solicitous of trial rights, even

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effect of which, even if improper, may be incurable. Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968).

[94] 316 N.C. 630, 343 S.E.2d 848, 859 (1986).

[95] 576 F.2d 1028, 1038 (3d Cir. 1971).

[96] 840 F.2d 587, 591 (8th Cir. 1988).

[97] 359 N.W.2d 508, 510 (Iowa App. 1984).

[98] *See* Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("[It is a] premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.").

as it pares back other collateral remedies of criminal defendants, has not affirmatively guaranteed the singular, functional role that the opening statement performs in the truth-seeking agenda of the trial. As seen, the opening statement performs a distinctive, organic function in the trial that enhances the reliability of the fact-finding process. Notice to the jury by the partisans of the competing models of fact, in advance of the evidence, gives the jury a quick reference frame in which to sort and organize the factual issues and the evidence as they come up in the trial.

The importance of such a device can well be deduced from the current 1990 Senate Ethics Committee hearings concerning the Keating Five, a hearing not unlike a complex trial. Few except the actual participants are likely to have followed the drone of testimony of witnesses and the train of exhibits, but most will recall the opening statements of the five targeted senators—not the text necessarily, but the images, because, like a live trial before a jury, these political hearings played to the ultimate lay triers of fact, the voters, via television. The opening statement is important not only for its content, but also for the act of answering. Every senator gave a careful and serious opening statement to defend himself; none waived. Rhetorically, one can ask: Who would listen to closing arguments? What good are they when the evidence has already been strewn across the record and the television cameras of America? The deciders wanted to know what the contestants had to say at the beginning; otherwise, the charges, set forth in the indictment or complaint and pressed by the prosecutor or accuser, are assumed true. Silence equals admission. Primacy works.

Such an important trial component deserves more protection than the illusory assurance of judicial discretion. It deserves constitutional rank as a concomitant of the right to jury trial. Statute or court rule is inadequate, although better than nothing, because, as the cases make clear, breach of such laws is frequently countenanced precisely by the ploys of discretion or other slippery judicial doctrines. Ultimately what is implicated, though, is the right to a fair trial. Why should the trial court or prosecutor be permitted to do, through either "discretion" or the good faith rule, in this one phase of the trial what they clearly would be constitutionally proscribed from doing in any other moment of the trial? Why should the law continue to persist in the outmoded fiction that the opening statement is of somehow lesser importance than all the other parts of the trial process?

Of course, many strict constructionists may object that the historical record is murky as to whether the opening statement was a regular

organic constituent of the trial when the Bill of Rights was adopted in 1791, and they might not be satisfied that the opening statement has since ascended to constitutional magnitude by widespread custom and practice. Perhaps better legal historical research than offered here will answer such objections. However, it should be born in mind that the effect of finding such a constitutional right would not be to create some new technical or procedural loophole to benefit criminals; rather such a development would only serve to strengthen the American constitutional commitment to the fact-finding integrity of the trial, which is the talisman of our justice system. It would remove a weakness in our system, and it would do so exactly by enhancing the guarantee to a fair trial, the most fundamental of all trial rights.

Furthermore, it would do so by merely endorsing what has become indisputable, empirical fact. Virtually every modern trial includes the opening statement. In this sense, elevating the opening statement to the level of a constitutional right would agree with the essence of conservatism: strengthen the truth-seeking capacity of the trial; endorse what already exists in fact.

Reference to *Herring v. New York*[99] may be instructive here. Justice Stewart, writing for the majority, found that the right to make closing argument was an incident of counsel protected by the sixth amendment by engaging in precisely the kind of historical and legal analysis the author has sought to demonstrate here. He cited widespread practice and recognition of the right to argue throughout the jurisdictions of the federal republic.[100] He cited history.[101] It is interesting to note that he termed closing argument "a basic element of the adversary fact-finding process in a criminal trial."[102] It is also striking to note that the New York statute, which was struck down, granted the trial judge "discretion" over argument, including whether to hear argument or not.[103]

However, the Supreme Court is still in a state of retrenchment from the Warren-era exuberance toward criminal defendants' constitutional rights. It is not likely to change course perceptibly in that area, no matter how persuasive an argument may be fashioned to put the imprimatur of constitutional dignity upon the opening state-

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[99] 422 U.S. 853 (1975).

[100] *Id.* at 858-59 nn. 8, 9.

[101] *Id.* at 860.

[102] *Id.* at 858.

[103] *Id.* at 856.

ment. Not so the state courts. Furthermore, as *Herring* implies, the work of the common law often proceeds apace in the state courts for some time before "fundamental rights" pierce the daylight of federal constitutional recognition.[104] The state courts are also the better field upon which to work out the constitutional implications of the opening statement as a trial right, because the historical record is more favorable for such a finding.[105] For every state west of the Alleghanies, history will likely show that the opening statement has been an integral feature of the trial since those states were born, and the farther west one goes the better the argument will be. Thus, for the majority of states, there will be no strict constructionist, literalist objection to inducting the opening statement into their constitutions.

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[104] *See, e.g., ex parte* United States, 101 F.2d 870 (7th Cir. 1939), which, drawing upon Wisconsin common law, preceded Federal Rule of Ciminal Procedure 29. Judge Kerner noted that federal courts may observe the common law procedure followed in criminal cases "as modified by the state practice as of the date the state was admitted to the Union." *Id.* at 877 (footnote omitted).

[105] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 498 (1977).

The Constitutional Structure of the Courts of the United States Territories: the Case of American Samoa

by Stanley K. Laughlin, Jr.*

INTRODUCTION**

For Americans who grew up in the states there is something more than a little exotic about the United States territories, those parts of our nation which are not part of any state. The old territories were associated with tales of the wild west and today's are all on tropical islands. Even territorial courts partake of this aura. Going into the past, the Wrecker's Court on Key West (it was the subject of an important opinion by John Marshall in 1828)[1] conjures up images of pirates and brigands, people operating on the edge of the Continent and at the edge of the law, with a court that may or may not have been an accomplice.

Today, the High Court of American Samoa carries on the romantic image, housed in a square, white clapboard building tucked in among coconut palms. On a typical court day, its downstairs porch is filled with witnesses and litigants, some of the men in the traditional *lavalava* (knee length skirt) while black-robed judges confer on the upstairs porch. Yet it should not be forgotten that these territorial courts decide the destinies and fortunes of millions of men and women, most of them American citizens or United States nationals.

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* Professor of Law, The Ohio State University.

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[1] American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828).

Unfortunately, what is most often truly exotic about these courts is their organization, jurisdiction and constitutional status. These courts upon which so many people rely for so much have often been created by Congress using the most obscure of its powers and sometimes reflect either legislative creativity run wild or the depth of inept draftsmanship.

This bizarre chapter in judicial history begins with the aforementioned Wrecker's Court in old Key West. The Wrecker's Court, created by the Florida territorial council[2] was presided over by a notary public and its function was to divide the spoils of shipwrecks or, where appropriate, to sell them and divide the money. In *American Insurance Co. v. 365 Bales of Cotton*,[3] Chief Justice John Marshall wrote that the Wrecker's Court was not created pursuant to the judicial power of the United States described in article III of the United States Constitution and thus was not controlled by that clause. Nevertheless, he held that its jurisdiction over the wreck of a merchant ship in the Florida Keys was legitimate and the article III courts were instructed to give full faith and credit to the Wrecker's Court's salvage award. Marshall's opinion was one of those models of surface simplicity which upon further examination reveals veins of unmined questions and ambiguities. The opinion in the *356 Bales* case has sometimes been interpreted (misunderstood we contend) by Congress, executive officials and courts to mean that article III has nothing to do with the territories and that Congress[4] has a completely free hand when it comes to designing courts for the territories.

Congress and the territorial governments have used their hands freely in designing territorial courts systems, often with little regard for the due process rights or equal protection needs of territorial residents. The article III requirement that judges have life tenure, for example, has not generally been the norm in the creation of territorial courts and territorial judges have been removed for nothing more than deciding cases contrary to government wishes.[5] Territorial courts some-

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[2] An Act for the Establishment of a Territorial Government in Florida (1822) *as amended* by the Act of March 3, 1823 and the Act of May 26, 1824. The Wrecker's Court was created by a territorial act of 1823, called the Wrecker's Act.

[3] American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828).

[4] Some of these courts, such as the Wrecker's Court or the High Court of American Samoa, were actually designed by a subordinate body (Wrecker's Court-Florida Territorial Council) or officer (High Court-Secretary of Interior) exercising power granted by Congress. For the sake of simplicity we will nevertheless usually refer to all of these situations as exercises of the power of Congress to create courts.

[5] *See infra* Section II, notes 201-02 and accompanying text. *See also Why I Am No Longer A Judge*, THE NATION 6 (July 18, 1953).

times combine article III and non-article III duties and some are subject to review by non-judicial officers.

Few challenges to these judicial chimeras have found their way into article III courts and when they have these courts have almost uniformly allowed Congress to get away with them. The proposition that territorial courts need not always comply with article III was reiterated (albeit in dicta) by a United States Supreme Court plurality as recently as 1984.[6] The Court did not say, however, that article III has no relevance to territorial courts and the issue of whether territorial residents can be cut off from all access to an article III court both in the first instance and on appeal is a question the Supreme Court has expressly kept open. It is one of three issues that this article will explore.

The perceived freedom from article III that the court designers have experienced when making courts for the territories has given rise to two related issues. These are the issues of due process and equal protection as they affect territorial courts. The relationship between due process and article III is on the one hand obvious and on the other far from clear. The obvious relationship is that article III's provisions protecting the independence of the judiciary and the fifth amendment's guarantee of due process are both concerned with the fairness of judicial proceedings. The unsettled issues concern the extent to which article III is intended to serve individual (as distinguished from institutional) interests and how much article III and amendment V overlap. I will contend that due process is an important additional limitation on Congress' power to create alternative courts for the territories (as well as on its power to create adjudicative bodies that serve the population at large).

Finally, since most of the territories have court systems that are quite different from the article III courts that serve the states (and Puerto Rico), and some territories have courts that are not nearly as independant as those of other territories, a potential equal protection issue arises. Acknowledging that equal protection may be the last refuge of constitutional argument, I believe that here the issue is a real one. No branch of government is more directly entailed than the courts in the concept of providing "protection of the law." Clearly the framers of the equal protection clause[7] were concerned with equal treatment

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[6] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[7] The equal protection clause as written applies only to states but the principle of equal protection has been incorporated into the fifth amendment due process clause

before the courts. Furthermore, there are cases which hold that access to courts is a fundamental right. This might mean that discrimination in access to courts should be subject to strict scrutiny and require a compelling interest to justify.[8] Hence, we will explore the potential application of the equal protection principle to the courts of the various territories. Thus, this paper will consider three constitutional provisions in the context of territorial courts: article III, due process and equal protection.

These questions can be seen as part of the of larger one of the extent to which Congress can create, or authorize creation of, adjudicative bodies that do not meet the standards of article III. These issues have been explored with moderate frequency (and without complete success) by many able judges and commentators. This article is written because commentators have seldom focused primarily on the territorial courts dimension of the article III issue. I hope nevertheless that in discussing the territorial courts, we shed some light on the broader, general issues of article III.

I. Territorial Courts and Article III

The central organizing principle of the governmental structure created by the United States Constitution is the establishment of a tripartite federal government. The first three articles established the legislative, executive and judicial branches, respectively, of the general government. The concept of "separation of powers" holds that each is to operate free from dominance or undue interference from the others.[9]

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and thus been made applicable to the federal government as well. Bolling v. Sharp, 347 U.S. 497 (1954). The earlier cases suggested that fifth and fourteenth amendment equal protection may not always be identical, *see Bolling*, *id.*, but later cases seem to treat them as for all practical purposes the same, *see*, *e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

[8] *See infra* Section III and notes 224-33 and accompanying text. Strict scrutiny is also appropriate where the classification adversely affects a "suspect class". A suspect class is sometimes described as a "discrete and insular minority." *See* United States v. Carolene Products, 304 U.S. 144 (1938). Territorial residents are discrete and insular minorities in the most literal sense of the term.

[9] The concept of separation of powers is inferred from the structure of the Constitution rather than set forth explicitly in it. The first three articles delineate the powers of the legislative, executive and judicial branches respectively. Article I begins with the statement, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representative."

This independence was nowhere more explicitly protected than in the case of the judiciary, no doubt because the founders had experience with judges beholden to those who had control over their offices.[10]

Article III creates some very explicit protections for judicial independence, including the provision that Federal judges shall have life tenure and that their salaries cannot be reduced during that tenure. In addition, article III courts can hear only actual "cases or controversies" between real parties; they cannot give advisory opinions or perform administrative tasks. Closely related is the requirement that a decision of an article III court not be subject to revision outside of the federal judiciary; judicial opinions must have finality else they are little more than advisory. Yet all of those requirements have been rather routinely violated when it comes to territorial judiciaries. How can that be?

The answer lies not in the interpretation of article III but in its coverage. Naturally, article III applies only to *federal* courts. It does not apply to state courts where, by way of illustration, judges without life tenure are the norm. But by interpretation, article III has also been held inapplicable to some *federal* courts, if the term "federal court" is used to encompass all courts created by the United States Congress or some agency or official of the United States government.

These non-article III federal courts are sometimes called "legislative courts" because they are created by Congress pursuant to its legislative powers under parts of the Constitution other than article III. This is a confusing term because article III courts (except for the Supreme Court) are also created by Congressional legislation.[11] Sometimes non-article III courts are called "article I" courts if they are created pursuant to the general list of Congressional powers in article I. In the case of territories the non-article III courts are sometimes referred to as "article IV" courts because they are deemed to have been created

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Article II begins, "The executive Power shall be vested in a President of the United States of America." Article III starts, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." From this it is inferred that no branch is to exercise the powers granted to another branch.

[10] *See*, D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION, 51-52 (1990).

[11] It will be noted that article III provides that the judicial power shall be vested in "one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." Thus only the Supreme Court is created by the Constitution itself. All other courts are created by legislation.

pursuant to the language in article IV which gives Congress the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[12]

Typically, the issue of whether Congress has used article III or some other part of the Constitution to create a court arises when Congress has departed from article III norms in creating the court, or has done something to the court that is inconsistent with article III. For example, where it has failed to give the judges of the court in question life tenure, where it has attempted to reduce their salaries or where some non-judicial body is given the power to revise the court's judgments. Thus, the extra-article III power of Congress becomes relevant only when it allows Congress to create a court that does not meet article III standards. That leads to a fundamental inquiry. Is it consistent with sound constitutional construction, however that term is defined, to allow the Congress to circumvent the strict protections of judicial independence in article III by creating courts outside of article III? That is the question that we turn to now.

Many would say that the concept of the non-article III federal court (particularly non-article III courts for territories) is backed by over a century and a half of precedent. To an extent these commentators are correct. Certainly the Supreme Court has approved non-article III courts in *some* circumstance since at least 1826.[13]

The whole thing started with territorial courts in the aforementioned case involving the Key West Wrecker's Court. As will be seen *infra* Marshall was saying much less than his holding has come to mean to many judges and legislators. Our view is that he was saying only that when Congress exercised the power of general government in the territories it had the power to create tribunals to deal with the everyday litigation matters that go before state courts in states; to create ersatz state courts, if you will.

For whatever reason Justice Marshall allowed congress to go outside of article III to create courts, a tough theoretical barrier exists today which must be crossed by anyone who attempts to put Congress completely back inside of article III. At bottom, it is the question of what is a court? Many federal administrative agencies perform functions of an adjudicatory nature. These have proliferated since the 1930's and have received judicial acceptance despite the fact that none of

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[12] U.S. CONST. art. IV, §3, cl.2.

[13] *See 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828).

them meet article III standards. If the framers intended article III to apply to all federally-created courts, then the question arises whether these agencies, in their adjudicatory modes, are "courts". Congress was not unaware of this problem in creating these agencies and usually provided for appeal of agency decisions into an article III court. Also, while it may not be consolation to the party that must have an important case tried in an agency, the agencies deal only with specialized issues, and those who appear before them have access to article III courts for the normal range of federal constitutional and legal protection.

But what about leaving people to non-article III adjudicatory bodies as their primary or even sole source of judicial protection? Is that fair, just or constitutional? Is it consistent with due process of law, equal protection of the law or with article III itself? That is the situation of many territorial residents and that is the question we explore.

A. The Samoan Court System

As an illustration of the problem consider the aforementioned High Court of American Samoa. It is not an article III Court or even literally speaking a legislative Court. It was originally a creation of the United States Navy. Navy Commander B. F. Tilley founded the High Court (with himself as Chief Justice) when he opened the American coaling station at Pago Pago in 1900.[14] In 1951 the Secretary of the Interior succeeded the Secretary of the Navy[15] as the person charged by the United States President[16] with the administration of American Samoa. Under the Secretary of the Interior the people of Samoa have held a constitutional convention and adopted a constitution which, *inter alia*, provided for the continuation of the High Court.[17] How much this changed the status of the Court is debatable. The Secretary of Interior found it necessary to "approve" the constitution, and even made several unilateral amendments to it before he allowed it to go into effect, so one would have to assume that he believed that the court still existed by his leave.[18] Even today he seems to remove judges

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[14] *See* 1 Am. Samoa, *Forward*, p. v. (1977).

[15] Gen. Order No. 540, U.S. Dept. of the Navy (February 19, 1900).

[16] Exec. Order No. 10264, 16 C.F.R. 6419 (June 29, 1951).

[17] Am. Samoa Const. art. III.

[18] The Constitution of American Samoa contains the following notation after the last article and before the signature of the delegates of the constitutional convention:

Ratified and Approved: Subject to the deletion from article I, section 2 of all

at will and openly asserts the power to revise judgments of the High Court. There is no direct appeal from the High Court to any other court on or off the island (although by judicial precedent a review of sorts can be had in the article III courts by suing the United States Secretary of the Interior in his official domicile, the District of Columbia).[19]

The High Court of American Samoa therefore provides a case study of how far the federal government can stray from article III and other values normally associated with judicial independence when it creates a court for a territory.[20]

B. The Presiding Bishop *Case*

A recent example of extreme willingness to approve any kind of court that is given to a territory is the opinion of Justice Douglas Ginsburg of the Court of Appeals for the District of Columbia Circuit in the case of *Corporation of the Presiding Bishop of the Church of Jesus Christ and Latter Day Saints v. Hodel.*[21] The *Presiding Bishop* case arose in the territory of American Samoa. It was brought in the United States District Court for the District of Columbia[22] by the Mormon Church on behalf of its American Samoan members in an effort to recover

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after the title and the insertion in lieu thereof of the text of article I, section 2 of the Constitution of American Samoa effective October 17, 1960, to wit: 'No person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.'

It is signed "Stewart L. Udall, Secretary of the Interior."

However, in 1983 Congress adopted a statute, now 48 U.S.C. § 1662a (1988), which apparently limits the Secretary's power to make unilateral amendments. The statute provides:

Section 1662a. Amendments of, or modification to, the constitution of American Samoa, as approved by the Secretary of the Interior pursuant to Executive Order 10264 [unclassified] as in effect January 1, 1983, may be made only by Act of Congress."

97 Stat. 1462 (1983).

[19] *See* Corporation of the Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988); King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975).

[20] More detail about the operation of the High Court is provided in Section II. *See also* notes 191-202 and accompanying text, *infra.*

[21] 830 F.2d 374 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988). Fair disclosure requires that the author reveal that he was *of counsel* to the plaintiff in this case.

[22] 637 F. Supp. 1398 (D.D.C. 1986).

certain real property situated in the territory, which it claimed had been taken from the church by the High Court of American Samoa.

The case was a particularly appropriate one for challenging the structure of the court because by the plaintiff's theory the High Court was the offending party. The Church alleged that in a trespass action the High Court had engaged in a radical reinterpretation of Samoan property law and perverse readings of prior judicial holdings in the Church's chain of title, in order to take the church's real property without compensation and give it to the trespassers.[23]

The suit was in form against the United States Secretary of Interior, because that is the only established method by which High Court decisions can be examined at all in an article III court. The church

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[23] In very summary form what happened in this complicated litigation was the following. The church (represented in this litigation by the Presiding Bishop) began leasing the land from Matai [high chief] Puailoa Viule around 1905. Chief Viule died in 1929 while a lease was in force. A dispute arose between his widow and his *'aiga* (extended family or tribe) over who was entitled to the rent. The issue turned upon whether Puailoa owned the land as his individual property (in which case it would devolve to the widow) or whether he merely controlled it as part of the *'aiga's* communal land.

The High Court in 1931 decided this conflict over the rent in favor of the widow. In 1952 the widow sold the land outright to the church and the church proceeded to put over four million dollars in improvements on it. The widow died in 1964.

A full exposition of the title question is beyond the scope of this paper and any short summary will perforce beg the question of the litigation. Still I think it fair to say when the decision was rendered in 1931 up until nearly 1980 virtually everyone, including the 1931 losers, understood the 1931 decision to give the widow something like a fee title. This is illustrated by the fact that at the time of the church's purchase of the land the governor and legislature of American Samoa approved of the purchase and in so doing acknowledged the widow's title. In 1977 when the Puailoa family became interested in obtaining the land, their first effort was to have the 1931 judgment set aside, illustrating that they at that time considered that decision adverse to them.

After this failed the Puailoas began to break down the church's fences and to take forcible possession of parts of the land in question. This prompted the church to file a trespass action. In this action the High Court decided, possibly on its own motion or at least after having suggested it to the Puailoa attorney, that the 1931 case had given the widow a life estate, and that upon her death the land had reverted to the Puailoa family. While American Samoa has an adverse possession statute the court put forth a variety of reasons why the church could not rely upon it. (It should be noted that on each of the issues the court used varying rationales at the trial, appellate, and rehearing levels respectively.) The net effect of the decision was to award the land, along with the church's improvements, to the Puailoa *'aiga*. It was this decision that the church characterized as "perverse," a "radical departure from existing law" and a "taking by force of judgment."

claimed, *inter alia*, that due process and equal protection were denied because the High Court justices were subservient to the Secretary of Interior, the Secretary asserted the power to revise their judgments, and High Court decisions were not appealable into any article III court.

The district court dismissed the complaint and the court of appeals affirmed. In his opinion, Justice Ginsburg rejected the plaintiff's claim that it had a right to have its constitutional claims heard either originally, or on appeal, in an article III court and also its alternative claim to have it heard at least by a court that possessed independence and finality of judgment. In so doing, Judge Ginsburg took an extremely broad view of the territorial courts exception to article III. He apparently believed that American Samoa has no entitlement whatsoever to a court system. "The Congress, that is, could have, so far as article III is concerned, provided that the Secretary [of the Interior] himself would exercise the judicial power in American Samoa."[24]

Not only would article III permit this but, according to Judge Ginsburg, due process would not be offended if the Secretary took upon himself the job of law judge and constitutional rights adjudicator in the United States territory. From that Judge Ginsberg concluded that since "[the Secretary] could have decided it himself . . . there can be no cause of action because the court that did so was subservient to him."[25]

In Judge Ginsburg's view, this result flowed from his interpretation of the territorial exception to article III that began in *356 Bales*. This was an interpretration that Judge Ginsburg thought had been approved by the United States Supreme Court in *Northern Pipeline Co. v. Marathon Pipe Line Co.*[26] in 1982. Whether he was correct in that asssumption is the issue that we turn to next.

II. The Importance of Territories

Before proceeding further it is worthwhile to reflect upon the importance of what is at stake here. I have stressed elsewhere that the constitutional and legal status of the United States Territories and affiliated states is a matter of major importance to this entire country

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[24] 830 F.2d at 384.

[25] *Id.*

[26] 458 U.S. 50 (1982).

and its legal community. For one thing, nearly four million people,[27] most of them United States citizens, nationals or persons under the protection of the United States, live in those areas and their ranks are increasing rather than diminishing.

International developments have demonstrated that this type of an arrangement can be beneficial both to the citizens of the territories and to the rest of the United States. These microstates need economic, political and military support that affiliation with a larger society can provide. If they can develop arrangements that will provide them with internal autonomy, allow them to preserve as much of their traditional cultures as they desire, and at the same time achieve collective protection against military invasion, coup d'etat, economic or natural disaster, financing for economic development,[28] larger free trade areas, backing in international negotiations both commercial and political and the legal rights of United States citizenship, they might have the best situation achievable in the present day world.[29]

The advantages to the rest of the United States are too numerous to discuss but would very definitely include increased trade areas, strategic value and an infusion of cultural diversity.[30]

In order to make these arrangements mutually beneficial, however, careful crafting of political and legal structures is imperative. I have written elsewhere of such political structures, and of the application of the United States Constitution and federal law in these areas.[31] We

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[27] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, POPULATION ESTIMATES FOR PUERTO RICO AND THE OUTLYING AREAS: 1980 TO 1988 (Oct. 1989). The total population of the United States territories and the Trust Territory of the Pacific Islands as of 1980 was 3,564,839. The total resident population for that year in Puerto Rico was 3,196,520; for the Trust Territory of the Pacific Islands, 116,555; for Guam, 105,979; for the Virgin Islands, 96,591; for American Samoa, 32,297; and for the Northern Marianas, 16,782. The United States has three other small unorganized territories with populations as of the 1980 census: Midway Island, 468; Johnston Atoll, 327; and Wake Island, 302. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981 (102d ed.).

[28] *See generally* Laughlin, *The Burger Court and the United States Territories*, 36 U. FLA. L. REV. 755, at 756-60 (1984).

[29] *Id.*

[30] *Id.*

[31] *See* Laughlin, *The Burger Court and the United States Territories*, *supra*, note 28; Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337 (1981); Laughlin, *United States Government Policy and Social Stratification in American Samoa*, 53 OCEANIA 29 (1982); Hughes and Laughlin, *Key Elements in the Evolving Political Culture of the Federated States of Micronesia*, 6 PACIFIC STUDIES 71 (1982).

are examining another persistent obstacle to perfected affiliation-the nature of territorial court systems and the relationship between those courts and the article III courts of the United States. It is in the importance of this topic to the futures of these areas and in turn to the larger United States, that we find the policy basis that supports our analytical contention that article III of the Constitution, as well as due process and equal protecton of the law, are applicable to territorial courts. This is, we concede, a position that is not readily apparent to some modern courts that have considered the issue.

III. The Relationship Of Territorial Courts to Article III

Article III of the United States Constitution provides that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their [o]ffices during good [b]ehaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[32]

As Justice White has noted

> [a]ny reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an 'inferior' court exercising 'judicial Power of the United States' and so must be manned by judges possessing both life tenure and a guaranteed minimal income. This would be an [imminently] sensible reading and one that . . . is well founded in both the documentary sources and the political doctrine of separation of powers which stands behind much of our constitutional structure.[33]

Justice White notes, however, that the case law is not as simple or straightforward as the language of article III.[34] Over the years the Supreme Court has recognized the validity in certain circumstances of so-called legislative courts. Stated in the broadest terms, the argument for legislative courts is that because Congress has broad discretion in interpreting and using its legislative powers under parts of the Constitution *other* than article III, it may use those powers to create courts

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[32] U.S. Const. art. III, § 1.

[33] Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 93 (1982) (White, J., dissenting).

[34] *Id.*

independent of article III, and therefore not limited by that article.

The troublesome part of that argument, as all of the members of the Court recognized in the *Northern Pipeline* case, is that taken to the end of its logic it would allow Congress to completely circumvent article III. That is, given the deference that the Court has shown towards Congress in its interpretation of its enumerated powers, including the necessary and proper clause, and given the creative use that Congress has made of those powers in the past, if Congress was completely free to use its other enumerated powers for the purpose of court creation, it could create whatever courts it wanted outside of article III and thereby avoid that article's strictures altogether.[35] This would certainly defeat the purpose of including article III in the Constitution.

A. Analysis of Enumerated Powers

Let us look a bit deeper at the concept of separation of powers. The United States government is deemed to be a government of enumerated

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[35] It has been recognized from the beginning that the government of the United States is one of enumerated powers. That means that every action that it takes must be authorized by some provision of the United States Constitution. This is emphasized by the tenth amendment which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, unlike its counterpart in the Articles of Confederation, the tenth amendment does not require that the powers be "expressly" delegated. *See* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Furthermore, article I, § 8, clause 18 gives Congress the power to make all laws "necessary and proper" to carry into execution the enumerated powers. In the McCullough case Justice Marshall defined "necessary and proper" to mean "appropriate."

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

17 U.S.(4 Wheat.) at 421.

If article III did not exist Congress might nevertheless, for example, create a court to hear all matters affecting interstate commerce, since this would be a reasonable means of executing its power to regulate commerce amongst the several states. In fact, Congress might be able to create a court to hear all matter within its legislative competence. The commerce clause might be a justification for Congress to create a court to hear all suits between citizens of different states, since fear of having to go into a biased state forum in case of law suits, might deter people from doing business in interstate commerce. This would be similar to the article III courts' diversity jurisdiction. If Congress put all of these powers in a single court system it would have created a court system with jurisdiction virtually identical to the present article III court system, without using article III.

powers.[36] Hence, any action that it takes, including any act of Congress, must be authorized by some language in the Constitution.[37] This is to be distinguished from state governments which have inherent powers to legislate on any matter affecting the health, safety or welfare of their residents.[38] Article III explicitly authorizes Congress to create courts, and it is the only clause that explicitly does so. While every federal action must be related to an authorizing clause or clauses in the Constitution it was held early on that the legislative action need not be *expressly* authorized.[39] Most Congressional powers are broadly defined, viz., "regulate commerce amongst the several states", "raise armies and navies", etc.[40] In addition, article I, section 8, clause 1 authorizes the Congress to pass all laws "necessary and proper" for carrying into effect the enumerated powers.[41] In the landmark case, *McCullough v. Maryland*, Justice Marshall, noting that Congress necessarily would have discretion in implementing its enumerated powers even without this clause, interpreted "necessary and proper" to mean "appropriate."[42] Thomas Jefferson was one of the first to point out that an imaginative Congress could put these powers together in so many ways that it would be possible for that body to do just about anything it wanted to do.[43] (Jefferson, of course, saw this as a cause for concern since he favored a limited role for the federal government.) Given this flexibility in the enumerated powers, if article III were removed from the Constitution, Congress could no doubt still find authority in the Constitution to create all the federal courts it has now, and more.

But article III has *not* been removed from the Constitution. Throughout most of its history, the Supreme Court has been very deferential in allowing Congress to put its powers together in any rational way to reach the result that it wants.[44] But where the Constitution puts a

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[36] 17 U.S. (4 Wheat.) at 421.

[37] *Id.*

[38] *See, e.g.*, Willson v. Black-bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

[39] *See supra* note 34.

[40] *See generally*, U.S. CONST., article I, § 8.

[41] Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

[42] 17 U.S. (4 Wheat.) 316 (1819).

[43] G. GUNTHER, CONSTITUTIONAL LAW 87 (11th ed. 1985).

[44] *See* Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). From some time around the turn of the 20th Century, *see, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918)(Court strikes down Federal Act banning child-labor made goods from

specific restriction on the way Congress uses a particular power, the Court has sometimes not allowed it to resort to another power to defeat those limits. This has frequently happened in areas touching on the concept of separation of powers. For example, in *Buckley v. Valeo*[45], the Congress provided that the members of the Federal Elections Commission which it created, should be appointed by the Congressional leadership of both major parties. Certainly this was a reasonable way to implement the election reform law in a non-partisan fashion. Being reasonably appropriate to the carrying out of its enumerated powers, this action of Congress would normally pass judicial muster under the necessary and proper clause. However, because the Constitution specifically gives the president the authority to appoint officers of the United States, the Supreme Court held the federal election act unconstitutional.[46]

Another case in point is that of the legislative veto. In recent decades the Congress had found it advisable in many areas of law (*e.g.*, immigration) to give rather wide discretion to the President in order for him to deal with the myriad of complexities that can arise in the modern world. Attempting to legislate too specifically could make the laws cumbersome and lead to an increase in red tape. The legislative veto was a means of giving broad discretion to the President but to allow the Congress to intervene when it believed that discretion had been exercised inconsistent with the intent of the law. The legislative

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interstate commerce) through the early New Deal years, *see, e.g.*, Carter v. Carter Coal, 298 U.S. 238 (1936) (Court strikes down Congressional effort to regulate mining of coal shipped in interstate commerce) the Court, in some cases, seemed to be putting stringent limitations on the federal government's power to interpret its own enumerated powers. However, the Court came under intense criticism because its limits on federal power seemed to be arbitrary and inconsistent, and many believed that the justices were more influenced by their own agreement or lack thereof with the congressional policy than by a neutral principle of limitations. *See* Holmes, J., dissenting in *Hammer*, 247 U.S. 251 at 280.

With NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937) the Court returned to the *McCullough* view of broad deference to Congress in interpretation of enumerated powers. Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982). That seems to be where the Court is today (or was at its last major statement on the matter.) Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). However, Chief Justice Rehnquist predicted that the position would soon change (pending one presumes, changes in the court's personnel). *Id.* 469 U.S. at 579 (Rehnquist, J., dissenting.) Those personnel changes may now have taken place.

[45] 424 U.S. 1 (1976).

[46] 424 U.S. 1 at 107-43.

veto allowed one house of congress acting alone, or in some cases both acting together, to override the President's application of the law in a particular case. This was certainly not an irrational way for Congress to exercise its enumerated powers in these areas, and thus would probably meet the "necessary and proper" test. But in *Immigration and Naturalization Service v. Chadha*[47] the Supreme Court held that the legislative veto was inconsistent with the explicit constitutional procedures for legislating which call for passage by both houses of congress and presentment to the President for signature or veto. Thus it was unconstitutional.

Therefore, the article III question deserves more serious consideration than it has received from some courts and commentators. The question is can Congress use non-article III enumerated powers to create courts and in effect circumvent the restrictions of article III designed to protect judicial independence? To answer the question we must consider not only the language of the Constitution but also the plan of the framers, the case law and the realities of modern day life.

As we noted, Judge Ginsberg in the *Presiding Bishop* case took the position that case law allows the Congress, or congressional delegee,[48] to create any kind of court system that it chooses for a territory, even to the extent of allowing the cabinet officer charged with administering the island to double as judge, and that neither article III, due process nor equal protection are offended thereby. Could Judge Ginsberg be reading the cases correctly? Let us look at three that he relied upon.

B. Three Hundred and Fifty-six Bales of Cotton

The Supreme Court first addressed this issue in the 1828 case of *American Insurance Co. v. 356 Bales of Cotton, David Canter, Claimant.*[49] The case involved a court in a United States territory, the then territory of Florida. The opinion was by John Marshall and it is the beginning

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[47] 462 U.S. 919 (1983)

[48] In the *Presiding Bishop* case the Congress had delegated to the president full governing powers over American Samoa, and the Secretary of the Interior was the President's nominee to exercise the power delegated. It was the Secretary then who approved the Samoan constitution that formally creates the High Court. In fact, the court was a continuation of the court set up by the Navy commandants of the base at Pago Pago, when the Secretary of the Navy was the President's representative in Samoa. *See supra* notes 14-17 and accompanying text.

[49] 26 U.S. (1 Pet.) 511 (1828).

point of most discussions, judicial and otherwise, of non-article III courts. The case is complex and there have been disagreements over just what it held.[50] However, it seems safe to assert that Marshall did say that at least in certain circumstances the authority to create a court can come from clauses in the federal Constitution other than article III. It is not quite accurate to say that the case held that *Congress* may create courts pursuant to articles other article III. In *356 Bales* the court in question, the Wreckers' Court in Key West, was created by the territorial legislative council pursuant to an authorization from Congress. However, since Congress could hardly delegate the authority to do what it cannot do itself, it is fair to say that the case supports the proposition that under some circumstance Congress can create courts based upon powers other than those granted by article III.

Beyond that what the case holds is open to debate. It is our position that some courts and commentators have read much more into the case that it will bear. As noted, some writers and judges appear to believe that *356 Bales* and its progeny make article III completely irrelevant so far as territories are concerned. That the *356 Bales* case is still relevant to the article III dilemma today, there can be no doubt. In the recent *Northern Pipeline Case*[51] both the plurality and the dissent discussed it and Judge Ginsberg in *Presiding Bishop* thought his interpretation of *356 Bales* to be the same as the Supreme Court's in *Northern Pipeline*. We will discuss *Northern Pipeline*, *infra*.

1. The wreck of the Pointe de Petre

The facts of the case before it got into court were very simple: In February, 1825, the ship Pointe de Petre left New Orleans with a cargo of cotton bound for Havre de Grace, France. The ship was wrecked off the coast of Florida, which was then a United States territory. Five hundred and eight-four bales of cotten were salvaged by persons other than the owners, some pursuant to an ageement made between the ship's captain and the salvagers. The cotton was taken to Key West.[52]

There the courts became involved and the case became complicated. The cotton was taken before the Wrecker's Court in Key West which

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[50] For an unusual interpretation *see, e.g.*, Laring, *Judicial Power and Territorial Judges*, 7 HASTINGS L.J. 62, 65-66 (1955).

[51] Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

[52] 26 U.S. 513-15, 541.

ordered it sold to satisfy the claims of the salvagers. The Wrecker's Court had been created by the Florida Legislative Council pursuant to an authorization from the United States Congress. It consisted of a notary public and several lay judges. None of them had life tenure.[53]

David Canter bought some of the salvaged cotton at the Wrecker's Court sale and shipped it to Charleston, South Carolina. There the underwriters who had insured the *Pointe a Petre* filed *in rem* actions in Federal court to recover the cotton.[54] The theory of their suit was that the Wrecker's Court had no jurisdiction in the matter and that the purported sale was therefore a nullity and did not affect title to the cotton.

The United States district court agreed and awarded the cotton to the underwriters.[55] However, the circuit court, in an opinion by Supreme Court Justice Johnson, reversed.[56] That set the stage for another John Marshall classic, foundational opinion, which began the doctrine of non-article III federal courts.

The opinion and the arguments, reprinted with the official reports, make it clear that the constitutional issue which has taken on so much importance was secondary to a statutory argument when the case was heard. The statutory argument was based upon the organic act for Florida passed by the United States Congress. The organic act created two Superior Courts for the territory and authorized the Florida legislative council to create courts inferior to the Superior Courts. The Wrecker's Court was one of those inferior courts. The jurisdiction of the Superior Courts was defined in the federal act mostly by reference to the federal court for the Kentucky district. The underwriters claimed that in cases such as these the Kentucky court would have exclusive jurisdiction and therefore the Florida Superior Courts should have exclusive jurisdiction of this case.[57] Thus, while the central issue in the case was the jurisdiction of the Wrecker's Court, that question could be answered only by examining two other courts, the Florida Superior Court and the federal district court for the Kentucky district.

That the opinion intermingles the discussion of the three sets of courts has confounded many casual readers of the opinion over the years. The reader who is trying to extract the rule of the case without

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[53] 26 U.S. at 515, 522 (unnumbered footnote).

[54] 26 U.S. at 541.

[55] *Id.*

[56] 26 U.S.at 515-22 (margin).

[57] 26 U.S. at 525-30.

fully understanding the complexity of the legal issues may easily become confused concerning which court Marshall is talking about at which time.

The statutory issue is interesting although the holding on that point is today of historical significance only.[58] It is necessary to understand a little about it in order to place the constitutional discussion in context.

In very summary form, the underwriters' argument is as follows. The Kentucky court had exclusive jurisdiction in its district in admiralty cases. By the organic act for Florida, the Superior Court of Florida was to have the same jurisdiction as the Kentucky court, so the superior court also had exclusive jurisdiction in admiralty cases. Salvage was an admiralty matter therefore the Wrecker's Court could not have jurisdiction in salvage cases.[59]

Marshall's response was that while a salvage case could be a part of the admiralty jurisdiction of a federal court, a salvage action could also be brought under the common law and, in Florida, under the law inherited from Spanish rule. In such cases the Superior Court and the Wrecker's Court had concurrent jurisdiction under the organic act.[60]

The Constitutional argument was clearly treated as subsidiary by the parties and the Court. Marshall's opinion devotes only one page to it in contrast to the five pages devoted to the statutory argument. In fact, it seems likely that the constitutional argument is one that was made to buttress the statutory argument more than as an independant ground for relief.

In the official reports counsel for the underwriters' argument is summarized over five pages, of which one short paragraph is devoted to the constitutional (article III) argument.[61]

Ogden, the underwriters' counsel, was on delicate ground with his article III argument since he obviously believed that his best theory was that the Superior Courts had exclusive jurisdiction over the matter. If his constitutional argument destroyed the Superior Courts it destroyed his statutory argument. As Marshall pointed out, the Superior Courts themselves were not article III courts because their judges were appointed for four-year terms.[62] It was for this reason, no doubt, that

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[58] 26 U.S. at 539-40.

[59] *Id.*

[60] 26 U.S. at 544.

[61] *Id.* at 523-30, 539-41.

[62] *Id.* at 546.

Ogden argued that the Wrecker's Court was not an article III court because it was not created directly by Congress, rather than arguing the more obvious article III shortcoming, that its judges did not enjoy life tenure. The method of creation was what distinguished the Wrecker's Court from the Superior Courts, not the tenure of the judges.

2. *The doctrinal foundation of legislative courts*

It was in this context then that the Supreme Court first explicitly acknowledged the possibility of non-article III federal courts. John Marshall did so in the following paragraph, a paragraph from which virtually all of the quotations of *356 Bales* seen in books and cases are taken. It is therefore worth reproducing in full:

> We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares, that 'The Judges both of the Supreme and inferior Courts, shall hold their offices during good behaviour.' The judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of soveriegnty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d [third] article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.[63]

Several people, most recently Justice Byron White,[64] have seen what they perceive to be an internal contradiction in that language. Early in the paragraph Marshall writes, "these Courts, then, are not constitutional Courts, in which the judicial power conferred on the general

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[63] *Id.*

[64] Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 106 (1982) (White, J., dissenting).

government by the constitution can be deposited. They are incapable of receiving it."[65] He ends the paragraph by stating, "[a]lthough admiralty jurisdiction can be exercised in the states in those courts, only, which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of [a] general, and of a state government."[66]

Are these two quotations contradictory, as Justice White and some others have thought they are? Only if the second is read as saying that in a territory Congress can vest article III powers in a non-article III court. This is the reading put on it by those, such as Judge Ginsburg in *Presiding Bishop*,[67] who wish to argue that article III has no bearing on what kind of forum is available in a territory. (They, of course, have to ignore the first part of the quotation.) But is such an interpretation necessary and was Justice Marshall really that confused?

In our opinion it was not necessary and it is not even a logical interpretation of what Marshall said. As noted, in responding to the underwriters' statutory argument, Marshall pointed out that the admiralty clause of article III was not the only possible source of jurisdiction over salvage cases. He noted that there could also be a common law cause of action for salvage and one arising under the laws held over from Spanish times.[68] What Marshall is saying in the second quotation from the crucial paragraph is that because Congress exercises the powers of local government (in lieu of state government) for a territory it could create a court to reach admiralty cases from another direction, just as a state court can reach admiralty cases under its common law powers, whenever it is not pre-empted by federal law. This is the only interpretation of the language that makes sense and not only by virtue of being consistent with the first quotation.

It is also the only interpretation that is consistent with Marshall's reference to Congress in the territories exercising "the combined powers

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[65] *See supra* text accompanying note 63.

[66] 26 U.S. at 546.

[67] Corporation of the Presiding Bishop v. Hodel, 830 F.2d 374, 384 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1752 (1988).

[68] This was in reponse to the argument that the Wrecker's Court was barred from hearing the case because the superior courts had exclusive jurisdiction over cases arising under the constitution and laws of the United States, and that salvage, being an action in admiralty, so arose. Marshall's response was that salvage cases could be brought under common law and probably the law of Spain. 26 U.S. at 544.

of a general and state government."[69] Adding the powers of a state government to its other powers would in no way enhance Congress' ability to vest article III powers. It would, however, give it the power to create courts that are analogous to state courts.[70]

Thus, logically understood, *356 Bales of Cotten* simply holds that when legislating for a territory, Congress can create courts to perform functions analogous to those performed by state courts in states; that is, to adjudicate the ordinary tort, contract, property, etc. cases that arise everywhere. Nowhere does the case say that in territories Congress can vest article III powers in non-article III courts. *It explicitly says the opposite.*[71]

This is an imminently sensible interpretation of the opinion. No doubt the reason the underwriters in *356 Bales* relied so heavily on their statutory argument was that they realized that it would be untenable to contend that only article III courts could be created in the territories for that would leave a large amount of legal business that could not be heard anywhere. That is why the constitutional argument was made in a roundabout way to support the statutory argument. Marshall's response to it was a reasonable one and a practical one.

C. Glidden Co. v. Zdanok

Judge Ginsberg in *Presiding Bishop* also purported to rely upon *Glidden Co. v. Zdanok. Glidden* was one of those cases that made up part of the "theological debate"[72] over article III that took place between *356 Bales* and *Northern Pipeline.*

During the century and a half between the *356 Bales Case* and the *Northern Pipeline Case,* the Court followed a twisted and tortuous path in this area of law. This was the time in which the Court was creating what the late Justice Harlan called one of the most confusing areas of

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[69] 26 U.S. at 546.

[70] *Id.*

[71] "These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. *They are incapable of receiving it.*" [emphasis added] 26 U.S. at 546.

[72] The term is that of Professor Wright. The allusion apparently was to the abstract quality of the arguments, the frequent contradictions and changes of ground. *See* C. WRIGHT, FEDERAL COURTS 33 (3d Ed. 1976).

constitutional law.[73] Professor Wright has called the article III/legislative court discussion of this era a "theological debate" and opined that it is impossible to synthesize these cases into consistent principles of law.[74] It is even difficult to determine the precise holdings in many of them. Therefore, a systematic analysis of all the case law during this period will not be attempted. However, it does seem appropriate to comment on some of it. Since Judge Ginsberg quoted from *Glidden Co.* we will use that as our focal point for examining this period in the law.

Glidden, and most of the Supreme Court cases of that era that considered article III, did not involve territorial courts and therefore what they have to say about territorial courts is *dictum*. In several of these cases the issues are analogous or the principles enunciated by their own logic necessarily apply to territorial courts and hence this dictum might be valuable. However, much of what is said in these cases about territorial courts is *dictum* in the classic sense; that is, highly unreliable offhand statements by a court considering another matter. In a number of these cases the courts simply did not wish to bother reconciling their holdings with anything that had been previously said about territorial courts, so they simply said that territorial courts are something quite different.

Glidden Co. v. Zdanok, as it pertains to territorial courts, is a typical example of this kind of dictum. In *Glidden,* and its companion case, *United States v. Lurk*,[75] the parties had been involved in proceedings in article III courts: *Glidden Co.* in a civil proceeding in a federal court of appeals and *Lurk* in a criminal proceeding in a federal district court. Both had been unsuccessful and both attempted to attack the validity of the judgments against them by claiming that non-article III judges had participated in the proceedings thus vitiating the article III nature of the courts. The judges at issue were visiting judges from the Court of Claims and the Court of Customs and Patent Appeals respectively,

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[73] The distinction referred to in those cases between 'constitutional' and 'legislative' courts has been productive of much confusion and controversy." Glidden Co. v. Zdanok, 370 U.S. 530 at 534 (1962). Among the Twentieth Century cases decided during this period are: Palmore v. United States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); National Mutual Ins. Co. v. Tidewater Transfer Co., Inc., 337 U.S. 582 (1949); Williams v. United States, 289 U.S. 553 (1933); O'Donoghue v. United States, 289 U.S. 516 (1933); Federal Radio Comm. v. General Elec. Co., 281 U.S. 464 (1930); *ex parte* Bakelite Corp., 279 U.S. 438 (1929); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923).

[74] *See supra* note 72.

[75] 370 U.S. 530 (1962).

sitting by designation. Glidden and Lurk were claiming that the courts the judges came from were not article III courts so they were not article III judges. Hence, appellants argued, having those judges sit by designation on article III courts violated the Constitution.[76]

1. The dictum

The Supreme Court held that the claims and customs courts were article III courts although it was not able to produce a majority opinion. As in *356 Bales*, several sets of courts were involved, adding to the confusion of the analysis and tempting lawyers and judges to grab a quick rule from the case before they fully understand it. Noting that the *356 Bales* case was the beginning of legislative court doctrine, Justice Harlan discussed the case briefly, and in the course of his discussion stated:

> "[I]n the territories cases and controversies falling within the enumeration of article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure.'"[77]

The fact that the above quotation from *Glidden* was both dictum and found in a plurality opinion did not stop Judge Ginsburg in the *Presiding Bishop Case* from treating it as authoritative and dispositive.[78]

Typically, the need to construe article III arises when someone complains that one or more of the five strictures of the article, discussed above, should have been followed but were not. Some of the cases involving interference with judicial tenure or a reduction in judicial salary, had been brought by the affected judges themselves. Other cases arise where someone complains that something was done by an individual or body which allegedly was not an article III court, when the complaining party contends that only an article III court should have been able to do it. *Glidden* was one of this latter category, although there was a peculiar twist to it. The issue presented was also atypical in that Congress clearly had intended to make the courts article III courts but it was argued that it had failed to do so. The more typical case involves Congress attempting to avoid article III. Therefore, much

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[76] *Id.* at 531-34.

[77] Glidden v. Zdanok, 370 U.S. 530, 544-45 (1962).

[78] 830 F. 2d at 384.

of what is said in *Glidden* must be understood in its unusual context and is not readily transferable to the typical situation.

The language pertaining to territorial courts is, of course, *dicta* because the case did not involve a territorial court. In addition, the *dicta* does not address or answer the question raised by the *Presiding Bishop Case*. The court of appeals in the *Presiding Bishop Case* divorced the statement entirely from its context, so much so that one wonders if it did not fall victim to the previously mentioned temptation to grab a rule without understanding the issues in the case from which the rule is taken.

Justice Harlan's quote is not inconsistent with what we have called the logical reading of *356 Bales*, but rather is supportive of it. Harlan states that non-article III courts in territories may hear cases that fall within the enumerations of article III, not that article III power can be given to non-article III courts in the territories. His statement can be interpreted to mean that courts can be created in territories to perform functions analogous to state courts and the jurisdiction of state and federal courts do overlap.

In fact, read in context this is inescapably what he meant. Harlan's discussion of *356 Bales* was aimed at demonstrating that it was not to be read as conferring *carte blanche* on Congress to create non-article III courts. Harlan seemed to begin with precisely the same analysis that led to Marshall's concern with the need for Congress to create surrogates for state courts in the territories. He added a note of confusion, when after a generally accurate and seemingly favorable review of Marshall's opinion in *356 Bales*, he suggested in a footnote that Marshall erred in his statement that non-article III courts were incapable of receiving the judicial power of the United States.

He then went on to suggest that another reason why non-tenured judges were appropriate in the early territories was because of the temporary nature of the territorial status and the possibility of the United States being stuck with tenured judges after their courts have been abolished. (An examination of this theory in the equal protection section of this paper concludes that whatever validity it may once have had, it has little or none today.) But the overall purpose of Harlan's discussion was to make the point that very special circumstances must exist to justify the creation of a non-article III federal court.

2. The holding

Most incredibly, Judge Ginsberg, in his reliance upon *Glidden Co. v. Zdanok* in the *Presiding Bishop Case* for the proposition that American

Samoa has no right to an article III or even an independant court, failed to mention the following footnote from *Glidden*: "We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an article III court in one or more of them."[79]

Finally, since Justice Harlan's holding was that the courts in question (Claims and Customs and Patent Appeals) were indeed article III courts, his statements about when article III need not be followed were dictum in the purest sense of the term.

This holding, however, raised an issue that is of some importance to territorial courts and issues we are considering. While the majority of the Court found that the Court of Claim and the Court of Custom and Patent Appeals were article III courts, some of the justices were troubled by the fact that those courts performed some tasks clearly not of an article III nature. Among these were referrals from Congress where congress retained the option not to follow the court's decision. Harlan's view was that this did not destroy the article III nature of the courts although it might violate article III, suggesting that this might make the provisions of the law that violated article III unconstitutional. In his view that issue was not before the Supreme Court. Justice Clark, in his concurring opinion, suggested that the Patent and Claims courts should simply refuse to do these non-article III tasks. To understand his concern with an article III court performing non-adjudicatory functions, we must look at a case that predates even *356 Bales*.

D. Article III Criteria and Hayburn's Case

Article III defines the judicial power of the United States in terms of cases or controversies. This has been interpreted to mean that the only legitimate function of article III courts is to resolve cases or controversies. Perhaps the best known and earliest manifestation of this interpretation of article III is the Supreme Court's unwillingness to give advisory opinions. Although not always understood by the other branches of government, this limitation on the judicial power seems to have been recognized by the Supreme Court from the earliest times. It is reported that in 1793 President Washington tried unsuccessfully

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[79] *Glidden*, 370 U.S. at 548 n.19.

to obtain an advisory opinion from the Supreme Court.[80] Whether the framers had such a subtle point as the case or controversy limitation in mind during the Constitutional Convention is debatable, although some support for the idea that they did is derived from the fact that the convention voted down a provision that would have given the court a power to pass upon the constitutionality of legislation prior to its implementation.[81]

Like the requirement for life tenure and the protection against reduction of salary, the case or controversy limitation is designed to insure the independence of the judiciary. Tenure and salary protection are designed to insulate the justices against undue influence from the executive and legislative branches. Prohibition against advisory opinions is sometimes seen as a means of preventing the executive and legislature from outmanuevering the judiciary.[82] It is said that after having the Court commit itself on abstract questions of constitutionality, the executive and legislative branches might impinge upon the Constitution in the actual implementation of a previously approved act.[83] Even without machinations of the other branches, giving advisory opinions might entice the court to pass upon laws before they have an opportunity to see how those laws impact upon constitutional rights in a real life situation.[84] According to some justices the opportunity to see the laws in the context of reality is an important factor for enhancing the proficiency of the judicial function. [85]

An offshoot of the case or controversy limitation is the plethora of litigation related to what sorts of parties can actually bring constitutional questions to the court ("standing" controversies) and what constitutes a case or controversy.

1. Judges imposed upon—Hayburn's Case

Another facet of the case or controversy doctrine is the finality requirement. Not only must article III courts be asked to consider real

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[80] 3 Correspondence and Public Papers of John Jay 488-89 (1890) *cited in* C. WRIGHT, FEDERAL COURTS, *supra* note 72, at 41 n.22.

[81] Randolph's resolution of May 29, 1787, *discussed in* D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 66-68 (1990).

[82] Adler v. New York Bd. of Educ. 342 U.S. 485 (Frankfurter, J., dissenting).

[83] *Id.*

[84] *Id.*

[85] *Id.*

controversies only, they must also be allowed to resolve them. This limitation also manifested itself very early in Supreme Court history. It was first discussed in *Hayburn's Case* decided in 1793.[86] *Hayburn's Case* was not decided by the Supreme Court as such although it appears in the official reports. Thereby, the Court seemingly approved the decisions some of its members made while they sat as circuit justices. In essense, the teaching of *Hayburn's Case* is that judicial decisions must be final. This finality requirement is also closely related to protecting the integrity of the court. In fact, the issue in *Hayburn's Case* went to the very heart of the integrity of the judicial process. To have its judgments in any case subjected to review by the executive and legislative branches would threaten the separation of powers and jeopardize judicial independence in all cases.

In *Hayburn's Case,* Congress had adopted a law which would have required federal judges to screen pension applications from Revolutionary War veterans. Although the judges would make a preliminary evaluation of the applicant's eligibility, the pension would still have to be approved by the Secretary of War and the Congress before it was paid. The Supreme Court Justices sitting on circuit unanimously agreed that they could not perform this function in their capacity as article III judges. The justices believed that since their decisions would not be final and binding between the parties, they would not be performing a "judicial" function and therefore would not be exercising the judicial power of the United States. Most of the justices also believed that they could not take on the title of "commissioner" (or some other title besides "judge") and perform the task wearing a different hat. They were not unanimous on this point as a later-discovered opinion reveals.[87]

2. United States v. Ferreira

In the post-*356 Bales* era, the Court considered the same issue with similar results in *United States v. Ferreira*.[88] In the treaty by which Spain ceded Florida to the United States, the United States promised to establish a process for Spanish citizens to prove and receive compensation for damages resulting from United States military activities in Florida. The original procedure established by Congress provided that

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[86] 2 U.S. (2 Dall.) 409 (1792).

[87] *See infra* note 95 and accompanying text.

[88] 54 U.S. (13 How.) 40 (1851).

the Superior Courts of Florida (the same non-article III courts discussed in the *356 Bales* case) would hear the claims in the first instance and make a recommendation to the Secretary of the Treasury. The Secretary was to pay a claim "on being satisfied that the same is just and equitable, within the provisions of the treaty."[89] Ferreira's claim was brought under a special act which allowed him to sue notwithstanding the fact that he was outside a statute of limitation that Congress had placed upon such claims. By the time Ferreira's claim was filed Florida had become a state and the special act provided that the United States district court should perform the role previously played by the Florida Superior Court. The district court had recommended that the Ferreira claim be paid and the issue in this case was whether or not that order was appealable to the United States Supreme Court.

The Supreme Court relying both on *Hayburn's Case* and it's own construction of article III, refused to hear the appeal so long as the matter was subject to subsequent approval by non-judicial authority. The Supreme Court indicated that the District Court could not, at least in its capacity as a court, pass upon the claim. It left open the issue of whether the District judge could pass upon the claim in some other capacity since that issue was not raised by the parties.

The Court made clear its belief that "judicial", at least as that term is used in describing the judicial power of the United States, implies the power to resolve disputes.[90] Therefore, any action which leaves the ultimate resolution of the matter open to the discretion of a non-judicial officer or body, is not "judicial." Hence it cannot be an exercise of the judicial power.

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[89] *Id.* at 45.

[90]

> It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.
>
> It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice.

United States v. Ferreira, 54 U.S. at 47.

3. Chicago and Southern Airlines *case*

In more recent times, the Court has considered the issue in the case of *Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp.*[91] The Civil Aeronautics Act made orders of the Civil Aeronautics Board pertaining to the authorization to engage in overseas and foreign air transportation, subject to the approval of the President. The act also provided in general that orders of the Board were appealable to the circuit court of appeals, and made no general exception for overseas or foreign orders.[92] The Waterman Steamship Corporation appealed to the court of appeals an order denying it a certificate of convenience and necessity for certain overseas air routes and granting one to a rival company, the Chicago and Southern Airlines.

In the Supreme Court the issue was whether or not such orders were appealable given the fact that they were subject to final approval by the President. The Court found that no appeal would lie, relying both on *Hayburn's Case* and *Ferreira*. The Court stated:

> Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, [or returned] or refused faith and credit by another department of Government. To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked [for], tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control.[93]

The decision was a close one, however. Justice Douglas wrote a dissent for four justices. Douglas, however, did not directly dispute the requirement of finality. As Douglas construed the act, the President could not award a route without a favorable recommendation from the Board. Therefore, as Douglas saw it, the order of the Board had final, binding legal effect, in the sense that it was a prerequisite to obtaining a route.[94] This is an interesting issue that was not considered in either *Ferreira* or *Hayburn's Case*. However, it does not seem to dispute the general proposition that judicial action must not be subject to revision by non-judicial authority.

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[91] 333 U.S. 103 (1948).
[92] *Id.* at 105-06 (1948).
[93] *Id.* at 113.
[94] *Id.* at 114-18.

The holdings in *Hayburn's Case* and in *Ferreira* that article III courts could not perform non-final fact-finding gave rise to another issue that neither case answered conclusively. Namely, if an article III court cannot make findings which are subject to final approval by the executive or the legislature, can article III judges perform that duty while wearing some other hat? That is, could they label themselves "commissioners", or some such, and perform the same task as a sort of official "moonlighting?" Four of the six Supreme Court judges who expressed an opinion in *Hayburn's Case*, considered that question and split two and two on it.

4. *The case of* Yale Todd

The Supreme Court considered that same issue a year after *Hayburn's Case*, in the case of *United States v. Yale Todd*.[95] *Yale Todd* was originally not an officially reported case but was brought to the attention of the Supreme Court after its decision in *Ferreira* and was described in an end note after the *Ferreira* opinion. *Yale Todd* was a friendly suit brought to determine the validity of orders made by those circuit judges who had believed that they could act as commissioners. The Supreme Court in *Yale Todd* held that they could not so act. This, however, was based primarily upon a belief that the Congress had intended that the judges act *qua* judges, and therefore that it would not be consistent with congressional intent for them to act as commissioners.[96] In *Ferreira*, the Supreme Court decided not to interfere with the District Judge's recommendation to the Secretary of the Treasury, apparently because the parties had not raised it. *Ferreira*, however, suggests that there are serious questions about whether a federal judge should so act. If the judge is deemed to be performing this task in a capacity other than his judgeship, then he may be an officer of the United States in a capacity in addition to judge. If that is so, the court suggests that his appointment to that other position would have to be by the President. If Congress in statutes such as those involved in *Ferreira* and *Hayburn* designated the federal judges to be the "commissioners" (assumming they are not acting as judges), that might make the act unconstitutional,

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[95] *Yale Todd* was an unreported case at the time that it was decided, but the court summarized it in a note after its opinion in United States v. Ferreira, 54 U.S. (13 How.) 40, 52-53 (1851).

[96] *Id.*

because the congress is encroaching on the President's appointments power.[97]

In *Glidden*, the justices who made up the majority did not definitively answer the question. Harlan for the plurality noted that the issue was not before the court but suggested that if it were efforts to give an article III court non-article III tasks would be declared unconstitutional rather that hold that the article III nature of the court was destroyed thereby. Justice Clark suggested that article III judges should simply refuse to perform such tasks.

In light of the fact that the Supreme Court has recently reiterated the enforceability of the constitutional requirement that appointments be made by the President,[98] this issue clearly has continuing vitality. However, where the President and the Congress were in agreement that particular constitutional problem would not exist since it would not bar the *President* from appointing a district judge to perform in some other capacity.[99] However, it does seem quite possible that the Court might still find this inconsistent with the spirit of article III. Furthermore, it would be hard to see how the federal judges could be *required* to accept an appointment that entailed performing non-article III duties. As noted, Justice Clark, concurring in the *Glidden Case*, suggested that article III judges could simply refuse to perform the non-article III tasks.[100] This presumably could not be grounds for impeachment or reduction in salary, if it was based upon constitutional considerations. An interesting issue might arise if Congress offered additional compensation for performing non-article III functions, and the article III judges were given a choice of accepting the work or not.[101]

5. *The territorial dimension of finality*

While there are only a handful of Supreme Court cases dealing with the finality issue one of them involved a territorial court, at least

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[97] *See* Buckley v. Valeo, 424 U.S. 1, 122-24 (1976).

[98] *Id.*

[99] Conceivably the President's signature on the bill could be deemed an appointment of the judge to the extra position.

[100] 370 U.S. 530, 585, 589 (1962) (Clark, J., concurring).

[101] If the judges who accepted the new assignment were paid additional compensation it could be argued that the judges who refused to perform the non-judicial task would have their salary diminished in violation of article III. At least the spirit of the article III prohibition on the diminuition of compensation of judges would be violated by any congressional scheme that gave extra compensation to federal judges who acceded to some wish of congress about how they perform their duties.

marginally. Under the original scheme at issue in *Ferreira* it was the non-article III Superior Courts of Florida that were to do the screening for the Secretary of the Treasury.[102] It may have been that fact that caused the Congress to believe originally that *Hayburn's Case* did not impede the implementation of this plan. However, the case that reached the Supreme Court arose after Florida had become a state and the screening function had been turned over to the United States district court. Therefore, the Supreme Court did not pass directly on the propriety of giving such a function to a territorial court. Some of the language of the Court seems to suggest that territorial courts could be given non-article tasks, but that, of course, was *dicta*. The issue is relevant to our subject because as we shall see many of the courts which serve the territories have both jurisdiction which does and does not fit within the definition of federal judicial power in article III. Is the hybrid nature of these courts constitutionally defensible?

E. Northern Pipeline Co. v. Marathon Pipeline Co.

Against this background the final case Judge Ginsberg relied upon, the *Northern Pipeline Case* was decided. *Northern Pipeline*[103] was the Burger Court's most significant statement on the distinction between article III and non-article III courts. It did not involve territorial courts although they are mentioned in three of the four opinions. Thus, much of what is said in *Northern Pipeline* must be considered *dicta* as applied to territorial courts. But much is clearly relevant and insofar as the case expresses the Court's general attitude toward article III it is extremely important. Judge Ginsberg and the District of Columbia Circuit Court of Appeals to the contrary,[104] there is nothing in the case that would support the proposition that article III has no applicability in the territories.

The *Northern Pipeline* case involved the constitutionality of the Bankruptcy Act of 1978. The Act replaced the referees in bankruptcy with bankruptcy judges. The judges clearly did not meet the restrictions of article III because, *inter alia*, they were appointed for terms of fourteen years. They were in the words of the Supreme Court "vested with all . . . the 'powers of court[s] of equity, law, and admiralty,' except that

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[102] 54 U.S. (13 How.) 40, 45 (1851).

[103] Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

[104] *See* Corporation of the Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

they 'may not enjoin another court or punish a criminal contempt not committed in the presence of the judge [or] . . . court or warranting a punishment of imprisonment.'"[105]

The bankruptcy judges were empowered to hold jury trials, issue declaratory judgments, issue writs of habeas corpus under certain circumstances, issue all writs necessary in the aid of a bankruptcy courts' jurisdiction and issue any order, process or judgment that was necessary or appropriate to carry out the provisions of the Act. Whereas the referees' decisions had been appealable to the United States district court to which they were attached, a different appeals process was set up with respect to the bankruptcy judges. The chief judge of the circuit could designate panels of three bankruptcy judges to hear appeals. If no such appeals panel was designated, the district court was empowered to exercise appellate jurisdiction. The court of appeals was given jurisdiction over appeals from the appellate panels or from the district court. If the parties agreed, direct appeal to the court of appeals could be taken from a final judgment of a bankruptcy court.[106]

So far as substantive jurisdiction is concerned, the Act gave the new courts jurisdiction over all "civil proceedings arising under [the Act] or arising in or related to cases [arising] under [the Bankruptcy Act]."[107] Thus, in the *Northern Pipeline* case, Northern Pipeline Company, which had sought reorganization in bankruptcy, filed a suit against the Marathon Pipeline Company alleging breach of contract and warranty as well as misrepresentation, coercion and duress. Marathon moved to dismiss on the grounds that the act unconstitutionally conferred article III power upon judges who lacked life tenure and protection against salary diminution. The United States Supreme Court agreed that the Act was unconstitutional in that respect, although it could produce no majority opinion. Justice Brennan wrote the plurality opinion for himself, Justices Marshall, Blackmun, and Stevens.[108]

In their briefs, the United States and *Northern Pipeline* suggested two basis for upholding the conference of broad adjudicative powers upon judges unprotected by article III. One was that the bankruptcy courts were properly constituted as "legislative courts."[109] The second was

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[105] 458 U.S. 50, 55 (1982).

[106] *Id.*

[107] *Id.* at 54.

[108] *Id.* at 52.

[109] *Id.* at 62.

that the bankruptcy courts were "adjuncts" of the article III courts.[110] Both of these arguments have some relevance to the territorial situation, and we shall consider them in order.

1. Justice Brennan's three "tidy" exceptions

Justice Brennan's central view was that Congress must generally use article III to create courts but that there are several narrow, specific (the concurring opinion calls them "tidy") exceptions. One of those is the exception for territorial courts.[111] Brennan's conclusion for the plurality is that since bankruptcy courts do not fall within any of those exceptions they must comply with article III.

Because no one contended that the bankruptcy courts fit under the territorial court exception, Brennan's discussion of it, beyond simply noting that it was one that existed, was *dicta*. Territorial courts were mentioned merely in the context of illustrating that there are some exceptions to the article III rule but that none were applicable to the case at hand. No effort was made to define the territorial exception since such a definition (beyond noting that it would not apply to the case at bar) was not relevant.

Even so, there is nothing in the Brennan opinion which is inconsistent with our interpretation of the *356 Bales* case. Justice Brennan says that the territorial exception dates from the "earliest days of the Republic", when "the Framers intended that as to certain geographical areas, in which no State operate[s] as sovereign, Congress was to exercise the general powers of government."[112] Thus Brennan's territorial exception is simply that when Congress is acting as a surrogate state government, it may create the territorial analogue to state courts. Nothing in the opinion suggests that non-article III courts can exercise the judicial power of the United States in territories, nor that territorial citizens can be denied access to article III courts for cases which fit into the Federal judicial power. That the court of appeals in *Presiding Bishop*[113] would rely on *Northern Pipeline* for that proposition simply demonstrates how casual some of the judicial work in this area has been.

Brennan's *Northern Pipeline* opinion must also be read in light of his majority opinion in *Guam v. Olsen*[114] where he suggests that any

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[110] *Id.* at 62-63.
[111] *Id.* at 64-65.
[112] *Id.* at 64.
[113] 830 F.2d 374, 384-85.
[114] 431 U.S. 195 (1977).

territorial court system which completely denies access to article III courts to territorials, may likely run afoul of article III.

In the *Guam* case the Court held that the Guam legislature's effort to create courts that would not be subject to article III review exceeded its authority under its organic act. However, Justice Brennan indicated that the Court made its interpretation of the organic act to avoid a constitutional problem. Namely, that it might be unconstitutional under article III to cut off all access of territorials to article III courts.[115]

2. *The Rehnquist opinion:* Northern Pipeline

The concurring votes of Justices Rehnquist and O'Connor were needed to make a majority in *Northern Pipeline*. Justice Rehnquist's opinion,[116] in which Justice O'Connor concurred, was so hemmed in it did not actually reveal where the two justices stood on the broader issues. Rehnquist notes "that the cases do not admit of an easy synthesis" but that "none of the cases has gone so far as to sanction the type of adjudication to which *Marathon* will be subject against its will under the provisions of the 1978 Act."[117] Although this analysis made him and O'Connor the decisive votes in favor of *Marathon*, he makes it explicit that he does not favor either Brennan's plurality or White's dissenting analysis. He wrote:

> I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on the judicial 'darkling plain' where ignorant armies have clashed by night, as Justice White apparently believes them to be.[118]

Justice White,in his dissenting opinion, read the Rehnquist opinion as being primarily concerned with the fact that the bankruptcy court was being permitted to adjudicate what was essentially a common law cause of action.[119] That may be true because the soon-to-be Chief

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[115] *Id.* at 204. While Guam v. Olsen was a five to four decision, the dissenters did not disagree with Justice Brennan as to the potential unconstitutionality of cutting off Guamanians from article III courts. The dissenting opinion acknowledges that such a problem may exist but apparantly believed that it was premature to consider it in this case. *Id.* at 208 (Marshall, J., dissenting.)

[116] 458 U.S. 50, 89.

[117] *Id.* at 91.

[118] *Id.*

[119] *Id.* at 94.

Justice's very brief references to the facts of the case seem to dwell upon that point.[120] In any event, since Justice Rehnquist would not even affirm the existence of three ("tidy") exceptions to the blanket article III rule, his opinion can hardly lend support to any contention that courts in United States territories are completely outside article III considerations.

3. White: Northern Pipeline

While on the facts of *Northern Pipeline* the White dissent is more deferential to Congress than the Brennan plurality, its analysis could be the basis for *more stringent* article III restrictions on Congressional power to create territorial courts.[121] White's approach is that congressional interest in creating non-article III courts must, *in every case*, be balanced against article III values. It was used in *Northern Pipeline* to expand the area of congressional discretion, but it could be turned around and used to find limitations even within the three exception areas enumerated in the Brennan opinion. Justice White argues that exceptions to article III can be made across the board but his balancing approach also must be applied across the board.[122]

Thus under the White theory a balancing of interests must take place even where the legislative court falls squarely within one of Brennen's enumerated exceptions. On the facts of *Northern Pipeline* White believed that the need for a large number of bankruptcy judges, which need might be temporary, justified a departure from article III requirements. What justification can be advanced for not giving territorial judges life tenure? Under White's theory it would have to be balanced against article III's preference for judicial independence. We shall examine the rationales proffered for non-article III courts in territories in some detail, *infra*.

4. Article III adjuncts

The alternative argument that was made to justify the bankruptcy courts in the *Northern Pipeline* case, was that the bankruptcy courts were in fact adjuncts of the article III courts. Justice Brennan acknowledged

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[120] *Id.* at 89.

[121] *Id.* at 92 (White, J., dissenting).

[122] *Id.*

the existence of article III adjuncts.[123] In fact, an adjunct theory is used to justify most of the federal administrative agencies in existence. The adjunct theory proceeds on the assumption that it is not inappropriate for an article III court to delegate certain fact finding functions and even preliminary law determination functions, to a person or persons who are not themselves article III judges. Since the earliest days of the republic, the federal courts have employed the common law concept of masters and commissioners, to make special findings in complicated cases.[124] This is permissible so long as the article III court maintains control over the adjunct and the "essential attributes" of article III adjudication are maintained in the article III courts.[125] From the standpoint of the territorial courts, the most significant thing about this part of the *Northern Pipeline* discussion is its affirmation of the idea that article III courts must maintain at least the power of appellate review over all article III litigation. This is the constitutional point that Justice Brennan considered compelling in *Guam v. Olsen*.[126]

The adjunct theory intersects with the "three exceptions" theory in Brennan's opinion, particularly the public rights exception, and is best understood in connection with them.

The three "tidy" exceptions to the article III rule that Justice Brennan enumerated in his *Northern Pipeline* plurality, were: (1) territorial courts, (2) military courts martial, and (3) courts that adjudicate "public rights."[127] The territorial courts exception might seem to be the one most specifically relevant to our concerns. But we have noted that Justice Brennan did not need to say and did not say very much about it. The exception for courts martial was also discussed very little other than to note its existence.[128] In addition, courts martial are *sui generis* and of little concern to issues that we are presently exploring. On the other hand, the "public rights" exception is one of broad applicability, and one that in subsequent cases has become wrapped up with the general question of the proper place of non-article III courts.

As Justice Brennan saw it, the concept of public rights seems to be an outgrowth of the doctrine of sovereign immunity. "Public rights",

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[123] *Id.* at 78.

[124] *See Yale Todd*, *supra* note 95. *See also*, *e.g.*, Oliver v. Piatt, 44 U.S. 333 (1845).

[125] *Northern Pipeline*, 458 U.S. at 78-79.

[126] 431 U.S. 195 (1977).

[127] Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 64-67.

[128] *Id.* at 66.

as Justice Brennan used that term, refers to rights that the government created in citizens as against itself. Justice Brennan found that many of the cases upholding non-article III courts involved such rights. Justice Brennan believed that in most of these cases because of the doctrine of sovereign immunity the government was not legally obligated to such individuals. Because it was discretionary with the government to make any recompense at all, no one could be heard to complain if the government chose to provide for adjudication of such "rights" in a non-article III forum.[129]

Thus, as originally delineated by Justice Brennan for the plurality in *Northern Pipeline*, the "public rights" exception seemed to have at least one very precise qualifying limitation. That is, it would have to involve actions against the government itself. As we shall see that limitation has not held.

Since the *Northern Pipeline* case the Supreme Court has twice more considered issues involving the limits that article III places upon Congress's power to create adjudicative bodies. In both of these cases the majority opinions were written by Justice O'Connor. In some ways that is ironic, because Justice O'Connor's views going into these cases were perhaps the least well known of any of the justices. In *Northern Pipeline* she had merely concurred in Justice Rehnquist's hedged and rather obscure opinion. Now, she may be emerging as the spokesperson for a majority consensus in this area.

The first two article III cases that the court considered after *Northern Pipeline* both involved situations in which lower federal courts read *Northern Pipeline* to invalidate non-article III federal adjudicatory arrangements. In both cases the Supreme Court disagreed with the lower courts and upheld the federal laws or actions. Thus, some commentators see these cases as a "retreat" from *Northern Pipeline*.[130] We are not sure it is.

F. The Union Carbide *Case*

In *Thomas v. Union Carbide Corp.*[131] the Congress dealt with a unique and relatively confined issue that arose out of pesticide regulation.

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[129] *Id.* at 68-69.

[130] *See, e.g.*, Brown, *Article III as a Fundamental Value—The Demise of Northern Pipeline and Its Implications for Congressional Power*, 49 OHIO ST. L. J. 55 (1988); *cf.*, Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

[131] Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985).

Federal environmental protection laws require pesticide manufacturers to make extensive filings with the Environmental Protection Agency. The cost of obtaining the data for these filings can in certain cases become very high. Congress found that some manufacturers would wait for a competitor to file information and then would use as much of it as they could for their own filings. Seeing this as an unfair and potentially harmful practice, Congress determined that the second manufacturer should compensate the first for this "follow on" use of the competitor's data. Where the parties could not agree if compensation was due, or what the amount of compensation should be, the act provided for binding arbitration. Judicial review is limited to a determination of whether the arbitrators decision involved "fraud, misrepresentation, or other misconduct." The lower federal court believed that the scheme violated article III as interpreted in *Northern Pipeline*.

1. The holding

Justice O'Connor's opinion upholding the arbitration scheme[132] attempted to reconcile it with all three substantive opinions in *Northern Pipeline*. Specifically she noted that *Northern Pipeline* on its facts had dealt with a situation in which a non-article III federal court had purported to adjudicate rights created by state law.[133] This was consistent with Justice Rehnquist's opinion in *Northern Pipeline* (in which she had concurred), holding the bankruptcy act unconstitutional for that reason and very carefully limiting the holding to the facts of that case.[134] But she then went on to say that the real issue was whether or not the case involved a public right.[135] Here, however, she engaged in a certain redefinition of "public rights." As noted, *Northern Pipeline* treated a public right as one that a member of the public has against the government. The *Thomas* action was between two private parties. Justice O'Connor, however, believed that was not dispositive. The arbitration was ancillary to Congress' effort to regulate the pesticide industry. Congress had the power to "allocate costs and benefits among voluntary participants in the [Federal] program without providing an article III adjudication."[136]

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[132] *Id.* at 593-94.
[133] *Id.* at 595.
[134] *Id.* at 587.
[135] *Id.* at 569-70.
[136] *Id.* at 570.

2. *Public rights after* Thomas

Thus, after *Thomas*, the public rights exception is no longer limited to rights against the federal government, but includes rights that are created *by* the federal government. This is an extraordinary expansion of the category. Perhaps Justice O'Connor realized that, because she was not finished creating rationales for the decision. Next she brought in the dissent of Justice White in *Northern Pipeline* to narrow and blunt the impact of her broadened exception. Thus, even though the case fits within the broadened exception of "public rights", there is still a balancing test to be met. This supports our point[137] that while Justice White's opinion dissenting in *Northern Pipeline* would have upheld non-article III bankruptcy courts, it might have a more limiting effect on efforts to exclude territorial residents from article III adjudication. White's balancing approach, it will be recalled, requires the balancing of the government's justification for creating a non-article III tribunal against the constitutional presumption in favor of article III adjudication and its purpose of protecting judicial independence.[138]

Justice Brennan concurred. Despite his *Northern Pipeline* opinion, in *Thomas* he accepted Justice O'Connor's conclusion that the application of the public rights doctrine is not conclusively determined by who the parties are. Public rights include not only rights against government itself, but disputes arising from the government's administration of its laws or programs.[139] Here Justice Brennan himself engages in some synthesis of concepts. He now finds that access to an article III court for appellate review may be required not only under the adjunct exception to article III but the public rights one as well.[140] This begins to approach the quite respectable idea that article III courts should have original or appellate jurisdiction of all cases that fit within the judicial power of the United States.

G. The Schor *Case*

In 1986, the Supreme Court considered the case of *Commodity Futures Trading Commission v. Schor*.[141] In the Commodity Exchange Act, Con-

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[137] 458 U.S. 50, 92 (1982) (White, J., dissenting).

[138] *Id.* and accompanying text.

[139] 473 U.S. at 594, 597 (Brennan, J., concuring).

[140] *Id.* at 598-99.

[141] 478 U.S. 833 (1986).

gress had provided that the Futures Trading Commission could adjudicate claims by customers against brokers for violations of the act. Congress provided this as an alternative remedy to a suit in federal court. The commission, by regulation, allowed broker-defendants to bring counterclaims against a customer, including counterclaims based upon state law. The circuit court of appeals held that the regulation allowing counterclaims was not authorized by the statute. In so doing, the court of appeals admitted that it was influenced by its fears that if authorized, the counterclaim regulation would be unconstitutional under *Northern Pipeline.*[142] In *Schor*, the process for adjudicating the original claims could probably fit within the doctrine of public rights as it was broadened in the *Union Carbide* case. However, the counterclaim of the broker arising under state law seemed much more like the state law claim that was involved in *Northern Pipeline*. Nevertheless, Justice O'Connor writing for a 7-2 court, upheld the act and the regulation.[143] Considerable reliance seems to have been placed upon the fact that the customer in *Schor* might be deemed to have waived any article III objections by commencing the action himself in a non-article III forum. This leads to the issue of whether article III is designed primarily to preserve structural integrity in the government or to assure fair adjudication to individuals. The opinions reflect a solid consensus on the Court that it involves both. This means that individuals should usually have standing to raise objections based upon article III.[144] It might also mean that they do not have a completely free hand to waive article III.

In the *Schor* case Justice O'Connor noted that the customer who was making the article III objections had voluntarily filed a claim before the commission. Not only was the regulation authorizing the counterclaim on the books at that time, there was extensive evidence that the customer was aware of it.[145] The customer's lawyers had moved in state court to have a suit by the broker based upon the same subject matter as the counterclaim dismissed, on the ground that the commission should adjudicate the claim. Justice O'Connor obviously considered this waiver important. Had the customer been forced to submit his claim in the commission and also submit to the adjudication of a state law cause of action against him in that same forum, the opinion

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[142] 740 F.2d 1262, 1269-70.

[143] 478 U.S. 833, 856-59 (1984).

[144] *See, e.g., Schor*, 478 U.S. at 849-50.

[145] *Id.*

suggests that the Court's decision might have come out the other way.

Nevertheless, as the Court implies, waiver does not provide the complete answer to the question. Waiver could not save a system which clearly flew in the face of article III. Therefore, the Court went on to apply what seemed to be the balancing test from White's *Northern Pipeline* dissent.[146] The government's justifications for a non-article III forum again won out over article III values. In applying the balancing test Justice O'Connor seems to brush aside the public rights distinction which she labored to save in the *Union Carbide* case. She also states that the fact that the case involves a state law claim should not be considered "talismanic."[147] Hence, the laborous effort in *Thomas* to show that the decision was consistent with the Brennan and Rehnquist opinions in *Northern Pipeline*[148] fades into the background as the White balancing test comes to the fore.

Justices Brennan and Marshall dissented.[149] Brennan objected to the balancing approach, arguing that it will lead to a steady erosion of article III values. He believes that in any given case Congressional departure from article III will not seem to be a significant impairment of judicial independence. Hence, the balance is likely to be struck in favor of the special need for a non-article III tribunal. However, the aggregate affect could be a significant undermining of article III. Therefore, Justice Brennan advocates a prophylactic approach. He would define a core of article III values and invalidate any infringement upon those unless they fit within certain narrow historical exceptions.[150]

As we noted earlier in this paper the article III legislative courts issue is at bottom a separation of powers issue. In the Court's recent discussions of article III, it has failed to compare its holdings there with its treatment of separation of powers in cases involving branches other than the judiciary. In *Schor*, Brennan makes such a comparison. He notes that in cases such as the legislative veto case, *Immigration and Naturalization Service v Chadha*,[151] and in the balanced budget case, *Bowsher v. Synar*,[152] the Court took a formalistic approach, relied heavily on the perceived intent of the framers, and rejected arguments based on

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[146] *Id.* at 851.

[147] *Id.* at 853.

[148] *See supra* note 132 and accompanyintg text.

[149] 478 U.S. at 859.

[150] *Id.* at 860-61.

[151] Immigation and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

[152] Bowsher v. Synar, 478 U.S. 714 (1986).

modern-day needs for effeciency. The Court saw its duty in those cases as one of upholding the structure contemplated by the framers, even though it might today "seem clumsy, inefficient, even unworkable."[153] Brennan suggests that a similar approach should be taken in article III cases.

H. The Effect of Article III on Territorial Courts

What has been established up to this point? It has been demonstrated that Marshall's logical and rather modest holding in the *356 Bales Case* has been misunderstood by some later commentators and courts, including some who have blown the territorial courts exception out of all recognizable proportions. Nevertheless, the United States Supreme Court has not been a party to this (despite some dubious *dicta*) and would not have to overrule any of its own precedents to return the doctrine to its proper and correct state.

In the *356 Bales* case Justice Marshall simply held that in a territory where Congress possesses not only the enumerated powers that it has over states, but also the powers of general government which are normally reserved to the states governments themselves, Congress can create courts to perform the functions normally performed by state courts in states. Such a decision was necessary because the judicial power of the United States which is enumerated in article III, does not extend to all of the ordinary tort, contract, criminal, etc., cases that arise in states and necessarily would arise in territories. Unless Congress could create these surrogate state courts for the territories there would be an enormous and intolerable gap in judicial jurisdiction. Marshall did *not* say that in territories non-article III courts could exercise the judicial power of the United States. On the contrary, he said *explicitly* that non-article III courts were incapable of receiving the judicial power of the United States. How the decision came to some to mean exactly the opposite of what it said, would be excellent fodder for those legal skeptics who deny that the written word has any control over judicial behavior. Nothing in *356 Bales* or its legitimate progeny suggests that article III is inapplicable to the territories.

The idea that article III courts exist completely exempt from article III requirements is a rank heresy, that while sometime supported by Supreme Court language taken out of context, has never been promulgated by the Supreme Court itself.

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[153] 462 U.S. 919, 959, *quoted in Schor*, 478 U.S. 833, 864 (Brennan, J., dissenting).

In the course of making these points we have shown that attempts to assign non-article III functions to courts charged with the responsibility of exercising the judicial powers of the United States, in particular attempts by the Executive and the Congress to maintain control over the adjudicative power of such courts has been met with consistent condemnation by the Supreme Court. Now we shall see how these principles apply to existing territorial courts.

1. The general application of the Constitution to the territories

The Supreme Court, over the years, has dealt with the issue of what parts of the Constitution are applicable in a territory. I have written extensively on this subject elsewhere.[154] This is not the place for a complete review of the topic, but some discussion of it in very summary form is necessary to maintain the continuity of the discourse. In the early days of the republic, up through at least the Civil War, the Supreme Court seemed to adhere to the *ex proprio vigore*[155] theory. This concept, popularly known as the idea that "the Constitution follows the flag",[156] held that all parts of the Constitution (except those by their terms clearly not applicable to a territory) were of their own force fully applicable every place that was under United States jurisdiction. At the turn of this century, the Supreme Court modified its views. The Supreme Court was sharply divided on this issue and some thought that the emerging majority was catering to the colonial aspirations of certain segments of the United States body politique. The "Incorporation Doctrine" was first enunciated in a concurring opinion in one

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[154] *See, e.g.*, Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337 (1981). *See also* Laughlin, *The Burger Court and the United States Territories*, 36 U. FLA. L. REV. 755 (1984).

[155] The phrase translated means "by its own force." It was used in the Insular Cases, *infra* note 157, to contrast with the extension theory which held that Congress must "extend" the Constitution to territories before it is applicable there. However, the idea that the Constitution is applicable in territories of its own force seems to be the original one in American constitutional jurisprudence. *See, e.g.*, Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820).

[156] The origins of this phrase are also obscure although it is reported that the phrase was a slogan of the Democratic Party at the turn of the century and appeared on a banner over the speaker's platform at that party's convention in 1900. G. SHANKLE, AMERICAN MOTTOS AND SLOGANS 61 (1941) (quoting *Official Proceedings of the Democratic National Convention Held in Kansas City, Missouri, July 4th, 5th, & 6th, at 121 (1900).*

of the *Insular Cases*[157], *Downes v. Bidwell*[158] in 1901. The doctrine was not adopted by the entire Court until the 1922 case of *Balzac v. Puerto Rico*.[159] Under the Incorporation Doctrine, the Constitution was fully applicable only in territories that had been "incorporated" into the United States. In other territories only those parts of the Constitution which protected "fundamental rights" were applicable. The doctrine spawned continuing debate over the criteria for determining whether or not a territory had been "incorporated" and also over the definition of "fundamental rights" in this context.[160] Apparently none of today's territories are considered to be "incorporated."

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[157] Six cases argued and decided together in the Supreme Court at its 1900 term were officially designated by the Court to be known as the *Insular Tariff Cases*, 182 U.S. 1, 2 (1901). They are more commonly called the *Insular Cases*. *See, e.g.*, 182 U.S. at 3. The *Insular Cases* are De Lima v. Bidwell, 182 U.S. 1 (1901)(Puerto Rico not a foreign country and import duties levied on sugar were illegal); Goetze v. United States, 182 U.S. 221 (1901)(Hawaii and Puerto Rico not foreign countries within meaning of tariff law); Dooley v. United States, 182 U.S. 222 (1901)(military authority to establish duties on American imports to Puerto Rico ceased with ratifications of treaty ceding the territory to the United States); Armstrong v. United States, 182 U.S. 243 1901)(post-treaty duties on imports recoverable under *Dooley*); Downes v. Bidwell, 182 U.S. 244 (1901)(uniformity clause of Constitution held inapplicable to Puerto Rico); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901)(steamship operating between New York and Puerto Rico not engaged in foreign trade).
The Court and others have sometimes used the term *Insular Cases* to include Supreme Court cases involving the territories decided through 1922. For clarity, I usually refer to cases following the 1900 decisions, through *Balzac v. Porto Rico* in 1922, as the *Latter Insular Cases*. They are: Balzac v. Porto Rico, 258 U.S. 298 (1922)(jury trial provision of sixth amendment inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914)(grand jury provision inapplicable in Phillipines); Dowdell v. United States, 221 U.S. 325 (1911)(confrontation clause not violated when Philippine court amended defendant's sentence in his absence); Rassmussen v. United States, 197 U.S. 516 (1905)(jury trial provision is applicable in Alaska); Dorr v. United States, 195 U.S. 138 (1904)(jury trial provision inapplicable in Philippines); Kepner v. United States, 195 U.S. 100 (1904)(Congress extended double jeopardy clause to Philippines in statutory bill of rights, thereby precluding government appeal of acquittal); Hawaii v. Mankichi, 190 U.S. 197 (1903)(grand and petit jury clauses inapplicable in Hawaii); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901)(post-treaty duty on foreign imports inapplicable to Philippines); Dooley v. United States, 183 U.S. 151 (1901)(duties on goods moving from states to Puerto Rico upheld).

[158] 182 U.S. 244 (1901).

[159] 258 U.S. 298 (1922).

[160] For a detailed discussion of the incorporation doctrine *see* Laughlin, *The Application of the Constitution in the United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV., *supra* note 31, at 343-55. *See also* Laughlin, *The Burger Court and the United States Territories*, 36 U. FLA. L. REV. 755 at 762-74 (1984).

a. Incorporation

The Incorporation Doctrine, while never rejected by the Court, today must be read in light of subsequent precedents such as *Reid v. Covert*.[161] Most thoughtful observers believe that *Reid* has necessarily worked a modification of the *Insular Cases*,[162] although there are those judges and commentators who seem to assume that the Incorporation Doctrine operates pretty much the same as it did in 1901.[163]

b. The King *doctrine*

Reid v. Covert did not deal with a territory as such, but rather with United States military bases in foreign lands (England and Japan). The four person plurality, in an opinion by Justice Hugo Black, spoke in language very reminiscent of the old *ex proprio vigorie* doctrine and seemed to be returning to a position in which virtually all provisions of the Constitution were at least *presumed* to be applicable in territories. Justice Harlan, in a concurrence for himself and Justice Frankfurter,[164] agreed that the Constitution should generally be applicable in United States jurisdictions outside the states, but that inapplicability might occur when enforcement of a particular provision in a particular territory would be "impractical [or] anomalous."[165]

The Court of Appeals for the District of Columbia, in the case of *King v. Morton*[166] synthesized these two opinions with the Insular Cases and came up with a workable rule for constitutional application in the territories. That rule, which I have referred elsewhere as the *King* rule, is, as I interpret it, that there is a presumption that the Constitution is applicable in territories but that such presumption can be rebutted

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[161] 354 U.S. 1 (1957).

[162] For an example of a court that did a very thoughtful job of trying to reconcile Reid v. Covert and the Insular Cases, *see* King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975). For further elaboration on this point see Laughlin, U. HAW. L. REV. *supra* note 31.

[163] *See, e.g.*, Corporation of the Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). *See also*, A. LEIBOWITZ, COLONIAL EMANCIPATION IN THE PACIFIC AND THE CARRIBBEAN 48-54 (1976).

[164] 354 U.S. 1, 65 (Harlan, J., concurring); *see also id.* at 41 (Frankfurter, J., concurring).

[165] *Id.* at 75-76 (Harlan, J., concurring).

[166] *See supra* note 162.

by a showing that a particular application in a particular territory would be "impractical or anomalous."[167]

It must be mentioned that in a couple of relatively recent Supreme Court decisions dealing with alleged equal protection violations in Congressional legislation for territories, the court without much explanation has seemed to apply a rational basis test for determining whether Congress can make distinctions in the way it treats territories *viz-a-viz* the way it treats states. [168]

c. The doctrines of application and Article III

No matter which of these constitutional rules are applied it would seem that article III should be applicable to territories. Under the Ex Proprio Vigore Doctrine, all parts of the Constitution are applicable in all territories.

Under the Incorporation Doctrine as laid down in the Insular Cases, access to courts has been determined in other contexts to be a fundamental right.[169]

Under the *King* rule as we shall demonstrate, *infra*, there seems to be no reason why it would be impractical or anomalous to have article III courts in territories.[170] Finally, as we shall discuss, there seems not to be even a rational basis for denying United States citizens living in

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[167] *See* Laughlin, U. HAW. L. REV., *supra* note 31, at 376-81. *See also* Laughlin, U. FLA. L. REV., *supra* note 29, at 778-80. The Ninth Circuit adopted this approach to the King rule in Wabol v. Villacrusis, 908 F.2d 411 (1990), when it upheld provisions of the Constitution of the Commonwealth of the Northern Marianas that restricted permanent or long-term interests in land to persons of indiginous ancestry as against an equal protection challenge. The court found that the application of the equal protection principle in this case would be "impractical" and "anomolous". The court cited my earlier Hawaii law review article Laughlin, U. HAW. L. REV., *supra* note 33, for the proposition that the Bill of Rights is not intended to be a genocide pact for indigenous cultures, 908 F.2d at 423, and for the proposition that free alienation is not impractical because it will not work, but because it would work too well, 908 F.2d at 423, n.21.

[168] Harris v. Rosario, 446 U.S. 651 (1980); Califano v. Gautier Torres, 435 U.S. 1 (1978). While I have been sharply critical of these decisions in my other writings, *see, e.g.*, 36 U. FLA. L. REV., *supra* note 29, at 798-800, they do not necessarily undermine the *King* doctrine because in both the Court limits itself to the very narrow issue of whether Congress may treat a territory differently from a state.

[169] *See* the penultimate section of this paper.

[170] *See infra* note 242 and accompanying text.

territories access to a court system similar to that which is found in states.[171]

i. Article III in the territorial context

Having established the idea that article III should be applicable in the territories, the next question is the effect of that article. The question can be stated this way: assuming our interpretation of *356 Bales* and its progeny is correct, then it follows that all Justice Marshall was saying was that Congress can create surrogate state courts for territories, and that in the territories, as in the states, article III powers must be exercised only by article III courts. Must then Congress create federal courts for the territories and what jurisdiction must it give them? One argument that we will explore later is that the equal protection principle might require territories to have the same access to federal courts as anyone else unless a compelling purpose can be shown for treating the territory differently. In this section, however, we will explore the question of what *article III itself* might require.

The problem is created by the fact that while article III courts are courts of limited jurisdiction, state courts are not. A federal court clearly cannot do everything that a state court can. However, it is not so clear that a state court cannot do everything that a federal court can. In making our case for the surrogate state courts in territories, we noted that the definition of the federal judicial power in article III excludes a wide range of cases that normally end up in state courts. These are ordinary tort, contract, property, etc., cases where no federal question is involved, there is no diversity of citizenship, and none of the other definitional conditions of article III are met. Thus, we said that it was a necessity that there be some courts in territories in addition to article III courts. (Unless, of course, we were to conclude that article III courts can in certain circumstances take on non-article III duties).[172] We have noted that state courts can and frequently do exercise jurisdiction over cases that fall within the definition of the federal judicial power, because the state courts come at them from a different direction. In the *356 Bales* case, Marshall noted that state courts decided salvage cases on common law principles even though

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[171] *See infra* notes 235-41 and accompanying text.

[172] The Supreme Court has flirted with the idea of "hybred" courts from time to time. *See, e.g.*, National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

federal courts also considered them as a part of their admiralty jurisdiction.[173]

In addition, the supremacy clause clearly contemplates that state courts will be involved in adjudicating cases under federal law. After pronouncing the United States Constitution, statutes and treaties the supreme law of the land, the clause goes on to say that "the Judges in every State shall be bound thereby."[174] This is always understood to refer to state court judges. Such an interpretation seems logical for there is little reason why the framers would have mentioned judges being in states if they were referring to federal (rather than state) judges.

In *Martin v. Hunter's Lessee*[175] Justice Story was concerned with the question of whether the federal Constitution allowed Congress to give the Supreme Court appellate jurisdiction over state courts in cases involving federal questions. Congress had done so in the very first Judiciary Act. However, the state of Virginia claimed that the Constitution did not authorize it. Justice Story said that it did. It making his case Story noted that while article III presupposes that there will be a Supreme Court it leaves it up to Congress to decide whether or not to create inferior courts.[176] Story contended that while Congress had from the beginning always opted to have lower federal courts, it might have chosen not to do so.[177] Since it was held in *Marbury v. Madison* that the Supreme Court can exercise only that very limited original jurisdiction which is spelled out in the Constitution,[178] nearly all cases would then have begun in a state court. All this would seem to suggest that there is nothing wrong with federal cases being heard in state courts in the first instance.[179]

What is more encouraging from the standpoint of territorial access to article III courts, is that Story made this argument in order to prove that the Supreme Court would in such cases by necessity have to exercise jurisdiction over state courts. Looking at the language of article

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[173] *See supra* note 60 and accompanying text.

[174] U.S. CONST. art. VI, cl. 2.

[175] 14 U.S. (1 Wheat.) 304 (1816).

[176] "The judicial power of the United States, shall be vested in one supreme court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[177] 14 U.S. at 330.

[178] 5 U.S. (1 Cranch.) 137, 175.

[179] *See also infra* notes 184-86 and accompanying text.

III Story concluded that it was obligatory on Congress to invest the entire judicial power in some federal court. This, as he saw it, meant that every case which fell within the definitional guidelines of article III would necessarily have the potential of being heard in either the United States Supreme Court or an inferior federal court. Thus, if no inferior federal court had jurisdiction over a particular federal case, the Supreme Court would by necessity have it.[180] This would seem to mean that if Congress chose not to create article III courts for the territories, it would have to give or acknowledge the fact that the Supreme Court has appellate jurisdiction over all cases arising in the territories.

There are those who would maintain that Story's analysis has been undermined by later cases such as *Ex Parte McCardle*,[181] the creation of discretionary jurisdiction for the Supreme Court, and monetary limits on federal jurisdiction.

None of these are necessarily fatal flaws, however. *McCardle* had in fact been heard in an inferior federal court. Thus when Congress cut off the appeal to the Supreme Court and the Supreme Court approved, it did not reflect any opinion on whether every case had to be heard in some article III court.[182] The idea of discretionary jurisdiction, while troublesome, is not fatal in theory. The fact that the federal court chooses not to exercise its jurisdiction does not necessarily mean that it is without jurisdiction. In the case of *Cohen v. Virginia*[183] John Marshall had said that a court was no more at liberty to refuse to exercise jurisdiction that it has than it is to exercise jurisdiction that it does not have. However, the idea of appellate courts disposing of cases within their jurisdiction short of plenary hearing is well established and can no longer be considered a statement that they are without jurisdiction.

Since article III itself makes no mention of amounts in controversy, it could be said that when Congress states that federal courts should not hear certain federal cases unless they involve a certain amount of money, Congress is in fact failing to vest the entire judicial power in some federal court. This is where the *McCardle* theory comes into play. *McCardle* involved an interpretation of that clause of article III which authorizes Congress to make "exceptions" to the jurisdiction of the

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[180] *See* 14 U.S. (1 Wheat.) 304, 329-34 (1816).

[181] 74 U.S. (7 Wall.) 506 (1869).

[182] *Id.* at 515.

[183] 19 U.S. (6 Wheat.) 264 (1821).

Supreme Court. The same exception power seems to have been extended to lower courts as a matter of interpretation. Some commentators over the years have interpreted *McCardle* to mean that there is no limit to the Congress's power to make exceptions to the jurisdiction of federal courts.[184] This would suggest that if Congress so chose it could take away the entire jurisdiction of the federal courts, including the Supreme Court, thus making them superfluous. However, recent cases and comments by justices seem to refute that.[185] It has been suggested, that the exceptions power must be exercised consistent with the essential function of the federal courts.[186] While this is a rather imprecise guideline the idea is that Congress may use its exception power to promote the orderly administration of justice but not to inviscerate the federal courts.

Applied to the territories this would suggest that while Congress could limit territorial access to article III courts at least to the same extent that it does in the states, it cannot cut territorials off completely from article III courts. This would seem to mean that territorials have to have some meaningful access to article III courts either in the first instance or on appeal. This interpretation is bolstered by the Supreme Court's statements in *Guam v. Olsen.*[187] In *Olsen*, the Court considered the issue of whether the Guam legislature could vest final jurisdiction over federal questions cases that arose in the territory in the territorial supreme court, a non-article III court. The United States Supreme Court split 5-4, with a majority holding that the organic act for Guam did not authorize such action. However, the entire Court seemed to agree that cutting off Guamanians entirely from article III courts could raise serious Constitutional questions.[188]

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[184] *See, e.g.*, Redish, *Congressional Power to Limit Supreme Court Jurisdiction Under the Exceptions Clause*, 27 VILL. L. REV. 900 (1982).

[185] *See* Glidden Co. v. Zdanok, 370 U.S. 530, 605 (1962) (Douglas, J., dissenting). *See also ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869). "[L]egislation of [the kind sustained in McCardle] is unusual and hardly to be justified except on some imperious public exigency." 75 U.S. at 104.

[186] Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 171-72 (1960).

[187] 431 U.S. 195 (1977).

[188] Likewise, a recent article in the Harvard Law Review suggests that at a bare minimum article III requires that federal courts have at least appellate jurisdiction over administrative agencies and non-article III courts. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

The foregoing analysis demonstrates that territorial residents must have some access to article III courts, at least on appeal. However, it also illustrates that there is some difficulty in suggesting, *based on article III alone*, that such residents have a right to access to lower federal courts. It is true that citizens and states are sometimes relegated to trials on federal questions in state courts, administrative agencies or legislative courts. There are, however, two factors that seem to cut in favor of arguing that Congress must give some inferior article III courts jurisdiction over territories. First, there is the idea that unlike state courts, federal administrative agencies and non-article III courts can at best act as adjuncts to article III courts or as specialists in interpreting limited areas of law. Secondly, while state residents may not have access to a federal court for every constitutional or federal statutory question, they do have it for a significant number of them. If Congress gave no inferior federal court jurisdiction over a territory, the only access the territorial residents would have to article III courts would be through the United States Supreme Court. Presumably, that jurisdiction would be discretionary. Given the very small number of petitions which the Supreme Court actually hears, it would be difficult to say that this amounted to meaningful access to article III courts.

Therefore, this analysis leads to the conclusion that since territorials have a right of meaningful access to article III courts, this would include at the very least a chance to actually have the merits of the case heard in the first instance or on appeal in an article III court. As with state residents, Congress would not necessarily have to provide for a plenary hearing on every single federal question that arose. Just how much federal jurisdiction would be necessary is a difficult question. It is at this point then that it would seem appropriate to look to the standards of due process and equal protection to come up with a more precise answer to that question.

The relationship between article III and equal protection and due process is a significant one. The question might be asked why we do not simply turn to equal protection and due process in the first instance. It is because the misunderstanding of article III by some judges, such as Judge Ginsburg, in the *Presiding Bishop* case, causes them to also misapply equal protection and due process. In short, their mistaken idea that article III has no application to the territories served as a justification for discriminatory treatment of territorial residents and for denying them fundamental fairness in adjudicatory proceedings.

Our analysis has taken away that justification. We conclude that so far as article III is concerned the territorials have the same right of

access to article III courts as state residents do. Therefore, any equal protection or due process justifications for treating them differently must proceed on its own. With that in mind, we turn first to due process and then to equal protection. It should be noted, however, that the due process and equal protection analysis could still have independent vitality, even if one rejects the article III analysis of this part of the article.

IV. The Territorial Courts and Due Process of Law

In its recent cases, the Supreme Court has touched upon the issue of whether article III is intended only to protect structural integrity or or whether it also creates individual rights to fair adjudication. The Court concluded that it does both. Insofar as the clause protects individual rights to fair adjudication, it has a close relationship to the due process clause. Due process and article III values are not co-extensive, but there is clearly an overlap between the two.

The core of article III is the independence of the judiciary. The self-evident purpose of judicial independence is to provide a fair and impartial tribunal for litigants. Trial before a fair and impartial tribunal is at the core of the due process clause.[189]

As we have noted, the Supreme Court has held that decisions of the article III courts must not be subject to revision outside the judiciary. While *Hayburn's Case*[190] and those cases that have expanded on it are based on interpretions of article III, the key term in article III, so far as the finality requirement is concerned, is "judicial." It is because article III courts exercise the *judicial* power that their decisions must be final for it is the role of the judiciary, *any* judiciary worthy of the name, to make final decisions and hence resolve cases.[191] Therefore, where due process confers the right to have certain matters heard in a court there may be a due process requirement that such court's decision be final, else it would not be a court hearing. The judiciary of American Samoa is a place where both of these concepts can be tested.

A. The Nature of the High Court of American Samoa

Congress's formal recognition of United States sovereignty over the eastern half of the Samoan archipelago is codified at 48 U.S.C.A. § 1661(c). It provides in pertinent part that:

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[189] "A fair trial in a fair tribunal is a basic requirement of due process." *In re* Murchison, 349 U.S. 133, 136 (1965).

[190] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

[191] *Id. See also supra* notes 86-87 and accompanying text.

> Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill the vacancies so occasioned.[192]

Since 1951 the president's designee has been the Secretary of the Interior.[193] The High Court of American Samoa is created by the Samoan Revised Constitution of 1967.[194] While the American Samoa Constitution was proposed by a constitutional convention and approved in a plebescite by the Samoan people, its legal force comes from the fact that it was signed and promulgated by the Secretary of the Interior.[195] The necessity for the Secretary's consent is illustrated by the fact that at the time that he promulgated the 1967 constitution, he unilaterally made amendments to it.[196] This is further emphasized by the fact that all amendments to the constitution must be approved by the Secretary.[197]

The Constitution of American Samoa does not specify any term for justices. However, Section 3.1001 of the American Samoa Code provides that "[s]ubject to any applicable limitations" in United States statutes, a justice of the High Court "shall hold office during his good behavior" subject to removal by the Secretary for "cause."[198] However, since the Secretary reserved the appointing power to himself in the

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[192] 48 U.S.C.A. § 1661(c) (1988) (first adopted in 1925, 43 Stat. 1357). The United States Navy had operated a coaling station at Pago Pago, and had governed the eastern islands of the Samoan archipelago for twenty-four years before Congress adopted this "interim" statute (note the temporariness suggested by the opening phrase of the quoted section). This statute has now been operational for sixty-five years. *See* Laughlin, *U.S. Government Policy and Social Stratification in American Samoa*, 53 OCEANIA 29 (1982).

[193] *See* Laughlin, 2 U. HAW. L. REV. 337, 361 (hereinafter cited Laughlin, *Hawaii*) and the executive orders cited therein. Exec. Order No. 10264, 16 C.F.R § 6419 (1951).

[194] AM. SAMOA CONST. art. III, § 1.

[195] Laughlin, *Hawaii*, *supra* note 31, at 362.

[196] The Constitution was drafted by the convention at Fagatoga in 1966, and ratified by a majority of the voters at the American Samoan general election that same year. It was signed on June 2, 1967 by United States Secretary of the Interior Stewart L. Udall. Above his signature were the following words: "Ratified and Approved: Subject to the deletion from article I, section 2 [of certain language] and the insertion in lieu thereof [of other language]." *Id.*

[197] AM. SAMOA CONST. art V, § 4.

[198] AM. SAMOA CODE ANN., § 3.1001 (1982).

Constitution, and the legislature derives its authority from him, it would not seem that the Samoan legislature has any power to qualify it. Furthermore, the Code does not define cause nor require the Secretary to justify his decision to remove anyone nor bind him by any specific procedure. Finally, as we shall see, the Secretary retains[199] the power to revise decisions of the Samoan courts.[200] Therefore, it seems unlikely that successful enforcement of the Samoan statute against the Secretary could be obtained in a Samoan court. In the past, article III courts have declined to enforce statutes of the Samoan legislature.[201] Thus the only limit on the Secretary's power to remove justices, American Samoan Code, Section 3.1001, can only be enforced in the High Court itself, a court the decisions of which can be revised by the Secretary.

History shows that the Secretary has not treated High Court justices as if they had any form of tenure. In fact, the Secretary through the years has exercised a free hand in removing judges at will. In recent years, the Department of Interior's technique has been to "reassign" justices who have fallen into disfavor either because their judicial conduct displeased the Department or because a justice displeased persons who had some influence on the Department. In 1978, Chief Justice K. William O'Connor was "reassigned" after he fell into disfavor with segments of the Samoan political establishment. This began because the chief justice fired a long-time clerk in the High Court.[202] In 1982, Chief Justice Richard I. Miyamoto was "reassigned" by the Interior Department to the High Court of the Trust Territory of the Pacific Islands. Miyamoto, who had been Chief Justice of the High Court of American Samoa since O'Connor was reassigned, was known to have been on the outs with other Interior Department officials in Samoa.[203] That "cause" was not established seems obvious from the fact that Miyamoto was assigned to another judicial post under the control of the Secretary.

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[199] More precisely, purports to retain. *See* Corporation of the Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1015 (1988).

[200] This claimed power of the Secretary is discussed, *infra*, at note 205 and accompanying text.

[201] In the Presiding Bishop case the plaintiff's core contention was that the High Court had flagrantly misinterpreted and misapplied Samoan law. The federal courts deferred entirely to the High Court on these issues. *See supra* note 19.

[202] *See Justice Wm. O'Connor Reassigned,* American Samoa News, May 19, 1978 at 1.

[203] American Samoa News, Apr. 2, 1982, at 1, col. 2.

B. Due Process and the High Court

In the *Corporation of the Presiding Bishop* case,[204] the Secretary of the Interior reasserted that he has the authority, if he so chooses, to overrule and change decisions of the High Court.[205] As we have noted, the Supreme Court of the United States on several occasions has stated that finality of decision is the hallmark of judicial power. The Supreme Court held very early on in *Hayburn's Case* that article III courts could not be given the task of adjudicating matters in situations where their decisions would be subject to approval by a cabinet officer and by Congress.[206] The Supreme Court reiterated the principle in 1948 in *Chicago & Southern Airlines v. Waterman S.S. Corp.*[207] While the decisions dealt specifically with article III courts, they were based upon an interpretation of what is in fact the "judicial" function. The finality requirement of article III is based upon the language "the judicial power . . . shall be vested" in the Supreme Court and inferior federal courts, and specifically on the word "judicial" and its general meaning. Hence, while those cases involved an interpretation of article III their logic should be applicable to non-article courts whenever the Constitution entitles someone to a hearing in a court.

1. Finality as an aspect of due process

Since the Constitution does not prevent non-article III courts from performing non-judicial functions, those courts could be given such tasks. However, they would not be operating as "courts" when they were so doing. Since the Secretary's letter in the *Presiding Bishop Case* asserts the authority to review the High Court decisions in all cases, it suggests that he does not consider the High Court a court of law in the generally understood sense of that term.

What then is the High Court of American Samoa? It is a creation of a cabinet officer that, at least until recently, he could abolish or

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[204] Corporation of the Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

[205] *See* letter from Secretary of the Interior Hodel to Counsel for Plaintiff, Wilford Kirton, dated 7 June 1985, in Corporation of the Presiding Bishop v. Hodel, 830 F.2d 374, 378 n.22 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988).

[206] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

[207] Chicago & S. Airlines v. Waterman Steamship Corp., 333 U.S. 103 (1948). *See supra* notes 91-94 and accompanying text.

alter virtually at will.[208] He has in the recent past explicitly asserted his authority to review and alter its decisions.[209] He promulgates the law under which it operates and has the power to revise those laws.[210] The justices are appointed by him and even in theory he can remove them for "cause," cause being defined by him in his sole determination with no specific procedures required. In practice, justices of the High Court have been removed or "re-assigned" or "forced out" with some regularity with no showing whatsoever (in fact with no claim) that they had been guilty of any wrongdoing, incompetence or disability.[211]

2. Independence as an aspect of due process

The Supreme Court has recognized on several occasions that not everything labeled "court" is capable of affording due process. In *Ward v. City of Monroeville*,[212] the Court held that due process was denied by requiring an accused traffic offender to be tried in a "Mayor's Court" because the judge-mayor also had administrative responsibility for the town. The Supreme Court stated, "the petitioner is entitled to a neutral and detached judge in the first instance,"[213] and that a "trial before a disinterested and impartial judicial officer is guaranteed by the Due Process Clause of the 14th Amendment."[214]

There is a close analogy between the courts of American Samoa and the Mayor's Court in *Ward*. In *Ward* the mayor was responsible for administering the city and its budget and also acted as judge. In Samoa, the Secretary of the Interior is responsible for the administration of American Samoa and its budget and also controls the courts.[215] *Ward* required no showing of wrongdoing by the person purporting to act as a judge. Rather, it held that due process requires that before being deprived of liberty or property rights, one must be afforded a trial before judges whose independence and impartiality is guaranteed by

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[208] *See supra* notes 17-18.

[209] *See supra* note 205.

[210] *See supra* note 196.

[211] *See supra* notes 201-03.

[212] Ward v. City of Monroeville, 409 U.S. 57 (1972); *See also* Tumey v. Ohio, 273 U.S. 510 (1927).

[213] 409 U.S. at 61-62.

[214] *Id.* at 59.

[215] In the *Presiding Bishop* case, Judge Ginsberg said that the Secretary could take over the adjudication function himself if he so chose. *See supra* note 25.

the court structure. That guarantee is as lacking in the court structure of American Samoa as it was in *Ward.*

V. An Equal Protection Claim

In contrast to the court system of American Samoa, as described in the preceding section, every state and even every other territory has either an article III United States district court or a court created by Act of Congress in which the tenure and independence of the judges is assured by statute.[216] In every state, and in every other territory litigants have a right of appeal into the article III court system.[217] However, this discussion is as important to the other territories as it is to Samoa. If Samoa has no right of access to the article III courts then the access of the other territories is a matter of legislative leave which could be taken away at any time. In establishing a constitutional foundation for article III court access for Samoa we are also establishing it for the other territories. Also, as we shall see it may well be that the equal protection principle may show that none of the territories have adequate access to article III courts for there may be no adequate justification for distinguishing between a state and a territory in this regard.

Since access to courts is a fundamental right and Samoans are a discrete and insular minority, arguably the government should be required to show a compelling purpose in order to justify this form of discrimination.[218]

A. Equal Protection Doctrine

While the equal protection clause of the fourteenth amendment by its terms applies only to state government,[219] the United States Supreme

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[216] *See: Puerto Rico*: 48 U.S.C.A. § 132(a) (1938) and 28 U.S.C.A. § 119 (1983); *Virgin Islands:* 48 U.S.C.A. § 1612 (1983) and 48 U.S.C.A. § 613 (1983); *Northern Marianas*: 48 U.S.C.A. § 1694(a)(c) (1983); and *Guam*: 48 U.S.C.A. § 1424(a) and 28 U.S.C. § 1291.

[217] *See: Puerto Rico*: 48 U.S.C.A. § 132(a) (1938) and 28 U.S.C.A. § 119 (1983); *Virgin Islands:* 48 U.S.C.A. § 1612 (1983) and 48 U.S.C.A. § 613 (1983); *Northern Marianas*: 48 U.S.C.A. § 1694(a)(c) (1983); and *Guam*: 48 U.S.C.A. § 1424(a) and 28 U.S.C. § 1291.

[218] This point is examined in detail in the next part of this paper.

[219] "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the law[.]" U.S. Const. amend. XIV, § 1.

Court has consistently interpreted the due process clause of the fifth amendment to embody an equal protection principle.[220] Although the Court said in *Bolling v. Sharpe* that the equal protection that is protected by the due process clause may not in all respects be identical to that guaranteed by the fourteenth amendment,[221] in recent years the Court has made it clear that the two principles are for all intents and purposes interchangable.[222] Hereinafter, when we speak of the equal protection principle we will be referring either to the equal protection clause of the fourteenth amendment or the virtually identical principle embodied in the fifth amendment. This equal protection principle has explicitly been held applicable to the territories.[223]

There can be no doubt that the equal protection clause at its inception was primarily aimed at discrimination by formal law and by courts. A principle target of the clause were the so-called Black Codes which withheld certain legal processes from black citizens.[224] The language of the fourteenth amendment itself reflects this focus; "No State shall . . . *deny* to any persons within its jurisdiction equal *protection* of the law" (emphasis added). The literal language of the principle applies precisely to situations where discrete groups of citizens are subjected to substantially different legal tribunals from others similarly situated. Clearly, persons who are forced to litigate in American Samoa, either because of their residency or other reasons, are not afforded the same legal protection that a similarly situated person would have in any state or even any other territory of the United States.

The Supreme Court has long held that when classifications affect a fundamental right or interest they must be strictly scrutinized, and if they impinge upon such interests they must be struck down unless they are justified by a compelling governmental purpose: "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."[225]

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[220] Bolling v. Sharpe, 347 U.S. 497 (1954).

[221] *Id.* at 499.

[222] *See, e.g.,* Washington v. Davis, 426 U.S. 229 (1976).

[223] Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976).

[224] Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873); *see also* Strauder v. West Virginia, 100 U.S. 303 (1880) (racial restriction on jury service held unconstitutional).

[225] Harper v. Board of Elections, 383 U.S. 663, 670 (1966) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); Carrington v. Rash, 380 U.S. 89 (1965).

An explicit articulation of the doctrine of multi-level review of equal protection can be found in *Dunn v. Blumstein*,[226] where the Court struck down a Tennessee durational residency test for voting. The classification was seen to affect the fundamental interest in voting and the constitutional right to travel. The Court wrote:

> In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interests affected [and] the classification involved. First, then, we must determine what standard of review is appropriate. In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements.[227]

Similarly, in *Shapiro v. Thompson*,[228] where the Court struck down durational residency requirements on welfare benefits in two states and the District of Columbia, it noted: "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest".[229]

In 1982 the Supreme Court reiterated its commitment to strict scrutiny of classifications that encroach on fundamental rights:

> In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. But we would not be faithful to our obligations . . . [if] we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right."15 (footnote by the Court.) With respect to such classifications, it is appropriate to enforce the mandate

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[226] 405 U.S. 330 (1972)

[227] 405 U.S. at 335. In the case of territorial courts, as in *Blumstein*, several fundamental rights and interests are involved: the right of access to courts and, as in *Blumstein* itself, the right to travel. In the *Corporation of the Presiding Bishop* case the right to own real property was also involved in addition to the right of access to courts.

[228] 394 U.S. 618 (1969).

[229] 394 U.S. at 638. *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

> of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.[230]

The footnote by the Court reads:

> In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction" even though "the right to vote, *per se*, is not a constitutionally protected right." With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights.[231]

The Supreme Court has consistently held that meaningful access to courts is a fundamental right, protected by both the due process and the equal protection principle.[232] The Supreme Court has recently reiterated that this right attaches to a civil litigant seeking to defend property rights.[233] "The Court traditionally has held that the Due Process Clauses [protects] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."[234]

B. Equal Protection in the Context of Territorial Courts

Thus when a statute discriminates with respect to a fundamental right, the classification system used therein must be justified by a

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[230] Plyler v. Doe, 457 U.S. 202, 217-18 (1982).

[231] *Id.* at 217 n.15 (note by Justice Brennan for the Court).

[232] Bounds v. Smith, 430 U.S. 817 at 821 (1977) (prisoners' right to meaningful access to court); Boddie v. Connecticut, 401 U.S. 371 (1971) (indigents' access to divorce court). *See also* Griffin v. Illinois, 351 U.S. 12 (1956) (indigent prisoner's right to appeal protected by equal protection clause).

[233] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[234] *Id.* at 429, *see also* Societe Int.v. Rogers, 357 U.S. 197 (1958).

compelling state purpose. What justification does the government have for treating American Samoa so differently from the other territories? American Samoa is an unincorporated territory,[235] but so is every other current territory. American Samoa is the only unorganized United States territory with any substantial indigenous population.[236] But why should that fact have relevance with respect to the protection to which persons within the jurisdiction of the territory are entitled? Congress itself determines whether a territory shall have an organic act. To allow Congress' own act to justify its discriminatory treatment of American Samoa would be to sanction bootstrapping of a most egregious nature.

If geographic remoteness is considered significant, Samoa is not as far from a United States state (Hawaii) as are Guam and the Northern Marianas, each of which has access to the article III court system.[237] Nor is Samoa as far geographically from the mainland United States as those other two territories.[238] Samoa has been a United States territory for one year less than Guam and Puerto Rico, for many more years than the Northern Marianas, and for more years than the United States Virgin Islands, which also have access to the article III court system.[239] American Samoans speak their native Samoan tongue as their primary language, but so do indigenes of other United States territories.[240] English has been taught in public schools in Samoa for more than eighty years and virtually every American Samoan is competent in English.[241] In short, it is impossible to think of even a rational basis (much less a compelling governmental purpose) to justify this disparate treatment of American Samoa.

Equal protection analysis need be taken no further. All of the territories, with the possible exception of Puerto Rico, have considerably more limited access to article III courts than do the states. If access to courts is a fundamental right, is there a compelling governmental interest to justify this distinction? Is there even a rational basis? Let us look at the arguments that have been put forward.

A review of the older literature seems to suggest two possible rationales for non-article III courts for territories. The first was travel

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[235] *See supra*, Laughlin, *Hawaii*, note 31, at 355.
[236] *Id.* at 361-66.
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*

and communication problems created by distance. It is impossible to considers this a compelling or even a rational jusification today. Any territorial resident can be in a United States state in a matter of hours, and in the United States capital in a day's time.[242] All of the territories have direct dial connections with the mainland United States today. Transportation and communications links for the territories with the existing article III courts, including the United States Supreme Court, are better today than they were for many states seventy-five years ago.

The other justification asserted was based upon the idea that territorial status was temporary status. Thus the argument was made that if territorial judges were made article III judges the status of the territory might change and they would have life tenure and nothing to do. If that argument ever had validity it has very little today. First, the temporary nature of territorial status is no longer obvious. American Samoa, Guam, Puerto Rico and the United States Virgin Islands have all been part of the United States for over seventy years. If they had been given life tenured judges at the time that they became a part of the United States those judges would almost certainly have retired or died by today. Nothing is permanent but temporariness can no longer be used as a justification for slighting the territories. Secondly, in every territory overwhelming majorities favor continued affiliation with the United States. Any status change that continued affiliation with the United States, including statehood, would not require abolition of article III courts.

When this rationale arose, it was probably assumed that federal judges in territories would be mainlanders who in the event the territory left the Union, would chose to remain in the United States. Today, most territorial judges are citizens of the territory and hence, in the (at present unlikely) event of a territory becoming independent, some of the judges would no doubt remain with the territory and give up their United States judgeship.

Because federal judges in Puerto Rico already have life tenure, and each of the other territories would likely need not more than one or two federal judges, there are less than ten article III judges who might even theoretically assert their tenure, after their jurisdiction had seceded. No doubt these judges could be absorbed. A similar argument

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[242] This assumes favorable airline schedules. Airline transportation to the Pacific territories has been precarious since deregulation but this has been the result of economics rather than technology. *See, e.g.*, III J.K. Report on Micronesia, No. 4, 3-5 (1989).

was rejected in *Northern Pipeline* where it was argued that if bankruptcy judges had to be given life tenure, changing conditions could make up to *ninety* of them superfluous.

Thus, while it is abundantly clear that American Samoa is being denied equal protection of the law, a tenable argument can be made the other territories are as well, by not being afforded the same legal protection as citizens of the states.

C. The Remedy For Underinclusion

These issues should have political significance for those who make policy at the national level and for those who live at the territorial level. But the national legislature and executive have often been slow to afford full rights to territorials. This raises the issue of whether there is any possibility of judicial relief for territorials with respect to inadequacy of their court systems. This is obviously has earmarks of a Catch-22 situation. Territorials who seek to challenge the inadequacy of their court systems will confront that inadequacy as an obstacle to their efforts.

Still the situation is not entirely hopeless. Once again take American Samoa as the real life worst-case scenario. Assuming there is a denial of equal protection and due process which flows from the nature of the High Court of American Samoa and its contrast to courts of the other territories and the states, the next question is whether or not the courts of the United States (article III courts) can afford a remedy. A similar remedy might also be available for any other territory denied equal protection by the nature of its court system. But in order to simplify our discussion of remedy we will discuss this in terms of a suit on behalf of American Samoa.

In allowing American Samoa to remain the only territory without an article III or statutory court, the Congress of the United States has, intentionally or unintentionally, created a body of underinclusive statutes. Taking the statutes creating the United States district courts together with those creating territorial courts, Congress has provided either an article III court or at least a statutorily independant forum for everyone except American Samoa. Thus, a member of a class of persons who must litigate in American Samoa could plausibly assert that the statute is invalid by virtue of underinclusion. But what would be an appropriate remedy in such a case? The *Presiding Bishop* case provides us with a precedent allowing the issue to be raised in a collateral fashion by a suit against the Secretary of the Interior based

upon his aforementioned control over American Samoa and its court system. The proper venue for the case is the United States District Court for the District of Columbia, the official domicile of the Secretary.

1. Methods of dealing with underinclusion

The federal courts have used a variety of means to remedy underinclusion. When a constitutional defect in a statute is remediable, the decision on how to remedy it is ultimately one for the legislature. However, courts typically provide an interim solution and indeed must (upon finding a constitutional violation) do something other than allow the unconstitutional arrangement to continue in force. Often that judicial remedy entails an effort to anticipate Congressional intent.

In some cases, courts are uncertain as to whether the legislature would cure the inequality by inclusion or exclusion. For example, in *Craig v. Boren*,[243] a statute allowed girls to drink beer at eighteen but prohibited boys from drinking until twenty-one. The Court simply declared the statutory discrimination unconstitutional and allowed the legislature to decide whether it was going to raise the drinking age for girls or lower it for boys.[244]

In other cases, such as the one under consideration, the courts can be relatively assured that the legislature will not abolish the entire statutory program. For example, in *In re Griffith*,[245] the Court found that it was unconstitutional for the state of Connecticut to refuse to admit an alien to the practice of law. The Court simply remanded the case to the state court for further proceedings "not inconsistent" with its decision. The Supreme Court no doubt assumed that the state would prefer to admit the alien rather than abolish the bar.

Northern Pipeline Co. v. Marathon Pipeline Co.,[246] is relevant to the remedy question because it involved declaring unconstitutional a statute that chartered a court system. (It is directly on point as regards remedy for an article III violation.) In that case, as indicated, the Court found the Bankruptcy Reform Act unconstitutional insofar as it gave article III functions to judges without article III tenure.[247] However, to avoid disrupting all bankruptcy proceedings in the United States, the Court

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[243] 429 U.S. 190 (1976)

[244] *See also* Stanton v. Stanton, 421 U.S. 7 (1975); Orr v. Orr, 440 U.S. 268 (1979).

[245] 431 U.S. 717 (1973).

[246] 458 U.S. 50 (1982).

[247] *Id. See supra* notes 103-130 and accompanying text.

stayed its order for approximately four months to allow Congress to cure the defect. Marathon Pipeline Company, which challenged the law, would get the benefit of the new statute although the decision was otherwise to have prospective effect only.[248] In a case challenging the court system, a federal court could hold the judiciary act unconstitutional, but stay its order for several months on condition that it would not take effect if American Samoa was provided with an adequate court system within that period.

In some cases, the court upon a finding of unconstitutional under-inclusiveness, simply orders the inclusion of the offended party. In these cases, as in *In re Griffith*, the Court is no doubt operating on the assumption that Congress would rather include the excluded party than abolish the entire program. For example, *Califano v. Goldfarb*,[249] was a challenge to the Social Security Act. Under the Act, the plaintiff widower could not collect his late spouse's Social Security because he could not prove that he had been dependent on her. A widow similarly situated would not have been required to prove dependency in order to receive the benefits. The Court found that this was unconstitutional sex discrimination and simply ordered the Secretary of HEW to pay the widower.

In accord, is *Williams v. Rhodes*.[250] In that case, the Court found Ohio's restrictions on minority parties unconstitutional. On the merits, Ohio had argued that since it was not required to have a presidential election at all (under the Constitution it could select its electors by any manner it chose) it could not be compelled to include particular candidates. Rejecting the argument and finding that George Wallace's exclusion denied him equal protection of the law, the Court simply ordered that his name be placed on the ballot. The Court no doubt assumed that Ohio would not cancel its presidential election to avoid including Governor Wallace in it. In the case we are considering a court could safely presume that Congress would not abolish the federal court system to avoid including Samoa.[251]

2. Theory of extention

The rationale for extending a statute to an unconstitutionally excluded group rather than striking it down is based upon the courts'

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[248] 458 U.S. at 87-88 and n.40.

[249] 430 U.S. 199 (1977).

[250] 393 U.S. 23 (1968).

[251] *See also* Weinberger v. Wisenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Levy v. Louisiana, 391 U.S. 68 (1968).

duty to implement the will of Congress in the wake of a finding of unconstitutionality. If a federal court believes that the Congress would rather have the statute saved by adding an excluded group than have the entire act invalidated the court may read in the necessary extention. A frequently cited statement of the principle is the concurring opinion of Justice Harlan in *Welsh v. United States*.[252] In that case Justice Harlan said that the power to expand comes from: "the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it . . . to render what Congress plainly did intend, constitutional."[253]

In *Welsh*, the Supreme Court was construing the conscientious objecter provisions of the Selective Service Act. Harlan found that the provision unconstitutionally excluded the petitioner but that the Court could save the statute by reading in an additional category of conscientious objectors. Harlan stated:

> When a policy has roots . . . deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail[] not simply eliminating an offending section, but building upon it.[254]

Certainly the federal judiciary "has roots deeply embedded in history."

One commentator has noted that in general courts are more likely to alter a statute to include the excluded group when the costs would not be disproportionately large with respect to the overall costs of the statutory scheme and where the number of people included thereby would not be large in comparison to the size of the entire program.[255] Here those criteria would suggest inclusion. Obviously, the United States Congress would rather have the very small number of cases that would be generated in American Samoa added to the dockets of one of the existing federal courts than have the entire federal judiciary declared unconstitutional. This no doubt be true even if we are talking about adding all of the territories to the article III court system. Under these circumstances, a court acting consistent with the intent of Con-

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[252] 398 U.S. 333 (1970) (Harlan J., concurring).

[253] 398 U.S. 333, 355-56 (1970) (Harlan J., concurring).

[254] *Id.* at 366 (1970) (Harlan J., concurring).

[255] *See* Comment, *Extension Versus Invalidation of Underinclusive Statutes*, 12 COLUM. J. L. & SOC. PROBS. 115 (1975).

gress, could build on the Judiciary Act by interpolating language that would extend jurisdiction to American Samoa.

It might be that if the exclusion from the federal court system is found unconstitutional, Congress would choose to create a statutory court for Samoa rather than include it in an article III district. Nevertheless, a court would be justified in including Samoa in a District Court's jurisdiction as an interim remedy since it would be less complicated for a court to do that than for it to create a new court. There is precedent for courts adopting feasible, interim judicial remedies that may be different from the anticipated legislative solution. For example, in reapportionment litigation courts have ordered at-large elections until the legislative body reapportions.[256]

Frequently, a government official who is the nominal party defending an underinclusive statute will try to defeat the claim by asserting his personal inability to enlarge the scope of the statute. This argument was made by the Secretary of the Interior in *Corporation of the Presidiary Bishop v. Hodel*.[257] In his brief, in answer to the plaintiff's claim that the Samoan court system was unconstitutionally organized the Secretary argued that "[u]ntil Congress takes . . . action, plaintiff must operate within the Samoan judicial system. . . ."[258] In essence, his argument boiled down to this; that since he cannot himself pass a constitutional statute he should not be prevented from enforcing an unconstitutional one.

This position is patently untenable. Many of the underinclusion cases cited above involved cabinet officers as defendants in directly analogous circumstances.[259] By act of Congress and proclamation of the President of the United States, the Secretary is responsible for the administration of the islands of American Samoa. While the Secretary himself cannot create such a forum independant of himself, this should not be an obstacle to obtaining relief. It is not uncommon for a public official to be ordered to take certain actions or to refrain from taking action until some change in conditions comes about, even where he personally does not have control over those conditions. For example, a prison warden

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[256] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 587 (1964); Swan v. Adams, 385 U.S. 440, 442 (1967).

[257] *See supra* note 19.

[258] Secretary of the Interior's Memorandum in Support of Motion to Dismiss, United States District Court, at 31 n.19.

[259] *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wisenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

who has unconstitutionally kept prisoners in an overcrowded facility, can be ordered to release those prisoners in a specified period of time unless more adequate facilities are provided.[260] While the warden does not have the means to build a new prison or enlarge existing ones (only the legislature could do so) it is appropriate to require the warden to act consistent with the Constitution irrespective of what course the legislature chooses to pursue. The warden is an agent of the government and the proper part of the government must act, if it so chooses, to bail him out.[261]

In *King v. Morton*,[262] the court issued precisely such an order against the Secretary of the Interior, commanding him and his agents not to enforce a criminal conviction against King in Samoa until a jury trial could be provided:

> that the defendant, his appointees, agents, employees, and all other persons subject to his authority and control cannot lawfully enforce these provisions or act pursuant to them; and (2) permanently enjoins the defendant, his appointees, agents, employees, and all other persons subject to his authority and control from enforcing any judgment of criminal conviction against plaintiff obtained without according him a right to trial by jury.[263]

3. The available remedy

Clearly, the federal courts have ample power to grant an appropriate remedy for the deprivation of due process and equal protection occasioned by the structural inadequacy of the High Court of American Samoa. There are several alternative remedies that the court could grant.

First, the court could declare the exclusion of American Samoa from both the article III and statutory court system to be unconstitutional and allow Congress to choose how to remedy that defect. In such

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[260] Ryan v. Burlington County, 708 F. Supp. 623 (1989); *but see* Swarts v. Johnson, 628 F. Supp. 549 (1986).

[261] A court can order prisoners released unless the state provides constitutionally acceptable facilities for them, thus demonstrating that the court can order a less than desirable alternative remedy if the proper government authorities will not cooperate. *See, e.g.*, Tillery v. Owens, 907 F.2d 418 particularly at 427-31 (3rd Cir. 1990).

[262] 520 F.2d 1140 (D.C. Cir. 1975), *on remand*, King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977)

[263] 452 F. Supp. at 17.

circumstances, the court could stay its decree to prevent disruption of the federal judiciary during the period of time necessary to allow Congress to act. Congress would inevitably choose to include American Samoa in a judicial district (or at least create a statutory court for it) rather than allow the federal judiciary to fall.

Secondly, a court could enlarge the Judiciary Act to include American Samoa. Clearly it would be consistent with the intent of Congress to include Samoa to save the federal judiciary. Furthermore, the addition of American Samoa to a judicial district and circuit would involve relatively few people in comparison to those already covered by the Judiciary Act and relatively little expense as compared to the overall cost of operating the federal courts.[264]

Other United States territories could seek a similar remedy if they challenged their own statutory court systems as violative of article III, due process and equal protection. The main difference would be that rather than comparing themselves to other territories they would be looking at comparisons with states. Arguing that they had a right of access to article III courts on the same footing with residents of the states, they would then challenge the rationales put forward for discriminating against them in the affording of justice (*i.e.*, temporary arrangements, distance, communication and so forth). Assuming they were successful they could invoke the same remedy arguments made above.

CONCLUSION

This article has attempted to show that the inadequate state of territorial courts is based in part upon a legal accident. In 1826, Justice Marshall, in the *356 Bales* case, reached the logical and modest conclusion that territories (or Congress acting on behalf of territories) should have the power to create non-article III courts to handle the ordinary tort, contract, and other cases normally handled by state courts in states. By a fair reading, Marshall explicitly stated that these courts could not exercise article III powers. However, the analysis was complex and the language vulnerable to accidental (or perhaps in some cases deliberate) misinterpretation. Some lower court judges and those charged with administering territories purported to read the case as

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[264] The High Court of American Samoa has two justices and nine judges. Probably less than one-tenth of its time is devoted to hearing "federal question" cases.

saying that article III has no application to territories and that courts failing to meet article III standards can perform article III functions there. Language in later Supreme Court cases was taken to reinforce this view. As a result, many territorial residents have been denied access to a truly independent judiciary. The epitome of this situation is the court system of American Samoa, where the justices are employees of the Department of the Interior, subject to removal or reassignment by the Secretary without explanation, and where the Secretary even asserts the power to review and revise court decisions.

This article has attempted to show that there is nothing in the *356 Bales* case nor in any other decision of the Supreme Court properly construed holding that article III is not applicable to territories and their residents. Thus, territorial residents have the same right of access to article III courts as Americans living on the mainland.

The substantive reach of article III is not easily determined. There is an overlap in jurisdiction between article III courts and state courts. Since the earliest times, Congress has chosen to leave to the state courts exclusive jurisdiction over some cases which could be heard in article III courts. Therefore, it is necessary to look to the Equal Protection and the Due Process Clauses to determine the kind of courts to which territorial residents are entitled. The article III analysis is a necessary foundation for due process and equal protection analysis. Some lower courts in the past have adopted the mistaken notion that article III is inapplicable to the territories, to justify what would have amounted to a denial of due process or equal protection if the same things had occurred in a state. Demonstrating that article III is applicable to territories sets the framework for a more rigorous due process and equal protection analysis. This article starts with the assumption that territorials have *ab initio* the same rights under article III to an independent tribunal and thus to equal protection of the laws as do residents of states. Any variation in the type of legal protection afforded to them would have to be justified by something other than the argument that they are not protected by article III.

Due process requires that all matters which are entitled to adjudication before a court be heard by a disinterested and impartial judge. The Supreme Court has held that a judge who in another capacity is responsible for the governmental administration of the area over which his jurisdiction extends, cannot be considered impartial. By the same token, a judge whose continued tenure depends upon the favor of the officials who are responsible for governmental administration can hardly be considered independent either. At the very least, due process requires

that judges in territories be afforded some degree of independence. Similarly, due process requires that territorial courts have finality of decision. Where a non-judicial official has the power to set aside or modify a judicial decree, the court is *per se* incapable of affording due process of law.

Equal protection of the law perhaps provides the best standard for determining the exact type of access to article III courts that territorials should have. Because access to courts is sometimes deemed a fundamental right and territorial residents can be considered discrete and insular minorities in the most literal sense of the term, any distinction between the types of courts afforded on the mainland and those afforded to territorials should be justified by a compelling state interest. Neither the compelling interest standard nor even the looser rational basis test could be met.

Whatever validity the reasons had that were originally given for denying territorials access to article III courts, none of those reasons stand up in today's world. Territorials are now within easier reach of the United States capital than many of the states were at the turn of the century. They are also in constant communication with the rest of the nation. Territories are now permanent parts of the United States, which happen to maintain different forms of government for a variety of reasons. None of these reasons give any justification for providing them with inferior court systems. The Congress of the United States should create article III courts for the United States territories or include them within the jurisdiction of existing article III courts. If Congress fails to do so, the article III courts, in a properly drawn law suit, should have the power to compel the inclusion of territories in the article III system. Only by so doing can the fundamental right of access to fair and independent tribunals be extended to a large group of people that has long been denied such access.

Some territorials do not want full applicability of substantive United States law for fear that it might destroy their cultural identity. But when it comes to enforcement of the laws that *are* applicable, none can quarrel with fair and impartial adjudication. An independent and unbiased tribunal is not culturally specific. It therefore cannot threaten cultural autonomy. Only a biased or controlled judiciary could do that. The concept of an independent and impartial judiciary transcends cultural divisions, and is an aspiration of all humankind.

Secession Crisis in Papua New Guinea: The Proclaimed Republic of Bougainville in International Law

by M. Rafiqul Islam*

I. Introduction

The ongoing secession crisis in Bougainville is perhaps the most convulsive episode that Papua New Guinea has encountered since its independence. It is one of those new states that has emerged through the process of decolonization with plural societies and illogical boundaries demarcated by colonial powers. Consistent with the dilemma of national integration in many third world multi-racial states, the political unity and nation-building of Papua New Guinea are now interrupted by separatist sentiments. Dissidents in Bougainville,[1] one of the nineteen provinces of Papua New Guinea, have demanded secession from the rest of the country, constituted their own armed forces and launched a full-scale guerrilla war against the national government. In a bid to preserve national solidarity, the government of Papua New Guinea has been attempting, through both persuasive and coercive means, to defuse the break-away aspiration, so far with limited success.

Bougainville is one of Papua New Guinea's most resource-rich provinces, having the world's biggest copper mine. A multinational mining company, the Bougainville Copper Limited (BCL), a subsidiary of the Conzine Rio Tinto of Australia (CRA), was commissioned to

* Professor, School of Law, Macquarie University, Sydney, New South Wales, Australia; former Head of Law Department, University of Papua New Guinea.

[1]Bougainville is also called the Province of North Solomon, and is a mountainous island, 560 kilometers off the coast of New Guinea.

exploit the deposits pursuant to an agreement in 1967.[2] This was followed by a renegotiated agreement in 1974 with provisions for reviews after seven years to cope with upgraded claims for compensation and development. Mineside landowners were unhappy about the amount of compensation and the pace of development. Dissatisfaction has grown at an alarming rate, especially among emerging younger landowner leaders who are not the direct beneficiaries of the mine.

The leader of the disgruntled landowners, Ona, tapped these deeply-rooted economic grievances and frustrations. He announced in April 1988, that they would revolt unless the Government met their demands for the permanent closure of the BCL open-pit mine at Panguna which was located on their ancestral land. He also sought $11.5 billion in compensation for environmental and social damages, and a referendum for the Bougainvilleans to decide whether to secede from Papua New Guinea.[3] These seemingly immodest claims were largely ignored until November 1988, when the mine closed temporarily. Due to substantial damage caused to the mine by rebel land owners, the mine was temporarily closed on May 15, 1989. The government initially regarded the crisis as a law and order problem and attempted in vain to rectify the situation by declaring a state of emergency on Bougainville on June 26, 1989, followed by police and troop reinforcements. This action sparked off violent retaliation by dissidents. The Bougainville Revolutionary Army (BRA) was organized to initiate and conduct guerilla resistance against government troops. The BRA recruited a large number of villagers and retired and defected police and army personnel. Difficult terrain and bushy hills were used as sanctuaries to train, rest and organize the BRA to fight government troops stationed in Bougainville. A civil war situation thus emerged with both sides convinced that the cause they were fighting for was just.

However, in early March 1990, the government and the BRA agreed on a cease fire. The government withdrew all police and troops from Bougainville as a precondition to the cease fire and peace negotiations.[4]

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[2] *See* R. West, River of Tears: The Rise of the Rio Tinto-Zine Mining Corporation, pt. 2, ch. 4 (1972).

[3] *See* Asian Wall Street Journal, Jan. 8, 1990, at 1, col. 2 (weekly ed.); Albon, *Back to Battle*, Island Business, Oct. 1989, at 12; Callick, *Bougainville Revolutionary Army Takes Charge*, Island Business, Apr. 1990, at 21, 24; Robie, *Bougainville One Year Later*, Pacific Islands Monthly, Nov. 1989, at 10.

[4] A cease fire which was to be effective from March 1, 1990, was signed by the Deputy Controller of the state of emergency and the commander of the BRA. *See*

Following this cease fire, an international observer team went to Bougainville to observe the surrender of all BRA arms and ammunition. Bilateral peace talks between the government and BRA have yet to commence. Mutual mistrust, insecurity and a lack of confidence resulted in a deadlock in the attempt to agree upon a venue for peace talks. Since the complete withdrawal of troops and police, the entire province has been under the absolute control of the BRA. The writ of the government ceased to run in the province. The functions and effectiveness of the provincial government have been totally paralyzed. In fact, the BRA has been running a parallel administration, if not a parallel government, in Bougainville. Recently, the government imposed a partial economic blockade around the province in a bid to regain control.[5] The BRA responded on May 17, 1990, by proclaiming the island a Republic with a new interim government.[6] The national government formally rejected the Unilateral Declaration of Independence (UDI) of Bougainville.[7]

This paper examines the international legal status of the secession of Bougainville through the UDI. It reveals that international law does not prevent the BRA from proclaiming their UDI as a revolutionary act. Nor does international law forbid the national government of Papua New Guinea from suppressing the UDI if it can. International law simply accepts the final outcome of the conflict that emanated from the UDI of Bougainville, which, if successful, will acquire legitimacy and recognition.

II. SECESSION IN INTERNATIONAL LAW AND THE UDI OF BOUGAINVILLE

The Wilsonian notion of self-determination received considerable boost and international blessing following the First World War.[8] Despite

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Senge, *Round One for the Militants*, PACIFIC ISLANDS MONTHLY, Apr. 1990, at 16-17; Callick, *Bougainville Revolutionary Army Takes Charge*, ISLANDS BUSINESS, Apr. 1990, at 21.

[5] *See Faxionalism: Bougainville is free—at least on paper*, TIME (Australia), May 28, 1990, at 16; *PNG Backed on Bougainville*, TIME (Australia), May 21, 1990, at 32; Post Courier (PNG), May 3 and 9, 1990, at 2.

[6] For the text of this proclamation, *see* Times of Papua New Guinea, May 17, 1990, at 1, col. 1; Times of Papua New Guinea, May 24, 1990, at 4, col. 1; *Faxionalism: Bougainville is free—at least on paper*, TIME (Australia), May 28, 1990, at 16.

[7] *See* Times of Papua New Guinea, May 17, 1990, at 2, col. 3; Post Courier (PNG), May 18, 1990, at 1; the Times of Papua New Guinea, May 31, 1990, at 4.

[8] For a discussion on the Wilsonian concept of self-determination in the form of

the consistent proclamation of self-determination as a right of "all people,"[9] it has generally been emphasized as a right of colonial peoples. The idea is that colonial peoples, should they so desire, are entitled to gain independence by exercising their right to self-determination. Once independence is achieved, their right is fulfilled and no further resort to self-determination is tenable within that state.[10] In other words, there is no room left for a dissident group in an independent state to break away. The inviolability of territorial integrity and political unity of the existing state is at the root of this presumption. Since secession involves the disintegration of a state, understandably no incumbent government will allow its constituent peoples and territory to secede. Similarly, no organization of states will prescribe any such principle to be followed by its members in case of an internal demand for secession. This explains why the United Nations is extremely discrete so as not to take a decision inimical to its power-base member states.[11] Therefore, the present state-oriented world order and its forum — the U.N. — are reluctant to extend the right to self-determination beyond the traditional colonial context.

However, claims to secession in non-colonial situations are growing alarmingly both in quantity and intensity.[12] The state solidarity for territorial integrity under circumstances at any cost has not succeeded

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the fundamental urge to self-government, *see* Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1 (1976).

[9] *See Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV) art. 2, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960) (hereinafter Decolonization Declaration); *International Covenants on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI) art. 1, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Chapter of the U.N.*, G.A. Res. 2625 (XXV) principle V para. 1, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) (hereinafter Declaration on Friendly Relations).

[10] *See* Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1975 DET. C.L. REV. 71, 80 (1975); Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971); Mustafa, *The Principle of Self-Determination in International Law*, 5 INT'L LAW. 479, 486 (1971); Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AM. S. INT'L L. PROC. 40, 44 (1971); P. TRUDEAU, FEDERALISM AND THE FRENCH CANADIANS 151-55, 187, 190 (1968).

[11] It has been argued that "the UN would be in an extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members." HUMAN RIGHTS, THE US AND WORLD COMMUNITY 102 (V. Von Dyke ed. 1970).

[12] At present, no region of the world is free from secessionist demands. For various self-determination claims in existing states, *see* Connor, *Self-Determination: The New Phase*, 20 WORLD POL. 30 (1967-68).

in solving the problem. Historically, separation on the basis of incompatibility as a means of restoring security and peace has been pursued as an effective remedy to situations where there is little or no likelihood that two groups of people will ever live together in harmony.[13] Separation appears to be the ultimate remedy to restore security of a subservient group when confronted with an irretrievable discrepancy between itself and the dominant group.[14] It has been argued that secession does not "automatically justify buttressing the existing order, for it may indicate a genuine associational desire and help transform an unstable situation into a more equitable new order."[15]

It has been claimed that the post First World War peace settlement, on the strength of which self-determination became operative, prescribed secession as a means of realizing the right and that "it is nonsense to concede the right to 'all peoples if secession is excluded.'"[16] Self-determination is described as "a two-edged concept which can disintegrate as well as unify[.]"[17] Secession from an existing state either to constitute an independent state or to join another existing state is recognized as one of the modes of exercising self-determination in the 1970 U.N. Declaration on Friendly Relations.[18] The new era of self-determination in post colonial times is exemplified by the independence of Bangladesh in 1971. The response of the world community to Bangladesh's bid for secession from the Federation of Pakistan was noticeably warm, which contributed significantly to the birth of Bangladesh.[19]

The Bangladesh experience for the first time disproved the presumption that self-determination has no relevance in this decolonized era. There is still room for the creation of new states through secession under certain circumstances. The secession of Bangladesh also indicates that dogmatic adherence to the territorial integrity of a state is counter-

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[13] The united India was partitioned in 1947 on the basis of this notion. The partitions of Ireland, Korea, Germany, Palestine, and Vietnam (which is now reunited), may be cited to the same effect. *See* THE PROBLEM OF PARTITION: PERIL TO WORLD PEACE (T. Hachey ed. 1973).

[14] *See* T. GURR, WHY MEN REBEL 22-58 (1970).

[15] For an excellent analysis of the rationales of secession, *see The Logic of Secession*, 89 YALE L.J. 802, 820 (1980).

[16] Emerson, *supra* note 10, at 464.

[17] Eagleton, *Excesses of Self-Determination*, 31 FOREIGN AFF. 592, 593 (1952-53).

[18] *See* Declaration on Friendly Relations, *supra* note 9, at principle V, para. 4.

[19] For a thorough international legal analysis of the Bangladesh case, *see* M. ISLAM, THE BANGLADESH LIBERATION MOVEMENT: INTERNATIONAL LEGAL IMPLICATIONS (1987).

productive without the allegiance of the people who live within that territory. Widespread international support for Bangladesh is indicative of the world community's willingness to recognize self-determination as a continuing remedy ranging from internal freedom and equal rights of peoples to secession of groups as the ultimate remedy in extreme cases. This shift in the international legal status of secession and the influence of the Bangladesh precedent are easily discernable in the statement of the U.N. Secretary-General in the post-Bangladesh period which is a marked deviation from his opinion on secession in the post-Biafra period.[20]

The principle of equal rights and self-determination of peoples has become an international legal right. Secession is a form of self-determination. There is no rule of international law which proscribes secession in all circumstances. Secession may therefore be exercised within the existing international legal system, favoring neither secession, which is disruptive to world order, nor the ruthless suppression of just secession in the name of territorial integrity. Such a compromise in the form of a checks-and-balance between the right of peoples to secession and the right of the state to territorial integrity has been accomplished in paragraph 7 of the 1970 U.N. Declaration on Friendly Relations (Paragraph).[21] For the first time, though the legitimacy of secession has been previously recognized in an international instrument of this nature, the scope of secession is circumscribed by conditions and circumstances. Secession may be permissible as a last resort only in situations where such a choice becomes unavoidable due to the practical impossibility of other means of realizing the right of peoples to self-determination. A circumspect dissection of the Paragraph may be helpful in ascertaining the standard of legitimacy of post-colonial secession claims.[22]

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[20] In response to a question on the secession of Biafra, U.N. Secretary U. Thant maintained that the U.N. "has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State." Emerson, *supra* note 10, at 464 and n.14 (quoting 7 U.N. Monthly Chronicle 36 (Feb. 1970)). Secretary Thant made a similar statement at the Accra Press Conference on Jan. 9, 1970. 7 U.N. Monthly Chronicle at 39 (Feb. 1970). In contrast, Secretary Thant changed his views on secession following the Bangladesh incident. In his 1971 Annual Report to the general assembly, he said: "A problem which often confronts us . . . is the conflict between the principles of the territorial integrity of sovereign states and the assertion of the right to self-determination, and even secession . . . within a sovereign state . . . ." 26 U.N. GAOR Supp. (no. 1A) at 1, 18 (1971).

[21] *See* Declaration on Friendly Relations, *supra* note 9.

[22] For the text of the Paragraph, *see* 9 INT'L LEG. MAT. 1292, 1296 (1970). This

The Paragraph may conveniently be divided into three interrelated sections. Dealing with the inviolability of territorial integrity of a state, the first part provides that "[n]othing in the foregoing paragraphs [the principle of equal rights and self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states[.]"[23] This protection however has not been extended to all states. The ensuing parts single out the beneficiaries of this protection. Only those states which are "conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . ." enjoy this protection. In its concluding part, the Paragraph explains, in the form of a savings clause, what it means by the compliance provision in the second part. To comply with the principles of equal rights and self-determination of peoples, a state must possess "a government representing the whole people belonging to the territory without distinction as to race, creed or color."[24]

It is evident that the right of a state to territorial integrity under the first part is not absolute but tempered by the corresponding duties under succeeding parts which require a state to comply with the principles of equal rights and self-determination of peoples in terms of providing a representative government. Admittedly, international law does not require any particular form of government. Yet there has been a growing tendency in the international community to favor forms of government based on popular support. This increasing concern for the realization of human rights and majority rule is not embodied for the first time in the Paragraph. Deeply rooted in the community expectations and the U.N. Charter, the protection of equal rights and majority rule through appropriate constitutional process has become a

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Declaration has been described as "the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity." *See* THE EVENTS IN EAST PAKISTAN, 1971: A LEGAL STUDY BY THE ICJ SECRETARIAT, 8 THE REVIEW 67 (1972). For an exposition of the legally binding effects of the Declaration, *see* M. SAHOVIC, PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION (M. Sahovic ed. 1972); Note, *Toward Self-Determination—A Reappraisal As Reflected in the Declaration on Friendly Relations*, 3 GA. J. INT'L COM. L. 145, 155 (1973) (authored by C.D. Johnson); Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 714 (1971).

[23] 9 INT'L LEG. MAT. 1292, 1296 (1970).

[24] *Id.*

part of international obligations.[25] The idea of self-determination itself owes its origin to the "consent of the governed" principle.[26] The Universal Declaration of Human Rights requires that the legitimacy of governmental authority must be based on the will of the people expressed in free and periodic general elections.[27]

Once a colonial people attains independence and establishes its own state, it is deemed to have enjoyed its right to "external" self-determination by freely determining its future political status in the international arena. The same people, as nationals of an independent state, are now entitled to the right to "internal" self-determination by freely electing and keeping a government of their own choice and by having the right not to be oppressed or discriminated against by the government or by any other influential group.[28] In other words, the right to "external" self-determination is exhausted when independence is achieved, and is replaced by the right to "internal" self-determination. The former will be meaningless in the absence of the latter.

Hence, the most elementary authoritative expectation of the world community has been incorporated in Paragraph 7 as a compliance clause. In order to insulate territorial integrity under this Paragraph, the government of a state must derive its legitimacy from the will of the people. Equal rights and self-determination of its peoples cannot be construed to sanction any action that impairs the territorial integrity of that state. Because people within that state are deemed to have been enjoying both "external" and "internal" self-determination, there would be no further exercise of the right. Being free from internal and

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[25] *See* H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 172-73 (1947); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 178 (1973); K. MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 53 (1954); B. BOT, NONRECOGNITION AND TREATY RELATIONS 24 (1967); Comment, *Recognition of De Facto Governments: Old Guide Lines and New Obligations*, 63 AM. J. INT'L L. 98 (1969) (authored by C. Fenwick); Note, *The Development of An Inter-American Policy For The Recognition of De Facto Governments*, 62 AM. J. INT'L L. 460, 464 (1968) (authored by C. Cochran).

[26] This idea was first enunciated on March 11, 1913 by President Wilson in relation to the recognition of the Huerta regime in Mexico. *See* G. Hackworth, 1 DIG. INT'L L. 174, 181 (1940).

[27] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), art. 21(3), 3(1) U.N. GAOR Resolutions 71, U.N. Doc. A/810 (1948).

[28] For a discussion of "external" and "internal" phases of self-determination, *see* M. Islam, *The Proposed Constitutional Guarantee of Indigenous Government Power in Fiji: An International Legal Appraisal*, 19 CALIF. W. INT'L L. J. 107, 120-21 (1988-89).

external domination, the people are debarred from any attempt aimed at total or partial dismemberment of the territorial integrity and political unity of the state to which they belong. Implicit in this protection is the corollary that if a state violates its duty owed to its people, they may not be prevented from resorting to any means of realizing their equal rights and self-determination even if such action infringes upon the territorial integrity of that state. The validity of such an action seems to flow from non-compliance with the principle of equal rights and self-determination of peoples by the state concerned. The justified end of the people in effect acts as a mitigating factor in turning the prohibited means into a permissible one.

The formulation serves as a release mechanism in preventing abuses of rights. It poses a threat to the territorial integrity of a state having scanty regard for the aggregate wishes of its peoples and their rights. Concomitantly, it is also a threat to the people within a state who wish to contravene the political unity of that state without having adequate reasons for so doing. Neither of these situations may be able to convince the world community to support their cause. Hence, the right of people in an independent state to secede is not a natural or inherent right, but a consequential right. It becomes permissible and operative only following the denial of equal rights and self-determination of peoples by the state concerned. In other words, respect for equal rights and self-determination by one state precludes the right of people to secede.

Bougainville became a part of the German colony of New Guinea during the late 19th century. Following the First World War, Australia took over the German colony and administered it as a League of Nations trusteeship. It continued to be administered by Australia under a U.N. mandate. Bougainville, being an integral part of Papua New Guinea under the colonial administration, attained self-government in December 1973, leaving Australia in control only of foreign affairs and defense.[29] All Bougainvillean members of the Constituent Assembly were included in the coalition, formed in 1972 by Chief Minister Somare, which administered self-government in the territory until independence.[30] As a result of previous grievances and frustrations

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[29] For a historical evolution of the political status of Bougainville, *see* R. WEST, *supra* note 2; *Trouble in Paradise*, SUNDAY TIMES MAGAZINE (London), June 10, 1973, at 32, 41-52; A. MAMAK & R. BEDFORD, BOUGAINVILLE NATIONALISM (1974) (NZ: Christchurch: special pub. no.1).

[30] *See generally supra* note 29; *also* PAC. ISLANDS Y.B. 348-51 (J. Carter, ed., 15th ed. 1984).

during the colonial period, Bougainville proclaimed independence on September 1, 1975, only fifteen days prior to the independence of Papua New Guinea. Yet the promise of political and fiscal autonomy by the national government persuaded the Bougainvilleans to remain with Papua New Guinea. Bougainville therefore gained independence along with Papua New Guinea from Australia on September 16, 1975, through the exercise of "external" self-determination. The Bougainville Agreement of August 1976 provided for the creation of the province of Bougainville, its provincial government and financing.[31]

The Constitution of Papua New Guinea envisages a quasi-federal system of government with provisions for power decentralization. It establishes nineteen provinces with their provincial governments enjoying autonomy in all matters except defense, foreign affairs and currency.[32] At the national level, the people and territory of Bougainville are represented in the national government and parliament through their elected representatives. At the provincial level, the provincial government is composed of the elected representatives of the Bougainvilleans who also enjoy the benefit of a local government council consisting of community leaders.[33] Bougainville has been governed by representative governments both at the national and provincial levels ever since the independence. The legitimacy of these governments is based on the will of the people expressed in free and periodic enfranchisements of all segments of the population within the territory. Under such constitutional regimes, the people enjoy their opportunity to exercise comprehensive control over, and participation in, the internal political power structure of the state. It also provides all groups of people with a high degree of self-government to develop their own economic, social and cultural institutions.

Given the constitutional and governmental structures referred to, it would be difficult to establish that the national government of Papua New Guinea lacks a popular base and representative character and is,

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[31] *See* Griffin, *Bougainvilleans: A People Apart*, PACIFIC ISLANDS MONTHLY, Aug. 1989, at 26; Times of Papua New Guinea, May 24, 1990, at 4, col. 1.

[32] Provincial governments are fully elected, formed to decentralize administration, receive revenue grants, impose and collect provincial taxes, and operate under the control of the Department of Provincial Affairs of the National Government. *See* PAC. ISLANDS Y.B., *supra* note 30, at 328.

[33] These Councils have been set up to keep law and order, and have wider scope in the fields of health, education and commercial enterprises and in providing any public or social service for the good of the community. *Id.*

as such, in violation of equal rights and self-determination of its people. Instead, a strong case can be made for saying that Papua New Guinea has persistently possessed democratic governments representing all sections of its population without any distinction whatsoever, and that it is conducting itself in accordance with the principle of equal rights and self-determination of peoples. Papua New Guinea is therefore entitled to the protection of its territorial integrity under Paragraph 7. This entitlement in turn affords some degree of strength and sanction that may be relied on to justify any action purported to defend the territorial integrity and political unity of Papua New Guinea. Since it is possible for the Bougainvilleans to realize their equal rights and "internal" self-determination in a constitutional manner within Papua New Guinea, no further exercise of "external" self-determination by way of secession maybe permissible under Paragraph 7. The UDI of Bougainville that has undermined the territorial integrity of Papua New Guinea is arduous to subsume appropriately under, but rather appears to be a violation of, Paragraph 7.

III. The Effects of Secession of Bougainville on the Rest of Papua New Guinea

An Act of secession implies a diminution of territory and population of the parent state. The effect of secession, in particular the economic and strategic significance of the seceding part, on the parent state has assumed and will continue to assume paramount importance in weighing the legitimacy of a secession claim. Secession jeopardizing the economic base of the parent state or exposing the latter to a vulnerable position or to the aggression of a hostile neighbor is unlikely to draw sympathy from the world community. The viability of the remainder must be taken into account and a secession that places too grievous an economic burden on the remaining area may not be permissible. It has strongly been asserted that the remaining state cannot be deprived of its economic base in case of secession.[34]

One of the factors which militated against the secession claims of Katanga from the Republic of Congo and of Biafra from the Federation of Nigeria in the 1960s was the fear that their separation would inflict

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[34] *See* Bowett, *Self-Determination and Political Rights in the Developing Countries*, 60 Am. S. Int'l L. Proc. 129, 131 (1966). For an application of this principle, *see* Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 Virginia J. Int'l L. 779, 824-26 (1975-76).

disastrous impacts on the remainder of the parent states. There was a good deal of concern for the future economic security of the Congo. Moreover, the recognition of legitimacy of the Katanga secession paralleled similar claims to legitimacy by the Congo, its parent state.[35] The economic viability of Nigeria excluding Biafra was never dubious, because Biafran oil was not indispensible to Nigeria. Yet there could be no doubt that oil was one of the major issues involved in the opposition to the Biafran secession. There was also widespread apprehension that this secession would induce a further break up of the federation into its ethnic components.[36] Such ramifications did not surface during the secession of Bangladesh, which was in a subordinate position in the wealth and political processes of Pakistan. Economically and politically, Bangladesh and the western part of Pakistan were distinct units with diverse features. The economic prosperity and political viability of West Pakistan was not dependent on Bangladesh. Just as the separation of overseas colonies had no adverse effect on their metropolitan territories, the separation of Bangladesh had no such effect on the rest of Pakistan. From all conceivable points of view, both wings of Pakistan showed signs of being able to survive as independent entities.[37]

The Bougainville secession is largely due to its wealth and economic frustrations. In spite of a small population (140,000), Bougainville is one of the most resource-rich provinces of Papua New Guinea. This enormous concentrtion of wealth has obvious political implications. The secessionist attempt by Bougainville on September 1, 1975, was perhaps influenced by the desire to make the island prosperous by disassociating itself from the remainder of Papua New Guinea. The national government, which was relying heavily on the Bougainville mine to support

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[35] Albert Kalongi, for example, declared the independence of his "Mining State"—an area adjacent to Katanga. For a discussion of the economic and political viability concerns about the Congo, *see* L. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 148 (1978).

[36] Almost all of Nigerian petroleum reserves are located in the coastal areas of Biafra. Nigerian regions embraced secession at one time or another. For an examination of these issues, *see id.* at 174-75; *see also* Nixon, *Self-Determination: The Nigerian/Biafra Case*, 24 WORLD POL. 473, 490 (1971-72).

[37] *See* Islam, *Secession Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh*, 22 J. PEACE RES. 211, 214 (1985); Nations, *The Economic Structure of Pakistan: Class and Colony*, 68 NEW LEFT REV. 3-27 (1971); Misra, *Intra-State Imperialism: The Case of Pakistan*, 9 J. PEACE RES. 27-39 (1972); Morris-Jones, *Pakistan Post-Mortem and the Roots of Bangladesh*, 43 POL. Q. 187-200 (1972).

its economy, quickly granted the island provincial status after national independence had been achieved.[38] This fact tends to indicate that there was a great deal of concern even at the time of independence of Papua New Guinea that the very economic survival of the new state would be at risk without Bougainville. Since independence, there has been an established flow of goods and services between Bougainville and other parts of Papua New Guinea which has made them interdependent economically. Since 1972, the Bougainville mine has been providing 17 percent of the national revenues and 45 percent of the national exports, earning a significant amount of foreign exchnage for Papua New Guinea. In monetary terms, the mine, before closure, was providing over one million U.S. dollars a day for the national treasury. Two-thirds of the 2,950 Papua New Guinean workers at the mine were from the rest of the country and are now unemployed.[39]

Given the nature and features of the Papua New Guinea economy, it would be extremely difficult to demonstrate that the separation of Bougainville would not produce any adverse consequences on the remainder of Papua New Guinea. Indeed, the national economy has received a serious set back as a result of the closure of Bougainville mine. The economy is now largely dependent on additional borrowing, loans and grants from various donor countries and financial institutions.[40] Further, secession by Bougainville has created an unhealthy precedent for other regions to seek secession in an attempt to resolve their economic grievances. The prevailing politial climate seems to contain symptoms of being further beset by similar claims by other PNG regions should Bougainville succeed.[41] These economic interdependencies and concern for the political unity of Papua New Guinea

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[38] *See supra* note 29 and accompanying text.

[39] For a detailed analysis of the dependence of Papua New Guinea on Bougainville mines, *see* Robie, *Bougainville One Year Later*, PACIFIC ISLANDS MONTHLY, Nov. 1989, at 10, 14; Callick, *Bougainville's Lessons For Pacific Leaders*, ISLANDS BUSINESS, Aug. 1989, at 28, 29; TIME (Australia), Jan. 22, 1990, at 24.

[40] PNG sought and got additional Kina 14.85m Australian aid, and over Kina 700m from the Consultative Group meeting in Singapore in May 1990, *see* Post Courier (PNG), May 9 and 17, 1990, at 3.

[41] Southern Highlands Premier Y. Koromba made such a threat in response to the Chevron Niugini development of the rich Iagifu-Hedinia oil reserve in his province. *See* Post Courier (PNG), May 2, 1990, at 11, col. 1. New Guinea Premier Pokawin also warned that New Guinea was prepared to secede as a group if there was any interference with the provincial government system. *See* Post Courier (PNG), May 7, 1990, at 1; The Australian, Mar. 16, 1990, at 13, col. 1.

appear to be influential factors which are likely to challenge the wisdom and reasonableness of the Bougainville secession claim.

IV. The Degree of Deprivation of Human Rights in Bougainville

Solicitude about present and future security appears to be the cardinal aim of the Bougainvilleans' bid for secession. The UDI overtly reflects a number of such convictions. These mainly include that Papua New Guinea: (a) in 1989 "declared and fought a war against the people of Bougainville," (b) "has begun imposing an econmic embargo against Bougainville," (c) "has again declared its intent to invade Bougainville and subjugate its people," and (d) "has refused to recognize the democratic rights of the people of Bougainville."[42] Inherent in these convictions are the assertions that numerous human rights violations and torture of civilians are being committed by Papua New Guinea discipline forces stationed in Bougainville. The BRA is convinced that the security of livelihood, properties and the very lives of the Bougainvilleans cannot be assured if they are subject to the control of Papua New Guinea. Confronted with such an insecure situation, they have asserted secession as a last resort to restoring security.

The sustenance of minimum conditions for the survival of people as dignified human beings is the common concern of all communities. The protection and promotion of, and respect for human rights in order to provide justice to the people has been acknowledged as a pre-eminent task of international law. This commitment is unequivocally reflected through continuous authoritative prescriptions of the U.N. on human rights. A denial of human rights infringes upon not only the U.N. Charter but also upon nearly all contemporary international instruments on human rights.[43] Where an incumbent government is responsible for the persistent violation of equal rights and internal self-

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[42] *See* BRA proclamation, *supra* note 6.

[43] The U.N. Charter embraces seven specific references to human rights, namely: preamble, arts. 1(3), 13(Ib), 55(c), 62(2), 68 and 76(c). Instruments subsequent to the U.N. Charter include, among others: the 1948 Universal Declaration on Human Rights; the 1960 Decolonisation Declaration; the 1963 Declaration on the Elimination of All Forms of Racial Discrimination; the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1966 Human Rights Covenants; and the 1970 Declaration on Friendly Relations. To these may be added at least 16 multilateral treaties on human rights prepared and adopted by the U.N.

determination of its own people, the aggrieved people may find it imperative to opt for secession as a last resort. Ultimately, claims to secession based on gross transgression of human rights and the lack of physical security may be undeniable in international law. Precisely such a situation happened when Bangladesh seceded from Pakistan. The humanitarian deprivations and the physical security of the Bengalees within the Federation of Pakistan were numerous. The Bengalees became the principal target of a planned mass massacre. Faced with this genocidal act of Pakistani troops in Bangladesh, the Bengalees passionately sought and fought for secession as a last resort to restoring their present and future security. The federal government of Pakistan mistreated its own citizens in a way falling so short of the general standard recognized by civilized peoples to "shock the conscience of mankind."[44] Consequently, the right of Pakistan to territorial integrity was overridden by the "elementary considerations of humanity."[45] The plight of the Bengalees generated worldwide sympathy and support for their cause and antipathy towards Pakistan's authoritarian military rule in Bangladesh. The separation of Bangladesh thus appeared to be the only alternative left for the world community to put an end to the then ongoing massive violation of human rights of the Bengalees within Pakistan and untold human misery in Indian refugee camps.[46]

Quite apart from economic deprivations that have precipitated since colonial days, it is acknowledged that Papua New Guinea troops abused unarmed Bougainvilleans during the emergency imposed by the national government. There occurred indiscriminate killing of civilians by members of the defense force who alienated many Bougainvilleans by beating up suspected rebel sympathizers and conducting Vietnam-style search and clear operations in villages near the copper mine,

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[44] L. OPPENHEIM, INTERNATIONAL LAW—A TREATISE 312 (8th ed. 1955). The Principles for International Law of the Future maintains that "each state has a legal duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity or justice or *shock the conscience of mankind.*" 39 AM. J. INT'L L., Supp. to No. 2 at 55, principle 2 (1944).

[45] *See* Corfu Channel Case, 1949 I.C.J. Rep. 22.

[46] For a complete analysis of violations of human rights in Bangladesh, *see* Islam, *The 1971 Bangladesh Crisis: A Case Study in Violation of Human Rights and the Plea of Domestic Jurisdiction*, 3 LAWASIA (NS) 45-65 (1984); Salzburg, *UN Prevention of Human Rights Violations: The Bangladesh Case*, 27 INT'L ORG. 115 (1973); Nanda, *A Critique of the United Nation Inaction in the Bangladesh Crisis*, 49 DEN. L. J. 53, 56 (1972).

turning thousands of villagers into refugees.[47] It was also alleged that homes, food gardens and jungles in the Kongara area, the militant stronghold, were sprayed with chemicals from a defense force helicopter.[48] This plight of the Bougainvilleans drew regional concern.

Nonetheless, the humanitarian deprivation of the Bougainvilleans is far less than that of the Bengalees in terms of the gravity and intensity of suffering. The Bengalees suffered a prolonged internal colonialism which cannot be said of the Bougainvilleans. In fact, there can be no comparison or parallel with the human tragedy in the Bangladesh situation. Moreover, it is not only the defense force members who were responsible for the violation of human rights in Bougainville. Human rights were also being violated by members of the BRA on a large scale.[49] These factors are likely to influence the decision making of many members of the world community in responding to the UDI of Bougainville. They may consider that the physical security of the Bougainvilleans and their humanitarian deprivation within Papua New Guinea are not grave enough to warrant secession. They may be inclined to remedy their grievances by any negotiated political or constitutional means short of outright secession.

V. World Order and the Secession of Bougainville

The sustenance of a minimum world order in terms of providing peace and security is one of the prime objectives of the world community[50]

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[47] An example is the unprovoked killing of 3 civilians on July 10, 1989. *See* Albon, *The Colonel Goes After Ona*, Islands Business, Aug. 1989, at 24, 25. The Defense Minister of PNG promised disciplinary action against those involved in violation of human rights. The Australian Foreign Minister recognized human rights abuses and expressed concern to the Prime Minister of PNG. North Bougainville MP, Mr. Ogio, filed an application before the National Court alleging violation of human rights on Bougainville by government troops. See Post Courier (PNG), Jan. 30, 1990, at 1, 2. For more atrocities and human rights violation claims, *see* Post Courier (PNG), Feb. 9 and 12, 1990, at 3; Post Courier (PNG), Mar. 15, 1990, at 2; Asian Wall Street Journal Weekly, Jan. 8, 1990, at 15, col. 1; The Australian, Feb. 6, 1990, at 11; Times of Papua New Guinea, May 17, 1990, at 14.

[48] A report to this effect was published in Post Courier (PNG), Feb. 13, 1990, at 2.

[49] The killing of a provincial government minister, John Bika, in front of his family is just one of many similar instances. *See* Times of Papua New Guinea, May 17, 1990, at 3; Times of Papua New Guinea, May 24, 1990, at 12, col. 1; Albon, *New Colonel In Charge of Bougainville*, Islands Business, Nov. 1989, at 18, 20.

[50] Of the two broad U.N. purposes mentioned in article 1 of the Charter, the maintenance of international peace and security in providing a stable world order is one.

which, as such, admits only those changes in the *status quo* that least threaten world order. A claim to secession is fraught with disruptive impacts on a stable world order. The secession of Bougainville involves a redelimitation of existing territorial boundaries which inflicts radical impacts on the *status quo* by disintegrating the recognized and established territorial boundary of Papua New Guinea. The reasonableness of the secession of Bougainville and that of the unity of Papua New Guinea therefore ought to be viewed in terms of basic community policy of minimization of disruption and disorder. In other words, the task is to decide whether the unity of Papua New Guinea or the separation of Bougainville would comparatively be more supportive of the maintenance of optimum world order. This leads one to examine the prospect of the proposed Republic of Bougainville of becoming a viable entity in terms of its internal stability and external ability to function as a responsible member of the international community.

The viability of many mini and micro states created as a result of decolonization has been the concern of the world community.[51] Secession is generally opposed because it will lead to further fragmentation of existing states. It has been asserted that self-determination would give each individual human being a right to an independent state.[52] This is greatly exaggerated because self-determination, by its nature, it is a collective right. A distinct group of people, not each and every individual of the group, is the beneficiary of the right.[53] No one would assert a claim to independence of a land mass without economic and political prospects. It is erroneous to pretend that every nationalist group would be willing or would have the ability to establish its own state by breaking away from its parent state.[54] The important consideration is that the group claiming independence must possess a rea-

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[51] *See* D. VITAL, THE SURVIVAL OF SMALL STATES (1971); E. PLISCHKE, MICROSTATES IN WORLD AFFAIRS: POLICY PROBLEMS AND OPTIONS (1977).

[52] *See* Eagleton, *supra* note 17, at 596.

[53] *See* Chen, *Self-Determination As a Human Right*, TOWARD WORLD ORDER AND HUMAN DIGNITY 214 (W. Reisman & B. Weston eds. 1976); Chowdhury, *The Status and Norms of Self-Determination in Contemporary International Law*, 24 NETH. INT'L L. REV. 72, 74 (1977); U. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 52 (1972).

[54] It is possible to prepare an endless list of ethnic groups in Asia, Africa and the Pacific which lack independent political and economic viability. The Mariana Islands of the Pacific, for example, opted for closer ties with the United States through plebiscite and covenant. *See* Dempsey, *Self-Determination and Security in the Pacific: A Study of the Covenant Between the US and the Northern Mariana Islands*, 9 N.Y.U. INT'L L.P. 277 (1976-77).

sonable economic and political prospect of becoming a viable entity so that it can manage its own affairs and act as a responsible entity in the international arena.

The crucial question is: can Bougainville achieve independent statehood in any meaningful sense which is more promising for enduring world order? An absolute answer cannot be given, because arguments both for and against are so convincing that they often lead to confusion.

Ironically, large developing states do not necessarily have an advantage for political stability and economic prosperity. If a larger population and area facilitate economic stability, the most populous and vast states would be the richest in the world. However, existing records do not show that all big states have done economically better than small states; nor does the former have a greater development potential over the latter. Factually, some of the world's most populous and vast states are among the poorest; whereas some small states have a gross national product either equal to, or even greater than, some big states.[55]

The proclaimed Republic of Bougainville would be smaller than only three states in the South Pacific, namely Papua New Guinea, the Solomon Islands and Fiji.[56] Its population would be bigger than Guam, New Caledonia, Vanuatu, Kiribati, Nauru, American Samoa, the Cook Islands, Tonga, Tuvalu, Niue, and French Polynesia.[57] Its economic viability cannot be questioned beyond doubt in view of its big copper mine, once reopened. Tax revenues from the mine would no longer be shared across Papua New Guinea, leaving the Republic perhaps the wealthiest island state in the South Pacific. However, the prospect of the mine reopening in the near future is bleak. Long-term closing of

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[55] For example, India is poor compared to Singapore or Hong Kong, which are rich indeed. For more examples, *see* Leff, *Bengal, Biafra and the Bigness Bias*, 3 FOREIGN POL'Y 129, 130 (1971).

[56] Bougainville has 9,000 square kilometers in area and a population of 140,000; PNG is 461,690 square kilometers in area with a population of 3.5 million; the Solomon Islands has an area of 29,785 square kilometers with a population of 196,823; and Fiji has an area of 18,376 square kilometers with a population of 650,409. PAC. ISLANDS Y.B., *supra* note 30.

[57] Guam has an area of 549 square kilometers and a population of 105,816; Nauru is 24 square kilometers with a population of 84,000; American Samoa has an area of 197 square kilometers with a population of 33,920; the Cook Islands have an area of 67 square kilometers with a population of 16,900; Tonga is 696.71 square kilometers with a population of 90,128; Niue is 258 square kilometers with a population of 3,298; and French Polynesia is 4,000 square kilometers with a population of 160,000. For a detailed comparison, *see id.*

the mine may mean that the Republic would revert to a subsistence economy. Whether such an economic state would be better or worse off is arguable in view of the indigenous life style and living standards (expectations) of the Bougainvilleans. The poor military strength of Bougainville for its security should not be unduly overemphasized. In this nuclear era and with the advent of sophisticated weapons, it has become exceedingly difficult even for the Super Powers to ensure their own security. In this interdependent world, a state's physical security from external aggressors does not lie in its own self-sufficient military strength, but in multinational cooperative arrangements.[58] Viewed from these perspectives, the defense strength of Bougainville may not be considered a criterion in determining its viability as an independent entity.

It may be argued that the disintegration of Papua New Guinea may exert an easing effect on continuous political unrest in Bougainville - the root cause of the crisis. There is no reason to surmise that the proclaimed Republic is not capable of managing its own affairs, at least with as much effectiveness as are found in other small island states of the South Pacific. Being a good foreign exchange earner, the potential of the Bougainville economy for a diversified scheme of industrialization may not be gainsaid. Although the crisis inflicts adverse impacts on regional order at this juncture, the prospects are promising that the Republic of Bougainville would be friendly towards other nations of the region, thereby promoting lasting regional peace and security.

The arguments referred to, intuitively appealing though they may be, should not be taken for granted, particularly in the case of Bougainville. Response to the UDI of Bougainville by some members of the regional community is indicative of their underlying assumption used to counter the secession.[59] They seem to think that it would lead to the proliferation of yet another independent entity in the region too small to be politically stable. Being a fragmented part of Papua New Guinea and constrained by small national income and limited markets,

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[58] Various agreements on disarmament between the NATO Allies, the Warsaw Pact members, the Non-Aligned Nations, the Super Powers, and regional states may be cited to exemplify the growing trend of collective security.

[59] Virtually all of the neighboring countries of PNG, namely Australia, New Zealand, Indonesia, Vanuatu, Kiribati, Fiji, and the Solomon Islands, have rejected the UDI of Bougainville. *See* Post Courier, (PNG), May 18, 1990, at 3; Post Courier (PNG), May 22, 1990, at 2.

the proclaimed Republic of Bougainville would be economically in a disadvantageous position to function effectively. Similar African examples tend to support the apprehension that political independence does not necessarily ensure freedom from outside control. Many black African states, due to their poverty and inefficient management ability, have had to pawn their natural resources to rich white countries, notably South Africa, France and the United Kingdom.[60] The same may well be said of Bougainville which appears to be ill-prepared for outright independence.

In the Bangladesh secession crisis, the world community accepted the disintegration of Pakistan to alleviate the then ongoing disruption to global and regional order. It was of paramount importance to ease regional tension and insecurity because the scale and diversity of the conflict added special urgency to prevent its escalation. There was no viable preference to the secession of Bangladesh that could ensure regional peace and security, Despotic adherence to the territorial integrity of Pakistan would have perpetuated regional disorder. Therefore, the secession of Bangladesh was judged by the international community as unavoidable and necessary for the maintenance of world order.[61] Nothing conparable has happened in Bougainville. A comparison between the two situations divulges that the parameters of the Bangladesh situation are not paralleled with, nor do they approach, the parameters of the Bougainville situation. Although the world community preferred the secession of Bangladesh, it would seemingly be reluctant to deviate from the Bangladesh circumstances and prefer to construe them strictly in responding to the UDI of Bougainville. Indeed, there are certain factors which are likely to influence many members of the world community to think that the proposed Republic of Bougainville would provide a poor case for future economic viability without massive international aid. The political knowledge and experience of the Bougainvilleans are not adequate enough to conduct the affairs of an independent state, and a support for the UDI of Bougainville may in turn contribute to the emergence of a non-viable entity at the expense of regional order.

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[60] There are also lessons to be learned from such smaller African countries as Kenya, Uganda, Zambia, and Sierra Leone, where tribal rivalries have been frustrating the efforts of independent governments. *See Trouble in Paradise*, SUNDAY TIMES MAGAZINE (London), June 10, 1973, at 52.

[61] *See* Islam, *The Territorial Integrity of a State Versus Secessionist Self-Determination of Its People: the Bangladesh Experience*, 5 BANGLADESH INST. OF INT'L & STRATEGIC STUD. J. 27, 28-35 (1984).

VI. Conclusion

In view of the foregoing analysis, it appears quite difficult to contain and subsume the UDI of Bougainville as an act of secessionist self-determination permissible in international law. Paragraph 7 of the 1970 U.N. Declaration on Friendly Relations, which recognizes the legitimacy of secession under certain circumstances, does not furnish any degree of strength and sanction that may be relied on to justify the secession of Bougainville impairing the territorial integrity and political unity of Papua New Guinea. The international support for the secession of Bangladesh may perhaps be viewed as a normative response to future seession claims. A comparative study establishes that there are certain factors which distinguish the two situations and that the Bougainville situation is somewhat different and is not as solidly founded as was the Bangladesh one. The world community, with *prima facie* respect for the existing state-centric order, would be inclined to interpret the Bangladesh precedent rigidly and find that the factors involved in the Bougainville situation are not sufficiently supportive of the cause.

This is, however, not to assert that the UDI of Bougainville is illegal in international law. The UDI is tantamount to a revolution from the viewpoint of the constitution of Papua New Guinea and as such it is stamped unlawful *ab initio*.[62] But the constitutionality of domestic activities is immaterial in international law.[63] As a result, the international legal position of the UDI is quite different. There is no rule of international law which prohibits revolution. Nor does the U.N. Charter contain any provision that forbids revolution. Historically, there has always been a right to revolution which has resulted in the breaking up of empires and making of modern states, and the breaking off of modern states and remaking of them.[64] The right of people to revolt exists quite independently in international law.

The emergence of new states on the world scene or the reshaping of the existing ones is a matter of obvious international concern. Emerging entities customarily make a formal statement to notify the world community of the new fact situation. The UDI of Bougainville is intended to serve this end. It is a proclamation made publicly and

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[62] According to the Constitution of Papua New Guinea art. 200.

[63] *See* G. Schwarzenberger, A Manual of International Law, 49, 69 (5th ed. 1967); D. O'Connell, International Law 137 (2d ed. 1970).

[64] *See* Higgins, *International Law, Rhodesia and the U.N.*, 23 World Today 94-96 (1967); A. Cobban, The Nation State and National Self-Determination 42-43 (Collins ed. 1969).

formally in explicit terms on a specific state of affairs - the formation of a new state and its interim government. Being a device of notification of this new state of affairs, the UDI is the starting point of the history of the Republic of Bougainville in the international arena. It therefore falls well within the category of international acts.[65] Through this act, the entity has purported to claim international personality and competence to speak and represent in the international arena on behalf of the territory and people concerned. To be an independent state, an entity is required to fulfill certain essential criteria of statehood. It is not possible to comply with all these conditions merely by proclaiming a UDI. It would be erroneous to say that the UDI of Bougainville itself has transformed the original status of Bougainville from that of a province of Papua New Guinea into an independent state. Whether, how far and under what circumstances the Republic of Bougainville would become an independent state and its interim government becomes its governmental authority after the UDI are issues to be ascertained independently in international law. But there is nothing in international law to suggest that it cannot assert such personality and competence.[66]

The nature of the UDI of Bougainville is a revolutionary act in international law which does not prohibit the acquisition of independence through revolutionary means. Nor is there any rule of international law which legalizes such an act until it is successful and recognized by other international persons. Concurrently, international law does not deny the right of a state to suppress rebellion as a police action to restore law and order. The maintenance of law and order and to compel obedience thereto by individuals is the essential task of a state. An incumbent government is free to subdue internal insurrection by force.[67] By virtue of this position, it is clear that international law does not take away the right of the national government of Papua New Guinea to use whatever force is necessary in putting down the revo-

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[65] *But see* G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 160 (5th ed. 1967).

[66] For an examination of the right of an entity to claim international personality and competence, *see* Islam, *The Status of the Interim Government of Afghan Mujahideens in International Law*, 37 NETH. INT'L L. REV. 1 (1990).

[67] *See* Waldock, *The Regulation of Use of Force by Individual States in International Law*, 81 RECUEIL DE COURS 454, 492-93 (1952); Higgins, *The Legal Limits to the Use of Force by Sovereign States—United Nations Practice*, 37 B.Y. INT'L L. 269, 318 (1961); *see also* the arbitral award of Great Britain v. Panama, 3 R. Int'l Arb. Awards 1447 (1933).

lution in Bougainville as a permissible police action in order to restore law and order. This internal resort to force by both sides does not come within the purview of international law which merely endorses the outcome of the struggle. In this respect, international legal rules governing revolution would be applicable in determining the legitimacy of the UDI of Bougainville, that is, might determines the right and nothing succeeds like success. The UDI of Bougainville would be an international legal act following its success and recognition. The UDI of Bougainville is yet to be succeeded or crushed. Therefore, its current status in international law is neither legal nor illegal but perhaps may conveniently be seen as extra-legal.

The Commonwealth of the Northern Mariana Islands' Rights Under United States and International Law to Control its Exclusive Economic Zone

I. Introduction

On March 10, 1983, President Ronald Reagan proclaimed the sovereign rights and jurisdiction of the United States over the ocean beyond its land area and adjacent to its territorial sea, known as the Exclusive Economic Zone.[1] The proclamation included a statement saying the establishment of rights over the Exclusive Economic Zone (hereinafter the EEZ) was made in accordance with international law.[2] The zone was defined as the area contiguous to the territorial sea of the United States, the Commonwealth of Puerto Rico and "the Commonwealth of the Northern Mariana Islands to the extent consistent with the Covenant and the United Nations Trusteeship Agreement. . . ."[3] As a result of the proclamation the United States claimed control of a huge expanse of ocean surrounding the insular territories and possessions of the United States. The proclamation is the source of the United States position that it has the authority to manage the economic zones of its insular possessions "to the extent consistent with the legal relationships between the United States and these islands."[4]

The proclamation does not provide authority for the actual resource conservation and management of the EEZ surrounding the Northern

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[1] Proclamation No. 5030, 3 C.F.R. § 22 (1984).

[2] *Id.*

[3] *Id.*

[4] United States Congress, Office of Technology Assessment, Marine Minerals: Exploring Our New Ocean Frontier, OTA-0-342 at 73 (1987) [hereinafter OTA Report].

Mariana islands by any agency of the federal government.[5] It establishes that these resources may not be exploited by foreign nations without agreement by the controller of the EEZ, but it does not allocate the governmental authority for administration of the EEZ within the federal government or between the United States and the Commonwealth of the Northern Mariana Islands governments.[6]

This comment will explore the United States' legal relationship with the Commonwealth of the Northern Marianas and whether the relationship gives the United States authority over the management of the zone 200 miles out from the territorial waters of the islands. The evaluation will include a history of the islands in their relationship with the United States and the rest of the international community, an analysis of international law with regard to the right of the Northern Marianas to management of its Exclusive Economic Zone and an evaluation of United States law on the subject.

II. Development of the EEZ Concept

The Exclusive Economic Zone concept was established when the South American nations of Chile, Ecuador and Peru declared control over areas they staked out as their Maritime Zones.[7] They justified their claims in the preamble to their 1952 pronouncement by declaring,

> it is the duty of each Government to prevent the said resources from being used outside the area of its jurisdiction so as to endanger their existence, integrity, and conservation to the prejudice of peoples so situated geographically that their seas are irreplaceable sources of essential food and economic materials.[8]

Following three decades of development of the idea, the concept was adopted internationally at the 1982 Law of the Sea Conference.[9] The EEZ is a 200 nautical mile area stretching from a State's coast in

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[5] Position Paper by the Special Representatives of the Governor of the Commonwealth of the Northern Mariana Islands for the Section 902 Consultations Ocean Rights and Resources, at 23 (D. MacMeekin and D. Woodworth eds. 1987) [hereinafter Ocean Rights Position Paper].

[6] *Id.*

[7] I New Directions in the Law of the Sea, 231 (Lay, Churchhill, Nordquist, eds. 1973).

[8] *Id.* at 232.

[9] 1 United Nations Conference on Law of the Sea, Commentary 228 (M. Nordquist ed. 1953). [hereinafter UNCLOS Commentary].

which the coastal State has first rights to living resources and exclusive right of access to non-living resources.[10]

The articles of the United Nations Convention on the Law of the Sea express with more specificity the rights and obligations of coastal states under the EEZ concept.

Article 56 of the Law of the Sea Convention defines the powers of a State in its own EEZ. In the EEZ the coastal state has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as production of energy from the water, currents and winds;
(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
    (i) the establishment and use of artificial islands, installations and structures;
    (ii) marine scientific research;
    (iii) the protection and preservation of the marine environment.
(c) other rights and duties provided for in this Convention.[11]

Article 57 defines the breadth of the economic zone to be no more than 200 miles from the baseline from which the territorial sea is measured.[12]

Article 58 describes the rights and duties of other states in the EEZ.

> In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.[13]

Articles 61 and 62 lay out the rights and responsibilities of coastal States to use and conserve sea resources.[14]

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[10] Comment, *The Exclusive Economic Zone: Its Development and Future in International and Domestic Law*, 45 LA. L. REV. 1269, 1270 (1985).

[11] UNCLOS Commentary, *supra* note 9, at 232.

[12] *Id.*

[13] *Id.* at 229.

[14] *Id.* at 230-31.

The government of the Commonwealth of the Northern Marianas, whose people voted in 1975 in favor of a relationship in political unity and under the sovereignty of the United States takes the stand that it should be the master of its own EEZ.[15] The United States stance is that the Northern Marianas is not a coastal State within the meaning of the Law of the Sea Convention but is identical to a state or insular territory with regard to control of ocean resources.[16] The United States contends the ocean off the coast of the Northern Marianas is part of the EEZ of the United States.[17]

Recently, United States representatives to talks with Northern Marianas leaders have indicated that the Bush administration is becoming more sensitive to the desires of United States insular areas to manage, protect and develop the EEZ's around their islands and is considering the issue in the context of a proposed new insular policy.[18]

III. History and Geography of the Northern Mariana Islands

The Northern Mariana Islands are a chain of 14 islands, five of which are inhabited, lying 3,300 miles west of Honolulu, 1,480 miles east of the Philippines and 1,260 miles northwest of Japan.[19] Exposure to American government, education, entertainment and consumer goods began in 1944 when American troops stormed ashore Saipan to take the islands from the Japanese.[20] The United States was the fourth country since the 1500s to arrive in the Marianas and declare itself in control of the islands and the people who live on them.

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[15] Compilation of Documents from the Ninth Round of the Covenant Section 902 Consultations Between the Special Representative of the President of the United States and the Special Representatives of the Governor of the Commonwealth of the Northern Mariana Islands 106 (D. MacMeekin and D. Woodworth eds. 1990) [hereinafter Covenant Consultations, Ninth Round]. (Closing statement of Commonwealth of the Northern Mariana Islands Governor Lorenzo I. De Leon Guerrero).

[16] *Id.* at 61-62.

[17] *Id.* at 62.

[18] *Id.* at 63.

[19] Northern Mariana Islands Commission on Federal Laws to the Congress of the United States, Welcoming America's Newest Commonwealth: The Second Interim Report 3 (1985) [hereinafter Welcoming America's Newest Commonwealth].

[20] F. Hezel & M. Berg, Winds of Change: A Book of Readings on Micronesian History 477 (1979) [hereinafter Winds of Change].

The Spanish arrived in the form of Ferdinand Magellan in 1521.[21] By the late 1600s the Spanish had succeeded in murdering the bulk of the population and almost all of the men who had not already succumbed to disease.[22] Those who were left became devout Roman Catholics, adopted many Spanish words and a Spanish counting system and lost memory of their ancient dances, music, and celebrations, distancing them culturally and socially from the rest of Micronesia.

After their victory in the drawn out wars against the Chamorros, the Spanish relocated the Chamorro population to Guam.[23] In the mid-1800's, after a huge waves washed over their islands, people from the low lying atolls of Satawal, Woleai, Puluwat and others in the central Carolines sailed to the Marianas and gained permission of the Spanish to settle on Saipan. There remains a modern population of the descendants of those islanders on Saipan, known in their own language as Refalawasch and in English as Carolinians.[24]

Chamorros repopulated these islands to the north of Guam and have since shared them with the Carolinians, who are recognized by the Northern Marianas Constitution as being of Northern Marianas descent.[25] The two ethnic groups have remained fairly separate. Carolinians have retained their language, ancient dances and family ties to the Caroline islands.

In 1898, Spain lost control of the Marianas and the rest of Micronesia.[26] The United States took control of Guam.[27] The rest of the islands became the property of Germany.[28] The Germans relinquished the islands almost 20 years later to the Japanese, who lost Micronesia to the United States during World War II.[29]

The ocean outward of the highwater mark was considered the property of the sovereign in both the German[30] and Japanese[31] periods.

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[21] *Id.* at 2.

[22] *Id.* at 31.

[23] *Id.*

[24] Author's knowledge as a result of eight years residence in the Mariana Islands with exposure to and some instruction in the Carolinian language.

[25] NORTHERN MARIANA ISLANDS CONST. art. XII, § 4.

[26] D. MCHENRY, MICRONESIA: TRUST BETRAYED 5 (1975). [hereinafter TRUST BETRAYED].

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Protestant Mission v. Trust Territory, 3 T.T. Rep. 26 (1965).

[31] Ngiraibiochel v. Trust Territory of the Pacific Islands, 1 T.T. Rep. 485,490 (1958).

Later, the United States was granted the United Nations Trusteeship over the area with the understanding that property held by the Trust Territory Government was to be in trust for the people of the islands.[32] However, the result of the United States administration of the Marianas and negotiations with Northern Marianas leaders at the end of the trusteeship has meant, by current United States' interpretation, the loss to the inhabitants of the Marianas of control over their ocean resources.[33]

A. United States Control of the Marianas

At the end of the second world war the United States was granted a strategic trust over the Micronesian islands by the United Nations.[34] Under this trusteeship agreement the United States was given full powers of administration, legislation and jurisdiction, and the power to apply to the Trust Territory those laws of the United States which it deemed "appropriate to local conditions and requirements."[35] The Marianas, which were geographically the closest group in Micronesia to Japan and to the United States territory of Guam, were administered by the United States Navy until 1961.[36] Authority for the rest of Micronesia was transferred to the Department of Interior.[37] By the time the Marianas were reintegrated with the rest of the Micronesia, the separate Naval administration had contributed to a feeling of separation from the rest of the islands.[38] An emphasis on the money economy, and along with that an increasing dependence on the United States was developing. Saipan, the most populated island in the Marianas, and the island that had been the base of the Naval administration, served as the capitol for the Trust Territory government. Just 120 miles from the United States territory of Guam, the capital island of Saipan continued to receive the benefits of modernization and a stronger economy that came with the location of the capital.[39] Cha-

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[32] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 6, 61 Stat. 3301 [hereinafter Trusteeship Agreement].

[33] Covenant Consultations, Ninth Round, *supra* note 15, at 61.

[34] Trusteeship Agreement, *supra* note 32, at art. 1.

[35] *Id.* at art. 3.

[36] TRUST BETRAYED *supra* note 26, at 10.

[37] WINDS OF CHANGE, *supra* note 20, at 478.

[38] TRUST BETRAYED, *supra* note 26, at 12.

[39] TRUST BETRAYED, *supra* note 26, at 12.

morros on Guam received United States citizenship in 1951 and Guam became increasingly more developed economically in comparison with the rest of the Marianas.[40] This increase in wealth so close geographically but so distant politically was attributed by people in the Northern Marianas to Guam's closer association with the United States.[41]

The capitol remained on Saipan despite criticism from a United Nations visiting mission in 1964. The United Nations mission said Saipan was an inappropriate site because of its location on the edge of the Trust Territory and an economy and atmosphere distinct from the rest of Micronesia.[42] The United States ignored the visiting mission's opinion that the capitol should be in the centrally located Truk district.

The Trusteeship agreement required that the United States, as the administering authority, promote the development of the inhabitants of the Trust Territory toward self-government or independence.[43] Toward this end, the Congress of Micronesia was convened in 1965,[44] and a Future Political Status Commission was established.[45] The commission was charged with investigating and reporting on options available to Micronesia in its future political relationship with the United States. Negotiations between representatives of Micronesia and the United States began in 1969.[46]

B. The Decision to Become a United States Commonwealth

Until August 1972, the Marianas delegation to the Future Political Status Negotiations participated with the rest of Micronesia in talks with the United States.[47] The Future Political Status Commission had determined that a form of free association with the United States would be the most desireable relationship.[48] A major point of contention was the Micronesian insistence that each side in the agreement would have the right to unilaterally end the relationship if there was dissatisfaction.[49]

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[40] *Id.* at 130.

[41] *Id.*

[42] Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1964, 31 U.N. TCOR Supp. 2 at 47, U.N. Doc. T/1628 (1964).

[43] Trusteeship Agreement, *supra* note 32, at art. 6.

[44] WELCOMING AMERICA'S NEWEST COMMONWEALTH, *supra* note 19, at 11.

[45] *Id.*

[46] Trust Betrayed, *supra* note 26, at 10.

[47] WELCOMING AMERICA'S NEWEST COMMONWEALTH, *supra* note 19, at 11.

[48] TRUST BETRAYED, *supra* note 26, at 92.

[49] *Id.* at 108-09.

The United States, concerned about its strategic position in the area, was opposed to the idea of unilateral termination.[50]

The Marianas delegation disagreed with the other delegations on the issue of maintaining the ability of Micronesians to terminate their relationship with the United States. They represented an area that had long been seeking closer ties with the United States.[51] The Marianas favored approval of the United States offer of Commonwealth status to the islands of Micronesia but the offer was rejected by the other Micronesian areas.[52]

The majority of the citizens of the Marianas were adamant in their desire to separate from the rest of Micronesia and develop a closer relationship with the United States. They were frustrated with their Congress of Micronesia representatives' attempts to reach an agreement that would retain Micronesia-wide unity. Marianas leaders who continued to support integration with the rest of Micronesia were voted out of office in Congress of Micronesia elections in November, 1970.[53] United States representatives continued to discourage separatist tendencies in the Marianas,[54] Nevertheless on February 19, 1971, the Mariana Islands District Legislature passed a resolution declaring that the Marianas would "secede from the Trust Territory, if necessary by force of arms, and with or without the consent of the United Nations" to achieve its goal of close association with the United States.[55]

The next day a pre-dawn fire totally destroyed the Congress of Micronesia's legislative chambers.[56] Fire investigators pronounced it work of an arsonist. Although investigations never identified a culprit, suspicions centered around secessionist leaders.[57]

In October, 1971 the Congress of Micronesia's Marianas delegation presented a letter to the United States delegation asking for separate status negotiations.[58] The United States delegation responded positively.[59] On May 13, 1972, the Marianas District Legislature passed a resolution endorsing the call for separate negotiations.

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[50] *Id.*

[51] WELCOMING AMERICA'S NEWEST COMMONWEALTH, *supra* note 19, at 11.

[52] TRUST BETRAYED, *supra* note 26, at 101.

[53] S. REP. No. 433, 94th Cong., 1st Sess. 47 (1975).

[54] *Id.* at 48.

[55] H.R.J. Res. 30, 1971 Mariana Islands Dist. Leg.

[56] S. REP. No. 433, *supra* note 53, at 49.

[57] *Id.*

[58] *Id.* at 54.

[59] *Id.*

> We advocate our present position for the sole reason that we desire membership in the United States political family because of the demonstrated advantages of such a relationship. More than any other nation with which we have had contact, the United States has brought to our people the values which we cherish and the economic goals which we desire. Continued affiliation with the United States offers the promise of the preservation of these values and the implementation of these goals.[60]

Several months later, the United States entered into seperate talks with the Marianas, aimed at commonwealth status for the islands.[61]

The desire in the Marianas to abandon the rest of Micronesia was not unanimous.[62] Many members of the Carolinian minority feared loss of ties with family in the rest of Micronesia and political domination by the majority Chamorro ethnic group.[63] A group of Carolinians petitioned the United States Congress and the Department of Interior asking Congress and Interior to challenge the rights of the separate negotiators to represent the people of the Marianas.[64] The ballot language used in the final vote for commonwealth status was seen by Carolinian opponents of Commonwealth status as being heavily biased toward approval of the Covenant.[65] The majority desire for increased economic advantages and United States citizenship prevailed and talks to negotiate a covenant agreement were scheduled.[66]

1. Covenant negotiations

Formal negotiations between the United States and the Marianas Political Status Commission, formed by law to represent the people of the Northern Marianas[67] in the negotiations, began in 1972.[68] The negotiations were complete on February 15, 1975[69] when negotiators

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[60] H.R.J. Res. 17, 1972, Mariana Islands Dist. Leg. *quoted in* S. REP. No. 433, *supra* note 53, at 56.

[61] S. REP. No. 433, *supra* note 53, at 54.

[62] *Id.* at 50.

[63] *Id.*

[64] TRUST BETRAYED, *supra* note 26, at 164.

[65] *Id.* at 165-66.

[66] *Id.* at 167.

[67] The name "Northern Marianas" came into use during this time to differentiate the islands from Guam, the southernmost island of the Marianas chain.

[68] WELCOMING AMERICA'S NEWEST COMMONWEALTH, *supra* note 19, at 11.

[69] *Id.*

from each side signed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States[70] (hereinafter "the Covenant"). The district legislature unanimously approved the agreement, and seventy-eight percent of the voters cast ballots in favor of it in a plebiscite held on June 17, 1975.[71] The United States Congress voted to approve the relationship[72] and it was signed into law by President Gerald R. Ford on March 24, 1976.[73]

IV. The Covenant

The Covenant consists of ten articles that attempt to define the political relationship between the United States and the Northern Mariana Islands. The agreement sets out the basic requirements for the Northern Marianas Constitution,[74] land ownership system[75], and revenue and taxation practices.[76] It includes provisions for United States citizenship[77], United States judicial authority[78], the applicability of laws enacted by the United States Congress[79], United States financial assistance[80], and Northern Marianas representation in the United States.[81]

The Covenant also contains in section 902, a provision for regular consultation between the government of the United States and the Government of the Northern Mariana Islands "on all matters affecting the relationship between them."[82] At the request of either government and not less frequently than every 10 years, the President of the United States and the Governor of the Northern Marianas are to designate special representatives to meet and to consider in good faith issues

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[70] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America and for other purposes, Pub. L. No. 91-241, 90 Stat. 263 (1976). [hereinafter The Covenant].

[71] Welcoming America's Newest Commonwealth, *supra* note 19, at 12.

[72] *Id.*

[73] The Covenant, *supra* note 70.

[74] *Id.* at §§ 201-204.

[75] *Id.* at § 804.

[76] *Id.* at §§ 601-607.

[77] *Id.* at §§ 301-304.

[78] *Id.* at §§ 401-403.

[79] *Id.* at at §§ 501-505.

[80] *Id.* at §§ 701-704.

[81] *Id.* at § 901.

[82] *Id.* at § 902.

affecting the relationship between them and to make a report and recommendations on the issues.[83]

Since the implementation of the Covenant there have been sporadic "902 talks" at the request of the Northern Marianas government. Topics have included problems with granting United States citizenship to segments of the population, and disagreement about the progress of a seven-year development plan for the islands.[84] On several occasions Northern Marianas leaders have complained that the United States has been too slow in appointing representatives to the consultations.[85] Fourteen years after approval of the Covenant, Northern Marianas leaders accuse the United States of failure to grant the Northern Marianas the local autonomy promised in the agreement, both in the running of the government and the control of its ocean resources.[86]

Northern Marianas leaders point to article 1, section 103 of the Covenant, which states "[t]he people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption."[87] They argue that the clause gives them sovereignty over local affairs.[88] Control over the ocean within the 200-mile exclusive economic zone is a matter of local affairs, Marianas leaders say, because the Marianas never agreed to surrendur control of the ocean.[89] United States attempts to control the zone and apply the territorial clause to the islands, are a breach of the promise of control over local affairs promised in the covenant, according to the Northern Marianas government.[90] United States Department of Interior Officials respond to the internal affairs argument by pointing to article 1, section 101 of the Covenant which says the Northern Marianas is a "self-governing Commonwealth in political union with and under the sovereignty of the United States."[91]

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[83] *Id.*

[84] Covenant Consultations, Ninth Round, *supra* note 15, at 12.

[85] Testimony of Northern Marinas Governor Pedro A. Tenorio, Hearing of House Subcommittee on Insular and Interior Affairs, Committee on Interior and Insular Affairs (May 23, 1989).

[86] Covenant Consultations, Ninth Round, *supra* note 15, at 107-08.

[87] The Covenant, *supra* note 70, at § 103.

[88] H. Res. 14, 5th Leg., 3rd Reg. Sess., 1986 Northern Marianas Commonwealth Leg.

[89] Covenant Consultations, Ninth Round, *supra* note 15, at 106.

[90] H. Res. 14, *supra* note 88.

[91] Compilation of Documents from the First and Second Rounds of the Covenant

A. The Covenant and the EEZ

Northern Marianas leaders have argued that section 801 of the Covenant provides for the vesting of title to the submerged lands surrounding the Northern Mariana Islands in the Commonwealth Government.[92] Otherwise the Covenant does not specify how jurisdiction of the Commonwealth's oceans, submerged lands and the natural resources of the ocean surrounding the Northern Mariana Islands is to be divided. The Northern Marianas government argues that control of internal affairs includes the legal right to control, manage, and develop its ocean resources.[93] The United States Covenant funding is scheduled to decrease over time[94] in anticipation that the islands will become increasingly able to live by their own resources. Northern Marianas leaders argue that the island government could derive a substantial amount of revenue from management of its fisheries, submerged minerals, thermal energy conversion, and other marine resources.[95]

V. Potential Benefits of the EEZ to the Northern Marianas

The EEZ surrounding the Marianas contains the Marianas Trench, the deepest area of ocean on earth, and a submerged volcanic system. Exploration of the ocean area has shown the existence of significant deposits of a number of commercially valuable minerals.[96] Presently nothing is being done to exploit the potential of the submerged lands or the fisheries around the islands. The United States EEZ proclamation continues the uncertainty surrounding the management of the resources. This is frustrating to Marianas leaders who see good potential for investment in the ocean and plenty of willing investors.[97] Since implementation of the Covenant, investment and development in the islands has increased dramatically. Asian investors have shown much enthu-

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Section 902 Consultations 186 (D. MacMeekin and D. Woodworth eds. 1986) [hereinafter Covenant Consultations, First and Second Rounds].

[92] Ocean Rights Position Paper, *supra* note 5, at 19.

[93] Covenant Consultations, Ninth Round, *supra* note 15, at 106.

[94] The Covenant, *supra* note 70, at § 702.

[95] Ocean Rights Position Paper, *supra* note 5, at 2.

[96] *Id.* at 9.

[97] *Id.* at 7.

siasm for entering into economic ventures in the islands. The once quiet lagoon on the eastern side of the island of Saipan is now ringed with high rise hotels filled with planeloads of tourists from Japan. Constructions companies, Chinese restaraunts, and Asian garment factories have proliferated. Although the Northern Marianas does not have the resources to exploit its ocean potential by itself, if the Northern Marianas had control over the management of the EEZ, it would be able to enter into joint ventures with investors who do have the resources.

The greatest proven potential source of wealth that would be available to the Northern Marianas through control of the Exclusive Economic Zone is the area's tuna fishery. Studies in the mid 1980s conducted pursuant to the Central, Western, and South Pacific Fisheries Development Act[98] revealed a potentially significant albacore resource in the Western Pacific, with estimates of an annual yield between 16 and 20 million pounds and a value of up to $23.4 million.[99]

The other former Trust Territory entities have negotiated lucrative fisheries agreements with foreign fishing interests. In April, 1982 Japanese interests agreed to pay the Federated States of Micronesia approximately $2.35 million for one year's fishing rights in the FSM waters and to provide about $150,000 in fisheries-related goods and services.[100] Another arrangement allows Japan's fishing boats to operate in the waters of the Republic of the Marshall Islands for one year in exchange for a cash payment of $1.25 million.[101]

The Northern Marianas representatives to the 902 talks maintain that by denying the Northern Marianas authority over its ocean resources, the United States is breaching its obligation under article 6 of the Trusteeship Agreement.[102] That article charges the United States with protection of the inhabitants of Micronesia "against the loss of their lands and resources."[103]

While there is no specific mention of the Northern Marianas rights to authority over its 200 mile EEZ, it is equally true that the Covenant does not expressly grant the rights of the ocean resources to the United States government. Section 801 of the Covenant specifies that

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[98] 16 U.S.C. § 758e (1972).

[99] H.R. REP. No. 549, 97th Cong. 2d Sess. 19-20 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 4320, 4332-33.

[100] WELCOMING AMERICA'S NEWEST COMMONWEALTH, *supra* note 19, at 121.

[101] *Id.*

[102] Ocean Rights Position Paper, *supra* note 5, at 4.

[103] *Id.*

> all right, title, and interest of the Government of the Trust Territory of the Pacific Islands in and to real property in the Northern Mariana Islands on the date of the signing of this Covenant or thereafter acquired in any manner whatsoever will, no later than upon the termination of the Trusteeship Agreement be transferred to the Government of the Northern Mariana Islands.[104]

Under Trust Territory law, submerged lands are real property.[105] Thus the Trust Territory Government, as administrator of the islands, was recognized as the owner of the ocean resources and when the Trusteeship ended,[106] the interest in the submerged lands was transferred to the government of the Northern Marianas. In addition to providing for the transfer of all Trust Territory government land to the Northern Marianas government, Covenant section 801 lists the specific parcels of property over which the Northern Marianas agreed to surrender to United States control.[107] The area of the Northern Marianas EEZ is not included in the listing, and was therefore not transferred from the domain of the Northern Marianas to the federal government.

The Northern Marianas Legislature has attempted to bolster its view of the Covenant's effect on the islands' EEZ by passing legislation supporting Commonwealth control of the area. In the Marine Sovereignty Act of 1980,[108] the legislature cited the Revised Informal Composite Negotiating Text of the United Nations Conference on the Law of the Sea as authority to establish a territorial sea, exclusive economic

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[104] The Covenant, *supra* note 70, at § 801.

[105] Ngiraibiochel v. Trust Territory of the Pacific Islands 1 T.T. Rep. 485, 490 (Tr. Div. 1958).

[106] Until December of 1989 there was debate as to whether the Trusteeship had actually terminated. The United States had received approval for termination only from the United Nations Trusteeship Council, which comprised nations friendly to the United States. Because the Trust Territory was established as a strategic trust, the trusteeship agreement required approval of the United Nations Security Council before the trust could be considered ended. The United States avoided presenting the agreements made with the entities of Micronesia to the Security Council until late last year, presumably because it feared a possible veto by the Soviet Union. The threat was no longer considered a reality after the thawing of the cold war, and the resolution was presented and approved on Dec. 28 despite a request to the Security Council by Northern Marianas Governor Guerrero that the Northern Marianas not be included in the termination until disagreements between the Commonwealth and United States were addressed further.

[107] The Covenant, *supra* note 70, at § 801.

[108] Marine Sovereignty Act of 1980, N. Mar. I. Pub. L. 2-7, 2 CMC §§ 1101-1143 (1980).

zone, and contiguous zone.[109] The act declares that the Commonwealth has sovereign rights in the EEZ for purposes of "exploring, exploiting, conserving, and managing" the living and non-living resources of the seabed, subsoil, and superjacent waters of the EEZ.[110] The act specifically recognizes the Commonwealth's special relationship with the United States and says nothing in the Act shall be construed to

> impose any impediment to any lawful action taken by the Government of the United States for the defense and security of the Commonwealth or of the United States; provided that the United States takes every practicable precaution to protect the marine environment and complies with any applicable Federal Law.[111]

In an attempt to get the United States to officially recognize the Northern Marianas government's right to control the area of its Exclusive Economic Zone, the Northern Marianas representatives to the 902 talks with the United States on the status of the Covenant have proposed the following amendment to the Covenant for the resolution of the ocean rights and resources issue.

> The Special Representatives of the President of United States of America and the Governor of the Commonwealth of the Northern Mariana Islands agree and recommend that the United States and the Commonwealth of the Northern Mariana Islands mutually approve an amendment to Article I of the Covenant and that the Congress enact the Northern Mariana Islands Federal Relations Act with provisions that, together with the Covenant amendment will:
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> 1) confirm by amendment of the Covenant the authority of the Commonwealth of the Northern Mariana Islands to conserve, manage, and control the marine resources in the waters and seabed surrounding the Commonwealth of the Northern Mariana Islands to the full extent permitted a coastal state under international law;
> 2) provide for the membership and participation of the Commonwealth of the Northern Mariana Islands in international organizations whose purpose is to manage and control such resources;
> 3) exclude the Commonwealth of the Northern Mariana Islands from the Magnuson Fishery Conservation and Management Act;
> 4) provide for appropriate federal oversight of the activities of the Commonwealth of the Northern Mariana Islands in the conser-

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[109] *Id.* at § 1111(i).
[110] *Id.* at § 1114(b).
[111] *Id.* at § 1136.

vation and management of ocean resources and the exercise of its ocean rights; and

5) provide increased surveillance in the exclusive economic zone surrounding the Northern Mariana Islands.[112]

The Magnuson Fishery Conservation and Management Act[113] (hereinafter "The Magnuson Act") mentioned in item three of the proposal is of concern to the Northern Marianas government because its application to the Northern Marianas has restricted the local government's right to exclusive management of fisheries in its EEZ. The act established a 200-mile fishery conservation zone beyond the territorial sea of the United States, with eight regional fisheries management councils[114] which make recommendations to the United States secretary of commerce for development of fisheries management plans within each region's geographical area of authority. Tuna fishing is exempted under the act because the United States has termed it a highly migratory species to protect the United States fishing industry.[115] State governments participate in the management of the fisheries in their zones by submitting names to the secretary of commerce for nomination to the councils.[116]

The Northern Marianas has been designated as part of the Western Pacific Management Council, which includes Hawaii, American Samoa, and Guam.[117] There are 13 members on the Western Pacific council, only four of whom are appointed by the island governments.[118] The other members are representatives of the other states in the Western council and federal government representatives.

The fisheries councils do not regulate the fisheries resources. Their function is solely advisory. They submit fishery management plans to the secretary who may disapprove them in whole or in part.[119] This means that the management and conservation of the fisheries within the fisheries conservation zone is removed from the jurisdiction of coastal state governments and placed with the federal government.[120]

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[112] Ocean Rights Position Paper, *supra* note 5, at 4.
[113] 16 U.S.C. § 1801 (1986).
[114] *Id.* at § 1852(a).
[115] *Id.* at § 1813.
[116] *Id.* at § 1822(b)(2)(B).
[117] *Id.* at 1852(a)(8).
[118] *Id.* at § 1852(a)(8).
[119] *Id.* at § 1854.
[120] Ocean Rights Position Paper, *supra* note 5, at 15.

The exclusion of tuna from any local authority totally withdraws from Marianas control a viable ocean resource in the islands. The United States has compromised its position on tuna by negotiating tuna fishing agreements with several independent Pacific nations. However, the Northern Marianas, as a part of the United States, has not been involved in the negotiations.

The Magnuson Act contains language making it applicable to the Northern Mariana Islands.[121] The Northern Marianas government, in the belief that it has the legal right to sole control over the ocean area covered by the act, has disputed its application. Former Northern Marianas Governor Pedro P. Tenorio instituted a Marianas policy refusing to submit names for appointment or otherwise participate as a voting member on the Western Pacific Fisheries Management Council.[122] Current Governor Lorenzo Guerrero is continuing the policy of non-participation.

VI. INTERNATIONAL CONSIDERATIONS ON CONTROL OF THE NORTHERN MARIANAS EEZ

By international agreement, where there is no treaty or other explicit source, the law between countries may be ascertained from the customs and usages of civilized nations.[123] The general international practice of nations with overseas territories with regard to the territories' control over the ocean washing up on their shores differs drastically from the United States policy.[124]

The general rule is that the metropolitan powers either give the residents full and equal representation in the national government or give the local government of the territory jurisdiction over the resources of the EEZ.[125] A 1978 study reviewing the law and practice of six nations with respect to their overseas territories[126] showed that Denmark (Faroe Islands and Greenland), France overseas departments and territories, and Spain, (Canary Islands), have given the populations of their territories full and equal representation in the national parliament

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[121] 16 U.S.C. § 1802(21) (1986).

[122] Woodworth, *U.S. Tuna: A Proposal for Resource Management in the American Pacific Islands*, 10 U. HAW. L. REV. 151, 163 (1986).

[123] The Paquete Habana, 175 U.S. 677, 700 (1900).

[124] OTA Report, *supra* note 4, at 297.

[125] *Id.*

[126] *Id.*

and government.[127] The United Kingdom in its relationship with the Caribbean Associated States, New Zealand with regard to the Cook Islands and Niue, and the Netherlands in the Netherlands Antilles have given the local governments of the overseas territories jurisdiction over the resources of the EEZs.[128] More recently Great Britain established an exclusive economic zone around the Falkland Islands.[129] The Falkland Islands government has administrative control of the zone and retains the money from the licensing of fishing vessels in the zone.[130]

Contrary to international practice the United States has neither fully integrated the Marianas nor has it granted the Marianas control of its ocean. Residents of the Northern Marianas are United States citizens but are not allowed to vote for the United States president. They have no representation in the United States Congress.[131] During the Covenant negotiations Northern Marianas representatives requested that their islands send a non-voting delegate to the United States Congress as is done by the Virgin Islands, American Samoa, and Guam.[132] The United States delegation refused to agree to this, saying Congress would not accept a member from such a small population base.[133] This argument was made despite the fact that American Samoa and the Virgin Islands both with population sizes similar to the Northern Marianas have non-voting delegates to the United States House of Representatives.

The arrangement as it stands now, with neither full integration in the form of equal representation, nor control over resources, is contrary to the United Nations stance on territories. General Assembly Resolution 1541[134] lists the three valid means of achieving self-government: independence, free association with an independent state, or integration with an independent state. The Marianas is none of these. It is not independent. Free Association must be the result of a free and voluntary choice, and must include the right unilaterally to change that status

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[127] *Id.*

[128] *Id.*

[129] *Paquete Habana*, 175 U.S. at 176.

[130] *Id.*

[131] Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT. L. REV. 19, 44 (1980).

[132] *Id.* at 45.

[133] *Id.* at 45.

[134] 1541 U.N. GAOR (48th mtg.) at 30, U.N. Doc. (1962).

on the part of the associated state.[135] The Marianas cannot unilaterally change status. Integration must be on the basis of complete equality of political status, including representation and participation at all levels of government.[136] The Marianas does not have full representation at all levels of government. The United Nations policy on acheivement of self-government clearly relates to the United Nations concern that residents of former territories be treated fairly. Residents must have representation in the national arena or have access to and control over their resources, as is the case with free association or independence. The United Nations wanted to avoid the possibility of a territory's people lacking representation in the national government and also losing their rights to control their natural resources.

New Zealand's policy towards the Cook Islands and Niue (mentioned above) is an example of a relationship which comes closer to the goals of either local autonomy or full integration envisioned by the United Nations. The relationship between those islands and New Zealand is called a relationship of free association but it has aspects that are more similar to the United States' relationship with the Northern Marianas than to the freely associated Federated States of Micronesia and Republic of the Marshall Islands.[137]

Cook and Niue islanders are citizens of New Zealand as Northern Marianas islanders are citizens of the United States. Neither Cook nor Niue residents are represented in in the New Zealand parliament, nor can they vote in New Zealand parliamentary elections.

As with the Northern Marianas and unlike the freely associated Micronesian states, New Zealand has domain over Niue's and the Cook Islands' external affairs.[138] Although the islands in the relationship with New Zealand have delegated their foreign affairs and defense powers to the bigger country, New Zealand has not insisted on control over the sea resources of the islands.[139] The people of those islands are not fully integrated into the New Zealand government system, so they have not been forced to relinquish their important ocean resources.

New Zealand has enacted legislation establishing an EEZ but that legislation expressly does not apply to the Cook Islands or Niue.[140]

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[135] *Id.* at principle VII.

[136] *Id.* at principle VIII.

[137] Ocean Rights Position Paper, *supra* note 5, at 24.

[138] *Id.*

[139] *Id.* at 25.

[140] *Id.*

Shortly after the New Zealand law was enacted the Cook Islands Legislative Assembly enacted its own Territorial Sea and Exclusive Economic Zone Act.[141] The United States formally recognized the sovereignty of the Cook Islands Government under its EEZ law by signing, on July 11, 1980 a treaty with the Cook Islands, establishing a maritime boundary with that government.[142]

The New Zealand government exercises more power over the Tokelau Islands than it does over the the Cook Islands or Niue.[143] Tokelau is regarded as a non-self governing territory, is without a constitution and is governed by the authority of New Zealand law.[144] Despite the dependent nature of the Tokelau Islands, New Zealand has enacted legislation recognizing the sovereignty of the people of Tokelau in the marginal sea.[145] "The United States has recognized the shared sovereignty between the people of Tokelau and the Government of New Zealand by signing a treaty delimiting the maritime boundaries between the Tokelau Islands and the United States."[146]

In addition to the general assembly position on the control of islanders over their ocean resources, the United Nations Trusteeship agreement with the United States specifically decreed that during the period of trusteeship the United States was responsible for "promot[ing] the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources."[147]

United States alleged attempts at economic development of Micronesia were a dismal failure.[148] The United States failed to promote economic advancement and self-sufficiency. There are few locally owned businesses or skilled technicians. Skilled workers are imported from

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[141] Territorial Sea and Exclusive Economic Zone Act of 1977, No. 16 (Nov. 17, 1977), *reprinted in* Compilation of Documents from the Third Round of the Covenant Section 902 Consultations (D. MacMeekin and D. Woodworth, eds. 1987).

[142] Treaty between the United States of America and the Cook Islands on Friendship and Delimitation of the Maritime Boundary Between the United States of America and the Cook Islands, *cited in* Ocean Rights Position Paper, *supra* note 5, at 26.

[143] *Id.*

[144] *Id.*

[145] Tokelau Territorial Sea and Exclusive Economic Zone Act of 1977, No. 125 (Dec. 23, 1977), Ocean Rights Position Paper, *supra* note 5, at 27.

[146] *Id.*

[147] Trusteeship Agreement, *supra* note 32, at art. 6.

[148] TRUST BETRAYED, *supra* note 26, at 224.

Asia.[149] The Trust Territory government's major accomplishment in the islands was to set up a huge government bureaucracy, enticing island residents to become dependent on government jobs which provided little training for self-sufficiency. This was especially true in the Marianas. To obtain the money necessary to buy the consumer goods Americans held out as being the symbols of success, it became necessary to get an eight-hour a day job where few new skills were taught and ancient skills were forgotten. There were no entrepreneurial programs set up for the people of the islands and no attempt to train islanders in the wise economic use of their resources. Dependency became a way of life, and along with the dependency came an increased belief in an inability to go it alone.

The United States failed during Trust Territory times to encourage self-sufficiency, and is now attempting to deprive the people of the Northern Marianas of access to the benefits of its largest resource contrary to the dictates of the Trusteeship Agreement and the Covenant it negotiated with the representatives of the people of the Northern Mariana Islands.

VII. UNITED STATES LAW ON NORTHERN MARIANAS CONTROL OF ITS EEZ

A. Application of the Territorial Clause

A crucial issue in the dispute over the extent of United States Congressional power in the Northern Marianas is the application of the Territorial Clause[150] of the United States Constitution to the Commonwealth. The Territorial Clause has been used since the 19th Century to settle territorial disputes by vesting responsibility for the territories in the federal government.[151] The Territorial Clause served the purposes of bringing federal civil authority to the frontier land of the United States and allowing economic development in the areas in the expectation that the areas would become states and residents of the areas would have the rights of all United States citizens.[152] The present

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[149] Author's knowledge as a result of six years of residence, including two years as a reporter for the *Pacific Daily News*, in the Northern Marianas.

[150] U.S. CONST. art. IV, § 3 cl. 2.

[151] Note, *Inventive Statesmanship vs. The Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA. L. REV. 1041, 1045 (1974).

[152] Leibowitz, *United States Federalism: The States and the Territories*, 28 AM. U.L. REV. 450, 454 (1979).

territories do not fit into the pattern of evolution into statehood that were the model relied upon for the Territorial Clause.[153] The Northern Marianas joined the United States with a developed culture of its own and wishes to preserve its uniqueness[154] by remaining apart from the United States in many ways and retaining its ability to reap benefits from its natural resources.

Because the Covenant is the agreement that defines the relationship between the Northern Marianas and the United States, application of the Territorial Clause would have to be done within the framework of the Covenant. Section 501 of the agreement lists the sections of the United States Constitution that are to apply to the Northern Marianas. The Territorial Clause is not one of the listed provisions. In article I section 105 of the Covenant, the United States agreed to limit its authority to enact legislation for the Marianas.[155] This agreement was made "[i]n order to respect the right of self-government guaranteed by the Covenant."[156] Fundamental provisions of the Covenant, including section 501, may be modified only with the consent of the government of the United States and the Government of the Northern Mariana Islands.[157] If the Territorial Clause were to apply, it would have to apply through section 105. It would therefore be limited by the mutual consent provisions of that section.

Unconsensual application of the Territorial Clause to the Northern Marianas in order to control ocean resources would be seen by Marianas leaders as a nullification of the Covenant.[158] Northern Marianas leaders staunchly maintain that any attempt made by the United States to exercise power with the respect to the CNMI must be based on the precisely delineated power in the Covenant.[159] In a CNMI House Joint Resolution adopted by the Northern Marianas Commonwealth Legislature and sent to the United Nations Security Council in 1986, Northern Marianas legislators, with the signed consent of then Governor Pedro P. Tenorio, expressed anxiety that the Territorial Clause may be construed by the United States as applying to the Common-

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[153] *Id.* at 451.

[154] *Id.*

[155] The Covenant, *supra* note 70, at § 105.

[156] *Id.*

[157] *Id.*

[158] H. Res. 14, 5th Leg., 3rd Reg. Sess., 1986 Northern Marianas Commonwealth Leg.

[159] *Id.*

wealth.[160] The document noted that the Territorial Clause is excluded from the list of United States constitutional provisions to which the Marianas voluntarily submitted under the Covenant.

> Its exclusion is intended to insure against Congress' use of an independent plenary source of power to encroach upon the sovereign prerogatives of the CNMI. In short, Congress is not authorized under the guise of the Territorial Clause of the United States Constitution to designate or treat the CNMI as a United States territory and by such rubric impose rules and regulations in a manner which it considers to be appropriate for regulation of the internal affairs of the CNMI.[161]

The Northern Marianas analysis of the United States' power over the Commonwealth begins with the proposition that the United States under the Trusteeship Agreement never had political sovereignty over the Marianas, but had only administrative sovereignty as a trustee.[162] The people of the Marianas retained true sovereignty. Just as states retain sovereignty over anything not granted by the United States Constitution to the United States government,[163] the Northern Marianas agreed to grant some sovereignty to the United States, but retained sovereignty over any area not relinquished to the United States. The question of Territorial Clause application, and with it the question of sovereignty over areas not granted to the United States by the Covenant, has never been addressed directly in United States courts. However, in two decisions released within a day of each other, the Ninth Circuit seemed to take two different positions on the question.

In *Hillblom v. United States*[164] the Court dismissed a challenge by plaintiffs to the United States' alleged intention to use the Territorial Clause to interfere, against the dictates of the Covenant, with the Northern Marianas' internal affairs. In declaring the challenge unripe, the court pointed out that section 501 of the Covenant enumerates the parts of the United States Constitution which apply to the CNMI, and that the Territorial Clause is not included.[165] In a footnote, the court mentioned apprehension expressed by a 1988 CNMI task force that the United States would try to govern the internal affairs of the CNMI

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[160] *Id.*

[161] *Id.* at 26.

[162] People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 95 (9th Cir. 1974).

[163] United States v. Texas, 339 U.S. 707 (1950).

[164] 896 F.2d 426 (9th Cir. 1990).

[165] *Id.* at 428.

through the Territorial Clause. The task force's report was issued a month before the lawsuit was filed. "It should be noted that section 501 of the Covenant explicitly enumerates the parts of the United States Constitution which apply to the CNMI, and despite the concerns of the Task Force, the Territorial Clause is not included in the list."[166] If the court is correct in saying that the Territorial Clause does not apply to the Commonwealth it would seem to follow that the United States Congress would not have authority to take control of the ocean resources of the Northern Marianas.

A day before the *Hillblom* decision the Ninth Circuit identified the threshold inquiry in challenges to United States action under the Covenant as whether Congress could, under the Territorial Clause, properly take the action being challenged.[167] This seems to contradict the statement in *Hillblom* saying that the Territorial Clause does not apply. The decisions have not helped to clear up the disagreement between the United States and Northern Marianas governments.

In a response to the Northern Marianas assertion during 902 talks that the Territorial Clause does not apply to the Northern Marianas, the United States Department of Interior Office of Territorial and International Affairs takes the position that "it is beyond question that the Territorial Clause applies to the CNMI . . . ."[168] The United States position is that the clause is applicable of its own force pursuant to Covenant section 501(a), and therefore did not need to be listed in that section.[169] Even assuming that the territorial clause applies to the Northern Marianas relationship with the United States, the conclusion still remains that the Northern Marianas government should control and reap the benefits of its Exclusive Economic Zone.

If despite the protestations of the Northern Marianas government, the Territorial Clause is applied to the Commonwealth, the United States should nevertheless follow international custom and recognize Northern Marianas ownership of its ocean resources. If the United States decided to pursue such a policy the issue would then become whether Congress had the power under the Territorial Clause to recognize the Northern Marianas' or any other territory's control over the EEZ surrounding its land area. In *Wabol v. Villacrusis*,[170] the court

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[166] *Id.* at 429.

[167] Wabol v. Villacrusis, 908 F.2d 411, 421 (9th Cir. 1990).

[168] Covenant Consultations, First and Second Rounds, *supra* note 91, at 192.

[169] *Id.*

[170] 908 F.2d at 421.

upheld Congress' power to approve the Covenant even though the agreement restricts the sale of land to people of Northern Marianas descent. The court assumed the Territorial Clause was applicable and wrote that Congress, in using its broad powers under the Territorial Clause, should make decisions about the application of constitutional rights based on "solid understanding of conditions in the territory."[171] The court stated, "In short the question is whether in the territory circumstances are such that [application of the right] would be impractical and anomalous."[172]

Wabol, determined Congress' right to approve Covenant legislation that included discrimination based upon race in land ownership laws. The same evaluation is appropriate in determining whether Congress has the right to enact the legislation suggested by the Northern Marianas government that would give the island government control over ocean resources its shores. Congress may treat the territories differently from the states, according to the *Wabol* court. The Court said Congress should make decisions based on a solid understanding of conditions in the territory, and evaluate Constitutional rights on the basis of whether their application would be impractical and anomalous.

Congressional refusal to recognize the special position of the Northern Marianas and the importance of the ocean resources to the islands through granting the Northern Marianas control of its EEZ would be impractical and anomalous. In addition to being contrary to international practice, it would defeat the United States' stated goal of moving the Northern Marianas toward economic self sufficiency.

VIII. Impact of a Northern Marianas EEZ on other United States Territories

The freely associated states of Micronesia may have objections to the United States declaring the Northern Marianas has the right to control its EEZ. During status negotiations the leaders of what became freely associated states, were aware that they were trading monetary support from the United States for a larger measure of autonomy.[173] Recognition as a sovereign state for the purposes of the Law of the Sea Convention undoubtedly was one of the advantages FSM, Palau

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[171] *Id.* at 422.

[172] *Id.* (quoting Reid v. Covert, 354 U.S. 1 (1956).

[173] Trust Betrayed, *supra* note 26, at Chapter V.

and Marshalls leaders saw as a part of their nation's increased autonomy. They may be resentful that United States seems to have forced them to trade economic aid for autonomy and has not done the same thing with regard to the Northern Marianas. Though this may cause dissatisfaction within the other areas of Micronesia, a look at the relationship between New Zealand and its territories and freely associated states shows that there could have been no specific expectation on the part of the Federated States that they would retain control of their EEZs and the Northern Marianas would not.

A larger concern to the United States might be the displeasure of the other insular territories, Guam, American Samoa, the Virgin Islands and Puerto Rico. The late Guam delegate to the United States Congress, Antonio B. Won Pat, expressed that concern during the United States status talks with the Northern Marianas while the Northern Marianas were still part of the Trust Territory and its residents had not yet become United States citizens.

> It comes as no small shock to our people to see the United States readily, even eagerly, offer our neighbors to the north a host of privileges which we on Guam do not enjoy. . . . [W]hatever the needs—whether real or imagined—of the Pentagon in the western Pacific, the willingness of Washington to deal so generously with non-citizens while denying their fellow Americans equal treatment can only be viewed with suspicion and resentment by the people of Guam.[174]

Citizens of the Virgin Islands, American Samoa and Puerto Rico are sure to feel the same resentment at the apparently superior treatment of newcomers to the United States system.

If the Northern Marianas' limited resources and need to retain cultural autonomy is deserving of consideration, the same is equally true for the other areas. It could be argued that the need for the protections and advantages in the Northern Marianas covenant is even stronger in the other territories because the lack of sensitivity to their needs in the past has weakened the indigenous population's control over land, resources, and politics more than in the Marianas. It would be offensive to other territorial areas for the United States to refuse to grant aspects of autonomy to them while granting them to the Northern Marianas.

All of the arguments for Northern Marianas control of its exclusive economic zone, with the exception of the Trusteeship Agreement and

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[174] *Id.* at 182.

the Covenant, apply to the other territories as well. This would seem to indicate that it is time for the United States to evaluate its policy of controlling the ocean resources of its overseas territories while at the same time not offering those territories full representation in the United States government system.

IX. Conclusion;

The proclamation of United States sovereignty over an Exclusive Economic Zone which includes the area of ocean 200 miles out from the United States territories including the Northern Marianas does not provide authority for the resource conservation and management of the area to either the federal government or the Northern Marianas government.

International development of the Exclusive Economic Zone concept was based on the rights of coastal-living peoples to reap the benefits of the ocean washing up at their shores. The people of the Northern Marianas live on a string of islands the largest of which is twelve miles long and five miles wide. They have traditionally depended on the resources of the ocean for survival. The Northern Mariana Islands became associated with the United States through a United Nations Trusteeship agreement which required the United States to protect the inhabitants of the islands against the loss of their lands and resources. United States refusal to grant authority over Northern Marianas 200-mile Exclusive Economic Zone to the Northern Marianas government or event to set up some mechanism whereby the inhabitants of the islands can benefit from the resources, is a breach of the Trusteeship agreement.

The Territorial Clause should not be used to deny the rights of the Marianas to control its ocean resources. The clause was not developed to be applicable in a situation such as United States' relationship with the Northern Marianas. Blanket application of the Territorial Clause would defeat the purpose of a negotiated Covenant.

If the Territorial Clause is judged to apply to the Northern Marianas, Congress is not obligated by the clause to curtail local territorial control of an island entity of its EEZ and should not do so.

The United States is obligated to honor the covenant and the trusteeship agreement, and apply principles established by the United Nations in dealing with territories that are not fully integrated into the United States.

The main reason the United States would use to deny the Northern Marianas control of its EEZ would be a desire to avoid the political

liability that might come with such a decision. Other territories, such as Guam, the Virgin Islands and Puerto Rico would be likely to demand the same treatment. An argument by the United States that the only reason it applied international norms to the Northern Marianas is because of United Nations oversight, would seem hollow and unjust.

The United States refusal is also contrary to international norms regarding large countries and island territories. All large international powers associated with islands grant either full political integration to the islands or the islanders retain control over the resources of their exclusive economic zones. The United States is the lone exception to this rule.

The international norms discussed in this paper were developed because of the recognition of the need of a people who are allegedly part of a nation to either be fully represented or to have control over their own resources. This internationally recognized truth would apply to all of the United States insular territories and seems to indicate that it is time that the United States changed its policy with respect to control over the EEZs of these areas.

Victoria King

Honolulu's Ohana Zoning Law: To Ohana or Not to Ohana

I. Introduction

In 1981, the State of Hawaii enacted legislation requiring each county to amend their zoning ordinances to permit the construction of "ohana" dwelling units.[1] The resulting "ohana zoning law" enabled qualifying property owners to build additional dwellings on their residentially zoned lots.[2] Ohana is the Hawaiian word for extended family,[3] which implies that ohana zoning permits additional housing solely for extended family use.[4] Although the statute contains no such restriction,[5] ohana owners have indicated they mistakenly understood their units to be limited to family member use.[6]

In 1982 the Honolulu City Council (City Council) amended the Comprehensive Zoning Code (C.Z.C.) to include an ohana zoning ordinance.[7] The ordinance permitted construction of ohana dwellings by property owners who met certain public facility infrastructure requirements.[8] The subsequent 1988 amendment characterized ohana dwellings as "accessory to the principal permitted single-family dwelling,"[9] and established maximum floor area sizes.[10] The City Council

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[1] Haw. Rev. Stat. § 46-4(c) (Supp. 1982) (current version at § 46-4(c) (Supp. 1989)).

[2] Comment, *Resolving a Conflict — Ohana Zoning & Private Covenants*, 6 U. Haw. L. Rev. 177, 179 (1984) [hereinafter *Ohana Zoning*].

[3] M. Pukui & S. Elbert, Hawaiian Dictionary 276 (1984).

[4] S. Jaworowski, Ohana Zoning: A Five Year Review 3, 12 (1988).

[5] Haw. Rev. Stat. § 46-4(c) (Supp. 1989).

[6] Jaworowski, *supra* note 4, at 12.

[7] Honolulu, Haw., Comprehensive Zoning Code § 21-5.2(f) (1982) (repealed 1986) [hereinafter Comprehensive Zoning Code].

[8] *Id.* at § 21-5.2(f)(3)(A)-(E).

[9] Honolulu, Haw., Land Use Ordinance § 21A-6.20 (1988) [hereinafter Land Use Ordinance].

[10] *Id.* at § 21A-6.20(D).

most recently amended Honolulu's ohana ordinance in December of 1989.[11] The amendment continues to characterize ohana dwellings as "accessory."[12] In addition, the amendment creates two exceptions to floor area size restrictions: it permits complete reconstruction of nonconforming dwellings destroyed by natural disasters;[13] and excludes qualified ohana dwellings sold under the Condominium Property Regime[14] from size limitations.[15] The December 1989 amendment appears inconsistent with common law and zoning goals in three ways. First, the City Council uses the misleading term "accessory" as well as the already misleading term "ohana." The amendment's characterization of ohana dwellings as accessory is inconsistent with common law interpreting accessory uses. Case law appears to prohibit ohana dwellings as accessory uses because they are independent residences not customarily associated with single-family residences and because they impair neighborhood character.

Second, the amendment's exemption of nonconforming ohana dwellings from size conformity indefinitely perpetuates their nonconformity. The perpetuation of nonconforming dwellings is inconsistent with three zoning goals: the attainment of state and county development plans; the creation of zoning district homogeneity; and the gradual termination of nonconforming dwellings. The perpetuation is also inconsistent with the policy underlying the concept of nonconformity. Furthermore, the amendment's perpetuation of nonconforming dwellings encourages their sale.

Third, the sale of ohana dwellings may be inconsistent with the legislative goal of increasing the supply of affordable housing. The sale of such dwellings in certain situations fails to serve the legislative goal. The amendment's provision excepting nondesignated dwellings sold under the Condominium Property Regime from maximum size limitations condones the sale of ohana dwellings.

The following discussion focuses on these inconsistencies. First, in order to familiarize the reader with ohana zoning law, Section II traces the development of State and Honolulu County ohana zoning law.

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[11] Honolulu, Haw., Ordinance 89-155 (Dec. 28, 1989).

[12] *Id.* at § 21A-6.20.

[13] *Id.* at § 21A-6.20-1(A).

[14] HAW. REV. STAT. § 514A-11 (1985). Under the Condominium Property Regime, ohana owners may convert their property interests to condominium forms of ownership. JAWOROWSKI, *supra* note 4, at 28.

[15] Honolulu, Haw., Ordinance 89-155 § 21A-6.20-1(C).

Section III discusses whether the characterization of ohana dwellings as "accessory to principal permitted single-family dwellings" is consistent with statutory and common law. Section IV discusses whether the perpetuation of nonconforming ohana dwellings is consistent with zoning goals. Section V discusses whether the sale of ohana dwellings is consistent with legislative goals.

II. Development of State and Honolulu County Ohana Zoning Laws

A. *Factors Influencing Hawaii's Housing Market*

In Hawaii, the American dream of home ownership is a dream deferred. Hawaii's housing supply is insufficient and housing costs are prohibitive.[16] In 1970, new home prices in Hawaii were sixty percent above those of mainland homes, and residential land costs were three times the national average.[17] In 1975, the state median family income was approximately $10,000 and the average home price on Oahu was $83,000.[18] Incomes have increased, but have not kept pace with escalating housing costs. In 1988, the state average annual salary was $20,454.[19] The average selling price of a new single-family home was $312,000.[20]

Several factors influence Hawaii's housing market. First, residential land is scarce due to Hawaii's size and location. Hawaii is an island state of only 6,425 square miles divided among eight major islands.[21] Larger states have more land available for housing.[22] Prospective buyers may also purchase homes in contiguous states and still work within state.[23] Hawaii must supply all the housing needs of its residents because over 2000 miles of ocean separate it from the continental United States.[24]

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[16] T. Creighton, The Lands of Hawaii: Their Use and Misuse 149 (1978).

[17] *Id.* at 162.

[18] *Id.* at 165-66.

[19] State of Hawaii Department of Planning and Economic Development, The State of Hawaii Data Book 321 (1989) [hereinafter 1989 Data Book].

[20] *Id.* at 537.

[21] *Id.* at 121.

[22] Smith, *Uniquely Hawaii: A Law Professor Looks at Hawaii's Land Law*, 7 U. Haw. L. Rev. 1, 7 (1985).

[23] *Id.*

[24] 1989 Data Book, *supra* note 19, at 123.

Second, relatively few land holders own the majority of land in Hawaii. The State and Federal governments hold 38.2% of the total land area,[25] leaving only 61.8% available for private ownership. Six large landholders possess 912,853 acres or 22.6% of this privately held property.[26] This leaves only 1,581,573 acres or 39.2% of the land available for other private owners.

Third, Hawaii is the only state in which all land is subject to use regulation.[27] The Hawaii State Plan of 1978[28] and State Land Use Law[29] regulate statewide land control. The State Plan establishes a statewide planning process to coordinate public action around a common set of objectives and priority directions.[30] The State Land Use Law provides a framework for land use management.[31] The Land Use Commission (L.U.C.),[32] under the State Land Use Law, classifies state land into one of four use districts: agriculture, rural, urban, or conservation. The L.U.C. classifies approximately 96% of the state's 4,112,388 acres as conservation or agricultural land.[33] The State controls the land classification system and tightly controls the use and development of conservation and most agricultural land.[34]

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[25] 1989 DATA BOOK, *supra* note 19, at 174.

[26] *Id.* The six large landowners are: Bernice P. Bishop Estate, Richard S. Smart (Parker Ranch), Castle and Cook, Inc, C. Brewer and Company, Ltd., Samuel M. Damon Estate, Alexander and Baldwin, Inc. *Id.*

[27] Smith, *supra* note 22, at 7.

[28] HAW. REV. STAT. § 226 (Supp. 1989).

[29] HAW. REV. STAT. § 205 (Supp. 1989).

[30] DALY & ASSOC., INC., STATE LAND USE MANAGEMENT STUDY: SUMMARY REPORT 1-2 (1982) (prepared for the State of Hawaii Department of Planning and Economic Development).

[31] *Id.* at 4.

[32] HAW. REV. STAT. § 205-2 (Supp. 1989).

[33] 1989 DATA BOOK, *supra* note 19, at 171.

[34] Callies, *Land Use: Herein of Vested Rights, Plans and the Relationship of Planning and Controls*, 2 U. HAW. L. REV. 176, 192 (1979). Land use regulations strictly limit the development and use of these two districts. The L.U.C. reclassifies conservation and agricultural land as urban only if a preponderance of the evidence indicates such reclassification is reasonable, conforms with the Hawaii state plan, and has no significant adverse impact upon natural, historical, scenic, environmental, recreational, or agricultural resources. HAW. REV. STAT. §§ 205-4(h), -16, -17 (1985 & Supp. 1989). The Hawaii State Planning Act promotes the development, conservation, and protection of agricultural lands. HAW. REV. STAT. §§ 226-103(d)(1)-(10), 226-104(b)(1),(2) (Supp. 1989). The Act also advocates the protection of environmental and conservation areas by regulating development so as to minimize its negative impact. HAW. REV. STAT. § 226-104(b)(9)-(13) (Supp. 1989).

Fourth, the rise in nontraditional households exacerbates the demand for affordable housing.[35] Young single professionals establish individual households[36] and seek lower priced "first time buyer" homes. Increasing numbers of one-parent families and retired persons living on fixed incomes also escalate the need for affordable homes.[37]

Fifth, people demand affordable homes because they want the economic benefits associated with home ownership. The federal tax system allows homeowners to claim property tax and mortgage interest deductions unavailable to tenants.[38] Property value inflation also makes home ownership a wise investment. Homeowners build equity in their property while tenants receive no benefits from long-term rentals and suffer because of increased rental costs.[39]

B. State Ohana Statutes

In 1981, the Hawaii State Legislature passed the ohana zoning statute[40] in response to Hawaii's unique housing needs.[41] The legislature intended to provide an immediate increase in the supply of affordable housing.[42] The statute required counties to amend their zoning ordinances to permit construction of second dwellings on qualifying residential lots.[43] The statute stated:

> Neither this section nor any other law, county ordinance, or rule shall prohibit the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted; provided:
> 1. All applicable county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback,

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[35] Comment, *Single-Family Zoning Ordinances: The Constitutionality of Suburban Barriers Against Nontraditional Households*, 31 ST. LOUIS U.L.J. 1023, 1029-31 (1987) [hereinafter *Nontraditional Households*].

[36] *Id.* at 1029.

[37] *Id.* at 1030.

[38] Mixon, *Duplex Cotenancies: Not Quite Condominiums*, 19 HOUS. L. REV. 193, 195-96 (1982).

[39] *Id.* at 196.

[40] HAW. REV. STAT. § 46-4(c) (Supp. 1982).

[41] The Legislature acknowledged that rising home costs, decreasing available residential land and an increasing number of married children living with their parents influenced the need for affordable housing. Act of June 22, 1981, No. 229, § 1, 1981 Haw. Sess. Laws 440-42.

[42] CONF. COMM. REP. NO. 41, 1981 HAW. LEG. SESS., SENATE J. 923.

[43] HAW. REV. STAT. § 46-4(c) (Supp. 1982).

> maximum lot coverage, parking, and floor area requirements; and
> 2. The county determines that public facilities are adequate to service the additional dwelling units permitted by the subsection. . . .
>
> Each county shall establish a review and permit procedure necessary for the purpose of this subsection.[44]

Although the word ohana means "family," the legislature did not restrict ohana dwellings to family member occupancy. The legislature merely intended to provide affordable housing[45] by allowing the construction of additional dwellings on one residential lot.

The legislature amended the statute in 1988[46] to remedy problems arising from conflicts between restrictive residential covenants and the ohana statute.[47] The revisions acknowledged the superseding authority of recorded covenants that prohibit the construction of second dwellings on single-family residential lots,[48] and included publication requirements intended to notify persons affected by the granting of an ohana building permit.[49]

The statute was most recently amended in 1989. Act 313 deleted most of section 46-4(c), retaining only the provision allowing county adoption of ohana zoning standards.[50] The revised statute states: "Each county *may* adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted.[51]

The legislature, by changing "shall adopt"[52] to "may adopt," broadened county authority to deal with unique ohana zoning complications.[53] The revised statute grants counties the necessary discretion to determine whether or not to permit ohana construction in established neighborhoods, thereby allowing counties to prevent increased density and altered neighborhood composition problems.[54]

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[44] *Id.*

[45] Act of June 22, 1981, No. 229, § 1, 1981 Haw. Sess. Laws 440-42.

[46] Act of June 9, 1988, No. 252, 1988 Haw. Sess. Laws 447.

[47] STAND. COMM. REP. No. 9-88, 1988 HAW. LEG. SESS., HOUSE J. 852-53; *See generally* Comment, *Resolving a Conflict — Ohana Zoning & Private Covenants*, 6 U. HAW. L. REV. 177(1984) (discussing the relationship between private covenants and public zoning law).

[48] HAW. REV. STAT. § 46-4(c)(3) (Supp. 1988).

[49] Act of June 9, 1988, No. 252, § 1, 1988 Haw. Sess. Laws 447.

[50] Act of June 13, 1989, No. 313, § 1, 1989 Haw. Sess. Laws 687.

[51] HAW. REV. STAT. § 46-4(c) (Supp. 1989) (emphasis added).

[52] Act of June 9, 1988, No. 252, § 1, 1988 Haw. Sess. Laws 447.

[53] STAND. COMM. REP. No. 1246, 1989 HAW. LEG. SESS., HOUSE J. 1295.

[54] CONF. COMM. REP. No. 33, 1989 HAW. LEG. SESS., HOUSE J. 770.

C. *Factors Influencing Oahu's Housing Market*

The need for affordable housing is especially critical on Oahu. Eighty-two percent of Hawaii's residents live on Oahu, with most concentrated in the Honolulu area. Oahu contains only 9.2% of Hawaii's total land area, and much of the land is too mountainous to develop.[55] The L.U.C.[56] classifies 154,882 of Oahu's total 386,188 acres as conservation land and 138,723 acres as agricultural land.[57] The State strictly limits the residential development of these districts.[58] The City and County of Honolulu exercises sole residential development control over only the remaining 92,583 acres[59] in urban districts.[60]

The concentration of land in the hands of relatively few holders contributes to the shortage of affordable housing on Oahu. After World War II, the land shortage enabled a few private owners to lease property on a large scale basis, rather than sell it outright.[61] Thus, many homeowners do not own their land in fee. By 1979, 35% of homeowners on Oahu leased the land underneath their homes from one of the major property holders.[62] The resulting scarcity of fee simple land inflates both its value and that of comparably priced lease-hold land.[63] The inflated land values result in increased home costs.[64] The factors above combine to limit the amount of land available for affordable housing.

D. *Honolulu County Ohana Zoning Ordinance*

1. *Original Honolulu ohana zoning ordinance*

The City Council amended Honolulu's zoning code to permit the construction of ohana dwellings in 1982.[65] The ohana ordinance re-

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[55] Note, *Midkiff v. Tom: The Constitutionality of Hawaii's Land Reform Act* 6 U. HAW. L. REV. 561, 566 (1984) [hereinafter as *Land Reform Act*] .

[56] HAW. REV. STAT. § 205-1 (Supp. 1989).

[57] 1989 DATA BOOK, *supra* note 19, at 172.

[58] HAW. REV. STAT. § 205-2 (Supp. 1989).

[59] 1989 DATA BOOK, *supra* note 19, at 172.

[60] Callies, *supra* note 34, at 192.

[61] *Land Reform Act*, *supra* note 55, at 566.

[62] *Id.*

[63] *Ohana Zoning*, *supra* note 2, at 183-84.

[64] *Id.* at 184.

[65] COMPREHENSIVE ZONING CODE, *supra* note 7, at § 21-5.2(f).

quired a prospective owner to obtain public facilities clearance from four county departments before applying for a building permit:[66] the Building Department;[67] the City and County Department of Public Works;[68] the Board of Water Supply;[69] and the Honolulu Fire Department.[70]

After obtaining the necessary clearance, the lot owner submitted construction plans and applied for a building permit.[71] The Building Department would issue the permit after ensuring compliance with county setback and lot coverage requirements.[72]

In 1988, the County Council amended the ohana ordinance, establishing maximum floor area sizes for ohana dwellings[73] and characterizing them as "accessory to the principal permitted single-family dwelling on the zoning lot."[74] The amendment failed to define the term "accessory." Zoning Committee Reports neither defined the term nor stated why ohana dwellings were so characterized.[75] A Department of Land Utilization (D.L.U.) report, Assessment of Ohana Zoning, mentioned in the committee reports possibly contained the rationale for the

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[66] *Id.* at § 21-5.2(f)(4).

[67] The Building Department determined whether the prospective ohana lot was located in a suitable district. The department required the lot to be zoned for residential use and to be located in an area identified by the county as ohana eligible. JAWOROWSKI, *supra* note 4, at 18. The county originally anticipated many older neighborhoods would qualify for ohana zoning, but later exempted several because of inadequate infrastructure. *Ohana Zoning, supra* note 2, at 186 n.53.

[68] The City and County Department of Public Works certified that adequate sewer capacity existed. COMPREHENSIVE ZONING CODE, *supra* note 7, at § 21-5.2(f)(3)(B). Many applications were denied on this ground. Planners designed sewer systems to manage the actual projected flow for designated areas and did not consider ohana dwellings in their original capacity estimates. JAWOROWSKI, *supra* note 4, at 18-19.

[69] The Board of Water Supply had to confirm water availability for both household and fire control purposes. COMPREHENSIVE ZONING CODE, *supra* note 7, at § 21-5.2(f)(C).

[70] The Honolulu Fire Department certified the lot met fire vehicle roadway requirements. The ordinance required lots to have direct access to a paved road with a minimum width of 16 feet. *Id.* at § 21-5.2(f)(3)(E).

[71] *Id.* at § 21-5.2(f)(4).

[72] *Ohana Zoning, supra* note 2, at 186 n.57.

[73] LAND USE ORDINANCE, *supra* note 9, at § 21A-6.20(D).

[74] *Id.* at § 21A-6.20.

[75] ZONING COMM. REP. No. 216, CITY COUNCIL, 1988 CITY & COUNTY OF HONOLULU; ZONING COMM. REP. No. 136, CITY COUNCIL, 1988 CITY & COUNTY OF HONOLULU.

change.[76] The report stated that the term "ohana" confused people. First, the zoning code provided no working definition of the term.[77] Second, the Hawaiian term was unfamiliar to nonresident or new-resident property owners.[78] Third, the definition of ohana as extended family led local residents to erroneously assume the statute restricted ohana use to blood relatives.[79] The report recommended deleting the word to avoid misinterpretation.[80] It suggested following Maui's zoning ordinance[81] which characterized ohana dwellings as accessory uses.[82]

Consistent with the D.L.U. report recommendations, the 1988 amendment established maximum sizes for ohana dwellings based on their corresponding residential districts. The building sizes ranged from 700 square feet in R-3.5, R-5, and R-7.5 districts to 900 square feet in R-10 districts and 1,000 square feet in R-20 districts.[83]. The report equated smaller dwellings with affordability. Thus, treating second dwellings as accessory and limiting their size was intended to promote the legislative goal of increasing the supply of affordable housing.[84]

2. *Current Honolulu ohana zoning ordinance*

In 1989, the City Council passed Ordinance No. 89-155 again amending the ohana zoning law.[85] The ordinance continues to characterize ohana dwellings as accessory and restrict their floor area sizes. It also permits two exceptions to size conformity to remedy complications created by the initial imposition of such size restrictions.

First, the size restrictions[86] make existing ohana dwellings exceeding the maximum floor areas nonconforming. The Honolulu Land Use Ordinance[87] (L.U.O.), which replaced the Comprehensive Zoning Code in 1986, requires reconstructions of nonconforming dwellings to comply

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[76] DEPARTMENT OF LAND UTILIZATION [D.L.U.], ASSESSMENT OF "OHANA ZONING" (1985) [hereinafter D.L.U. ASSESSMENT].

[77] *Id.* at 10.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 12.

[81] MAUI COUNTY, HAW., CODE ch. 19.35 (1983).

[82] D.L.U. ASSESSMENT, *supra* note 76, at 12, 13.

[83] LAND USE ORDINANCE, *supra* note 9, at § 21A-6.20(D).

[84] D.L.U. ASSESSMENT, *supra* note 76, at 12, 13.

[85] Honolulu, Haw., Ordinance 89-155 (Dec. 28, 1989).

[86] LAND USE ORDINANCE, *supra* note 9, at § 21A-6.20(D).

[87] Honolulu, Haw., Ordinance 86-96 (Oct. 22, 1986).

with current building and land use regulations.[88] Ohana owners testified the restriction made obtaining insurance coverage and mortgage financing difficult.[89] The legislature determined that remedying these hardships was more important than discouraging nonconforming dwellings or bringing nonconforming dwellings into conformity.[90] Consequently, the 1989 ordinance exempts reconstructions of nonconforming ohana dwellings, destroyed by natural disasters, from maximum floor area limitations.[91]

Second, the 1988 amendment's characterization of ohana dwellings as accessory to principal single-family dwellings requires the designation of one dwelling as ohana (accessory) and the other as principal. Property owners often failed to do this before selling their dwellings under the Condominium Property Regime.[92] The determination of which condominium dwelling was principal and which was accessory created equity problems between the two owners.[93] The 1988 amendment prohibited owners of dwellings not designated as principal from expansion beyond maximum accessory dwelling sizes.[94] The 1989 ordinance permits the expansion of nondesignated dwellings by treating them as principal structures.[95]

The following sections discuss the inconsistencies created by the 1989 ordinance.

III. Is the Characterization of Ohana Dwellings as "Accessory to Permitted Principle Single-Family Residences" Consistent with Statutory and Common Law?

Zoning ordinances divide residential, industrial, and commercial land uses into districts and permit different types of buildings and land uses in each district.[96] Most also permit accessory uses.[97] Zoning codes and

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[88] Land Use Ordinance, *supra* note 9, at § 21A-3.120(D).

[89] Zoning Comm. Rep. No. 704, City Council, 1989 City & County of Honolulu 2.

[90] *Id.*

[91] Honolulu, Haw., Ordinance 89-155 § 21A-6.20-1(A).

[92] Haw. Rev. Stat. § 514A (Supp. 1989).

[93] Zoning Comm. Rep. No. 704, *supra* note 89, at 3.

[94] *Id.*

[95] Honolulu, Haw., Ordinance 89-155 § 21A-6.20-1(C).

[96] Comment, *Zoning: Accessory Uses and the Meaning of the "Customary" Requirement*, 56 B.U.L. Rev. 542 & n.1 (1976)[hereinafter *Customary Requirement*].

[97] *Id.* at 542.

case law often characterize accessory uses as related to, subordinate to, and customarily incidental to primary uses in order to prevent adverse impact on surrounding neighborhoods and frustration of zoning objectives.[98]

Honolulu County Ordinance 89-155 characterizes ohana dwellings as "accessory" but provides no definition of the term. The Legislature appears to have redefined the term "accessory" because such a characterization of independent residential dwellings is inconsistent with zoning ordinance and common law definitions and applications of the term. Arguably, the Legislature should have chosen another term because practitioners and potential ohana builders may be mislead by relying on accessory use case law in other jurisdictions.

A. Honolulu Land Use Ordinance Definition of Accessory Use

Honolulu's Land Use Ordinance (L.U.O.) adopted the prior Comprehensive Zoning Code (C.Z.C.) definition of "accessory use."[99] Article Nine of the L.U.O. defines accessory uses as those meeting the following conditions:

> A. It is a use which is conducted on the same zoning lot as the principal use to which it is related whether located within the same building or an accessory building or structure, or as an accessory use of land, or which is conducted on a contiguous lot in the same ownership;
> B. Is *clearly incidental to* and *customarily found in connection with* the principal use; and
> C. Is operated and maintained *substantially for the benefit or convenience of* the owners, occupants, employees, customers, or visitors of the zoning lot with the principal use.[100]

The L.U.O. provides neither a separate definition nor separate examples of "accessory building" and appears to incorporate the concept within the broader category of "accessory use." Therefore, ohana dwellings will be analyzed as accessory uses. The L.U.O. lists special accessory uses authorized in residential districts, including: antennas; guest houses; home occupations; kennels; and roomers.[101] The County Council amended neither article 9 nor the accessory use

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[98] *Id.* at 543.

[99] COMPREHENSIVE ZONING CODE, *supra* note 7, at § 21-1.10.

[100] LAND USE ORDINANCE, *supra* note 9, at § 21A-9(A) (emphasis added).

[101] *Id.* at §§ 3.140 to .140-2, 5.40-2.

list to include ohana dwellings. The council may have simply interpreted the term "accessory" broadly enough to include nontraditional uses.

B. Judicial Interpretations of Accessory Use

Hawaii courts have not published any opinions on ohana zoning issues.[102] No cases exist challenging Honolulu's ohana ordinance or its subsequent amendments. Thus, it is necessary to supplement Hawaii's decisions with judicial interpretations from other jurisdictions when discussing whether the characterization of ohana dwellings as "accessory" is consistent with statutory and common law.

1. Hawaii Intermediate Court of Appeal

The Hawaii Intermediate Court of Appeal (I.C.A.) applied the definition of accessory use in *City of Honolulu v. Ambler*[103] and *Foster Village Community Ass'n v. Hess.*[104] The C.Z.C. defined accessory uses as: (1) clearly incidental to and customarily found in connection with the principal use; and (2) operated and maintained substantially for the benefit or convenience of the owners, occupants, employers.[105]

In *City and County of Honolulu v. Ambler*, the I.C.A. emphasized the second part of the definition and held the dispositive issue was whether the accessory use directly benefitted and serviced the principal use.[106] The court prohibited a portable gift shop located on land leased from the Cinerama Reef Towers Hotel as an accessory use because it served the public as a whole, and failed to operate solely for the substantial convenience of the hotel's owners, employees, or customers.[107] The I.C.A. did not consider whether portable gift shops were "clearly incidental to or customarily found in connection with" hotels.

Ohana dwellings appear inconsistent with the I.C.A.'s application of the term "accessory use" which required that the operation of

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[102] A decision concerning ohana zoning and restrictive covenant conflicts remains a memorandum opinion that left the issue unresolved. Doran v. Ramones, Civil No. 86-0177 (Haw. Sept. 29, 1989).

[103] City and County of Honolulu v. Ambler, 1 Haw. App. 589, 623 P.2d 92 (1981).

[104] Foster Village Community Ass'n v. Hess, 4 Haw. App. 463, 667 P.2d 850 (1983).

[105] COMPREHENSIVE ZONING CODE, *supra* note 7, at § 21-1.10.

[106] *Ambler*, 1 Haw. App. at 590, 594, 623 P.2d at 92, 94.

[107] *Id.* at 594, 623 P.2d at 94.

accessory uses benefit and service primary uses. Independent ohana units housing unrelated families are not operated solely for the convenience of the principal single-family dwelling. This is especially true when ohana dwellings are sold.

In *Foster Village Community Ass'n v. Hess*, the I.C.A. focused on the first part of the "accessory" definition and held that the dispositive issue was whether the proposed accessory use was "clearly incidental to and customarily found in connection with" the residential use.[108] The I.C.A. applied the accessory use definition flexibly and held that a pet pig was a permitted accessory use in a residential neighborhood.[109] The zoning code permitted pets as accessory uses, but did not define "pets." The trial court affirmed the Department of Land Utilization's determination that "pets" were not defined simply by animal type.[110] The community association appealed the decision arguing that the pig was livestock, not an accessory use pet. The I.C.A. affirmed the trial court's findings and concluded the pet classification included nontraditional pets, such as pigs. The I.C.A. stated the resolution of zoning regulation ambiguities should not further derogate common law property rights.[111] The court held the plaintiff's claim limited homeowners' rights to keep unusual animals as pets, even if such animals were not customarily kept as pets in residential neighborhoods.[112] This extension of the zoning ordinance curtailed a property owner's right to use the land in any legal manner.[113]

Arguably, ohana dwellings are consistent with this broader application of the accessory use definition. The court chose an interpretation which favored expansive freedom of personal land use because zoning regulations limited common law property rights. The I.C.A. defined "customarily" flexibly enough to include novel uses. Thus, the "customarily" requirement arguably does not prohibit ohana dwellings just because they are not prevalent in the owner's neighborhood.

2. Interpretations by courts in other jurisdictions

The characterization of ohana dwellings as accessory is inconsistent with the statutory and common law of other jurisdictions in three ways.

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[108] *Foster Village Community Ass'n*, 4 Haw. App. at 463, 470-71, 667 P.2d at 850, 855.

[109] *Id.* at 469-72, 667 P.2d at 854-55.

[110] *Id.* at 467, 667 P.2d at 853.

[111] *Id.* at 469-70, 667 P.2d at 854.

[112] *Id.* at 470-71, 667 P.2d at 855.

[113] *Id.* at 471, 667 P.2d at 855.

First, ohana dwellings, as recent legislative creations, are inconsistent with case law requiring that accessory uses be traditionally associated with, dependent on and incidental to principal uses. Second, ohana dwellings are inconsistent with case law prohibiting accessory uses which impair neighborhood character. Third, ohana dwellings are inconsistent with case law prohibiting second residential dwellings as accessory uses.

a. Case law characterizing accessory uses as traditionally associated with or dependent and incidental to principal uses

In applying zoning code requirements that accessory uses be "customarily" associated with principal uses, courts in other jurisdictions interpreted the term "customarily" more narrowly than did the I.C.A. in *Foster Village Community Ass'n v. Hess*. Courts have frequently characterized accessory uses as traditionally associated with and dependent and incidental to principal uses. The California Third District Court of Appeals held the use of a home as real estate office, though incidental to its principal residential use, was inconsistent with the zoning code definition of accessory as "usually, habitually, according to the customs, general practice or usual order of things, regularly."[114] Similarly, the Connecticut Supreme Court prohibited raising livestock in a residential neighborhood as an accessory use because such practice had not "commonly, habitually and by long practice been established as reasonably associated with the primary use."[115]

The Supreme Court of Connecticut also stated accessory uses were limited to those that were both "minor in significance" and were attendant to or concomitant to principal use.[116] Otherwise, the court feared the accessory use classification would include all non-primary uses. The Georgia[117] and New Jersey[118] Supreme Courts have also

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[114] Jones v. Robertson, 79 Cal. App. 2d 813, 818, 180 P.2d 929, 932 (Cal. App. 3d 1947).

[115] Lawrence v. Zoning Bd. of Appeals, 158 Conn. 509, 512, 264 A.2d 552, 554 (1969).

[116] *Id.*

[117] The court declined to hold a miniature golf course was an accessory use to a principal adjacent motel because its use was independent of the motel's use. Guhl v. Par-3 Golf Club, Inc., 238 Ga. 43, 46, 231 S.E.2d 55, 57 (1956).

[118] The court permitted uses ancillary to principal ones, but prohibited an off-premises advertising sign as an accessory use because of its independent business use. United Advertising Corp. v. Metuchen, 42 N.J. 1, 6-7, 198 A.2d 447, 450 (1964).

characterized accessory uses as dependent on or related to principal uses and have prohibited independent, separate uses as accessory.

The characterization of ohana dwellings as accessory is inconsistent with case law which defines "customarily" in relation to accessory uses as habitually, regularly, or through long practice associated with principal uses in single-family neighborhoods. The State and counties enacted ohana legislation less than ten years ago. Thus, ohana zoning is a recent development not commonly identified with primary residential uses. Although the concept of extended families has historical roots, property owners seldom built separate and independent homes on their lots for extended family use.[119]

The characterization of ohana dwellings as accessory is also inconsistent with the case law because they are not attendant to or concomitant to single-family residences. Unlike guest cottages which lack cooking facilities, ohana dwellings are self-contained and do not depend on the principal residence. Ohana units are independent uses, especially when rented or sold as investment ventures to unrelated individuals.

b. Case law considering neighborhood impact of accessory uses

At least two courts have considered the impact of proposed accessory uses on neighborhood character. In *United Advertising Corp. v. Metuchen* the Supreme Court of New Jersey considered the aesthetic impact of billboards on a community's residential character.[120] The court agreed that plaintiff's 300 square foot billboards neither prevented air flow nor produced objectionable noise, but prohibited them on aesthetic grounds.[121] The aesthetic impact of billboards influenced property value and neighboring owners' enjoyment of their property. The court stated the recognition of different residential districts with varying lot dimensions and setback restrictions reflected the proposition that aesthetics contribute to general welfare.[122]

In *Borough of Northvale v. Blundo* the Bergen County Court prohibited the parking of a distinctly commercial truck in a residential neighborhood because of its impact on residential character.[123] The court stated

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[119] *See* Sullivan v. Anglo-American Inv. Trust, 89 N.H. 112, 193 A. 225 (1937).

[120] United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

[121] *Id.* at 4-6, 198 A.2d 449-51.

[122] *Id.* at 6, 198 A.2d at 449.

[123] Borough of Northvale v. Blundo, 81 N.J. Super. 201, 203, 195 A.2d 221, 223 *aff'd*, 85 N.J. Super. 56, 203 A.2d 721 (Bergen County Ct. 1965).

accessory uses were not without limitation. Accessory uses reached one such limitation when they impaired neighborhood character.[124]

The cases above reflect judicial consideration of aesthetic factors in evaluating accessory uses. Otherwise appropriate accessory uses may be prohibited because of their impact on neighborhood character. Arguably, ohana dwellings as second homes on a single lot have far greater aesthetic impact on neighborhood character than do billboards and commercial vehicles.[125] Ohana dwellings are inconsistent with aesthetic zoning because they decrease open spaces, increase density and noise levels, and create on-street parking shortages.[126] Some Honolulu communities perceive ohana dwellings as detracting from the quality of life in their neighborhoods.[127]

c. Case law prohibiting second independent dwellings as accessory uses

Courts in four jurisdictions have refused to characterize additional independent dwellings as accessory uses to principal residences. The Superior Court of Pennsylvania in *Deane v. Board of Adjustment of Zoning Board Borough of Edgeworth* refused to characterize a garage altered for rental purposes as an accessory use.[128] The court determined the proposed use of the garage was not a customary incidental accessory use to the single-family residential dwelling permitted by the zoning code.[129]

The Supreme Court of New Hampshire in *Sullivan v. Anglo-American Investment Trust* refused to characterize the alteration of a single family dwelling into a duplex as an accessory use.[130] The pertinent zoning ordinance permitted the use of a single-family detached dwelling for any customarily incidental accessory use.[131] The defendant claimed he remodeled the home for rent free occupancy by his relatives. While

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[124] *Id.* at 60, 195 A.2d at 223.

[125] An alternative argument exists that ohana units, as dwellings, have less impact on neighborhood character than do non-dwelling uses such as billboards and commercial vehicles.

[126] JAWOROWSKI, *supra* note 4, at 8.

[127] The Kaimuki, Manoa, and Kailua communities expressed their frustration over ohana zoning and its associated problems. JAWOROWSKI, *supra* note 4, at 25.

[128] Deane v. Board of Adjustment of Zoning Bd. Borough of Edgeworth, 172 Pa. Super. 502, 94 A.2d 112 (1953).

[129] *Id.* at 509, 94 A.2d at 115.

[130] Sullivan v. Anglo-American Inv. Trust, 89 N.H. 112, 193 A. 225 (1937).

[131] *Id.* at 116, 193 A.2d at 227.

the court stated occupation by domestic staff might qualify as an accessory use, it held the defendant's proposed use was not customarily incidental to the principal residence's occupation because home owners rarely provide relatives with separately heated and wired apartments.[132]

In *Trent v. City of Pittsburgh* the Kansas Court of Appeals declined to characterize the residential use of a second building on a single-family residential lot as accessory.[133] While the former use of the structure as a servants quarters was held incidental to the primary property use, its rental to college students was held to be an independent, primary use. As such, it was not necessary to or dependant on the principal dwelling.[134]

The Supreme Judicial Court of Massachusetts held accessory use provisions excluded second dwellings.[135] In *Town of Maynard v. Tomyl* the defendant applied for a building permit to expand the smaller of two dwellings located on his 8,000 square foot lot residential lot.[136] The permit was denied because a zoning by-law required a minimum of 7,000 square feet for each residence. The court rebutted the defendant's claim that the smaller dwelling was a permitted accessory building. The zoning code permitted accessory uses which were customarily incidental to permitted uses and did not alter the residential character of the neighborhood.[137] The court stated that it was not accessory because its kitchen and bathroom facilities enabled occupancy independent of any other structure.[138] Thus, the residential use of the second dwelling was a primary use. The court also held that the use of both dwellings by members of the same family was inconsequential.[139]

The characterization of ohana dwellings as accessory is inconsistent with decisions in which courts failed to include independent second dwellings in the accessory use classification. Under *Town of Maynard v. Tomyl* ohana dwellings are primary uses and rent-free use by family members is not dispositive. Guest houses and servants quarters are accessory uses because such structures are customarily appurtenant to

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[132] *Id.*

[133] Trent v. City of Pittsburgh, 5 Kan. App. 2d 543, 619 P.2d 1171 (1980).

[134] *Id.* at 545-46, 619 P.2d at 1173-74.

[135] Town of Maynard v. Tomyl, 347 Mass. 397, 198 N.E.2d 291 (1964).

[136] *Id.* at 398, 198 N.E.2d at 292.

[137] *Id.* at 399, 198 N.E.2d at 293 n.3.

[138] *Id.* at 398-99, 198 N.E.2d at 292-93.

[139] *Id.* at 399, 193 N.E.2d at 293.

and dependent on the main buildings.[140] Ohana dwellings used as separate residences with adequate kitchen and bathroom facilities have no dependent relationship with principal residences.

The characterization of ohana dwellings as accessory thus appears inconsistent with statutory and common law. The L.U.O. defines accessory uses as those "customarily found in connection with the principal use."[141] Ohana dwellings are inconsistent with zoning code definitions and case law applications of the "customarily" requirement. The L.U.O. also defines accessory uses as "clearly incidental to" principal uses.[142] Ohana dwellings are independent, self-contained residences and are thus inconsistent with common law interpretations of the necessary incidental relationship between accessory uses and their principal uses. As ohana dwellings arguably negatively affect neighborhood quality, they are inconsistent with common law prohibiting accessory uses which impair neighborhood character. Finally, ohana dwellings are inconsistent with common law prohibiting independent second dwellings as accessory uses.

At least one court, however, has permitted the occupancy of an accessory building by family members in a district zoned for single-family residential use. In *Farr v. Board of Adjustment of City of Rocky Mount* the North Carolina Supreme Court determined a zoning ordinance restricting property to single-family residential uses did not prohibit members of the same family from occupying an accessory building on the same lot.[143] The Zoning Board of Adjustment prohibited such occupancy, focusing on a code provision which stated an accessory use in a residential district did not include the residential use of an accessory building except by domestic employees of the principal residence.[144] The supreme court failed to characterize the residential use of a detached building by defendant's son and family as accessory use

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[140] Trent v. City of Pittsburgh, 5 Kan. App. 2d 543, 619 P.2d 1171 (1980) (small residence used as living quarters for servants is accessory because it is incidental to the use of the main purpose). *See* Sullivan v. Anglo-American Inv. Trust, 89 N.H. 112, 193 A. 225 (1937) (domestic help occupancy may be an accessory use because it is customarily incidental to the primary single-family residential use). *See also* LAND USE ORDINANCE, *supra* note 9, at § 9, Table 7-A (guest houses of 500 square feet or less permitted as special accessory use in R-10 and R-20 residential districts).

[141] LAND USE ORDINANCE, *supra* note 9, at § 21A-9(A).

[142] *Id.*

[143] Farr v. Board of Adjustment of Rocky Mount, 318 N.C. 493, 349 S.E.2d 576 (1986).

[144] *Id.* at 495, 349 N.E.2d at 578.

because such occupancy was not a use customarily associated with or incidental to the principal single-family use.[145] The court stated the use by the defendant's son was a use-by-right since all were part of a single family.[146] As the occupancy of the accessory building was not an accessory use, the domestic employee residential restrictions did not apply. The court further stated zoning ordinances were in derogation of private property rights and, as such, must be liberally construed in favor of freedom of use.[147]

Arguably, ohana dwellings occupied by family members would be permitted as accessory buildings under *Farr*. Thus, the Legislature may be able to avoid the apparent inconsistency with case law by characterizing ohana dwellings as accessory buildings and defining accessory buildings broadly enough to include non-family member occupancy. As previously stated, the Honolulu L.U.O. presently contains no definition for the term "accessory building." Also, both *Hess* and *Farr* advocate broadly construing zoning ordinances so not to further derogate property rights. The Legislature may have intentionally permitted owners freedom in the use of their property, rather than restricting them to only traditional uses. Yet, it is odd the term "accessory" was chosen to accomplish this.

C. A More Flexible Application of Accessory Uses

Case law from other jurisdictions narrowly characterized accessory uses. A more flexible approach to accessory use permits ohana dwellings within the classification. Arguably, the Hawaii Intermediate Court of Appeals in *Hess* characterizes accessory uses flexibly enough[148] to include novel land uses such as ohana dwellings. The Honolulu City Council, in characterizing ohana dwellings as accessory, appears to have interpreted the term broadly enough to include independent dwellings. A more flexible application of the "customarily" requirement of accessory uses broadens the classification to include nontraditional property uses. The I.C.A. in *Hess* adopted this approach in permitting a pet pig as an accessory use.

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[145] *Id.* at 496, 349 S.E.2d at 578.

[146] *Id.* at 497, 349 S.E.2d at 578.

[147] *Id.* at 497, 349 S.E.2d at 579.

[148] *See* Foster Village Community Ass'n v. Hess, 4 Haw. App. 463, 667 P.2d 850 (1983).

Zoning stagnation occurs if the "customarily" requirement limits accessory uses solely to traditionally accepted uses.[149] Such a literal definition is too rigid to be workable in a changing society.[150] If "customarily" refers only to uses already common in the community, courts will not permit innovative land uses such as ohana dwellings. A more flexible approach accommodates uses which, though uncommon, do not diminish the value of or enjoyment of neighboring lots.[151] One commentator has suggested that the determination of permitted uses requires the consideration of three factors: the size of the geographic area surveyed, the time frame of the customary determination, and the prevalence of the use.[152]

The customary determination depends on the size of the area surveyed for the prevalence of an accessory use. A narrow approach confines the examination to small areas such as individual neighborhoods or counties. Courts adopting the more flexible approach examine broader geographic areas, thus including diverse land uses.[153]

A second factor in the determination of what is customary depends on the time frame of the customary determination.[154] For example, stables were once common accessory uses in residential areas, but are now less acceptable. If the determination depends on what was customary at the time of the zoning ordinance's enactment, courts may permit currently offensive uses solely because such uses were innocuous years ago.[155] Also, courts may deny currently acceptable uses because such uses were nonexistent at the ordinance's adoption.[156] A flexible approach considers the current acceptability of the proposed use and the present needs of the community. Communities avoid zoning stagnation because flexibility in time determination enables accessory uses to change with current views.

A final factor in evaluating proposed accessory uses is the actual prevalence of the use.[157] The degree of prevalence necessary is not clear. For example, in *Newark v. Daly* the New Jersey Court of Appeals

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[149] *Customary Requirement*, *supra* note 96, at 546.
[150] *Id.* at 546 n.36.
[151] *Id.* at 546.
[152] *Id.* at 547.
[153] *Id.* at 550.
[154] *Id.* at 553.
[155] *Id.* at 554.
[156] *Id.*
[157] *Id.*

permitted a milk vending machine in an apartment house as an accessory use, though apartment buildings seldom contained such machines.[158] While not customarily associated with apartment buildings, the court allowed the use because it was not harmful to the neighborhood or a threat to the zoning scheme.[159] A flexible approach accommodates present community needs by allowing innovative and novel uses, even if they are not prevalent.

Thus, courts applying the flexible approach could permit ohana dwellings as accessory uses under existing common law. Arguably, *Newark v. Daly* supports ohana zoning. The State Legislature, in enacting the ohana zoning statute, implicitly asserts that ohana zoning is neither harmful nor a threat to state or county zoning schemes. At the county level, the City Council tries to prevent neighborhood harm by designating ohana eligible areas based on facility adequacy and removing from eligibility those neighborhoods with inadequate infrastructure.[160]

IV. Is the Perpetuation of Nonconforming Ohana Dwellings Consistent with Zoning Goals?

A. Hawaii Case and Statutory Law Regarding Nonconforming Buildings

Changes in zoning regulations create nonconforming buildings. Nonconforming buildings are prior legal structures which no longer comply with current zoning ordinances.[161] Hawaii case and statutory law permit nonconforming buildings, but regulate their perpetuation.

In *City and County of Honolulu v. Cavness* the Hawaii Supreme Court prohibited property owners from using extensive repairs to perpetuate nonconforming buildings.[162] The court, in deciding whether a severely termite damaged building should be repaired or demolished, stated that subsequent building code restrictions failed to make illegal per se existing buildings. However, the court held demolition was appropriate

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[158] Newark v. Daly, 85 N.J. Super. 555, 205 A.2d 459 (N.J. Super Ct. App. Div. 1964), *aff'd per curiam*, 46 N.J. 48, 214 A.2d 410 (1965).

[159] *Id.* at 558-59, 205 A.2d at 461-63.

[160] Honolulu, Haw., Ordinance 89-155 § 21A-6.20-2 (Dec. 28. 1989).

[161] *See* Sussna, *Termination of Nonconforming Land Uses*, Inst. Plan. Zoning & Eminent Domain, Winter 1989, 5-2, 5-3.

[162] City and County of Honolulu v. Cavness, 45 Haw. 232, 364 P.2d 646 (1961).

when the building required repairs which amounted to its "substantial reconstruction."[163]

Statutorily, Hawaii permits the continuance of nonconforming buildings, but prohibits their expansion, replacement, and reconstruction.[164] Similar provisions exist in the Honolulu L.U.O.[165] In addition, the L.U.O. contains sections regulating nonconforming dwellings. As ohana units are dwellings, this section applies to them. The section allows enlargement, alteration, repair, or extension of nonconforming dwellings provided the changes comply with all other L.U.O. provisions.[166] In other words, changes made to nonconforming dwellings must move them toward zoning code compliance. The L.U.O. requires owners of nonconforming dwellings, destroyed to more than 50 percent of their replacement costs, to rebuild in conformity with current land use and development regulations.[167] The provision is consistent with *Cavness* which prohibited the perpetuation of nonconforming structures through substantial repairs. The above L.U.O. provisions make no distinctions between principal and ohana dwellings. Prior to the 1989 amendment, L.U.O. restrictions applied to ohana dwellings and prohibited owners from rebuilding nonconforming ohana dwellings.[168] The L.U.O. required reconstructed ohana dwellings to conform to the maximum size limitations established in the 1988 ohana amendment.

B. Current Ordinance Provision Excluding Nonconforming Ohana Dwellings from Reconstruction Size Requirements

In 1989 the City Council amended Honolulu's ohana zoning ordinance in response to controversies created by the 1988 amendment. The 1988 ohana amendment set maximum floor area sizes for ohana dwellings based on their corresponding zoning districts. The floor area sizes ranged from 700 square feet in smaller districts (R-3.5 to R-7.5) to 1000 square feet in R-20 districts. As a result, existing ohana dwellings which exceeded the size limitation became nonconforming dwellings.[169] The L.U.O. required owners of such nonconforming

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[163] *Id.* at 236, 364 P.2d at 650.
[164] HAW. REV. STAT. § 205-8 (1985).
[165] LAND USE ORDINANCE, *supra* note 9, at § 21A-3.120(B).
[166] *Id.* at § 21A-3.120(D)(1).
[167] *Id.* at § 21A-3.120(D)(2).
[168] *Id.* at § 21A-3.120(D).
[169] ZONING COMM. REP. No. 704, *supra* note 89, at 2.

dwellings to rebuild destroyed dwellings in conformity with current zoning regulations, including the floor area restrictions.

The City Council received testimony by owners of nonconforming dwellings relating to hardships created by this limitation. Owners stated they were unable to secure home improvement loans based on the full value of their dwellings or obtain insurance for full replacement values.[170] Owners claimed L.U.O. repair, enlargement, and reconstruction limitations reduced their homes to second class dwellings.[171]

The City Council balanced the above hardships against zoning principals discouraging nonconformity and encouraging compliance with the City's general zoning scheme.[172] The City Council, in Ordinance No. 89-155, excepted nonconforming ohana dwellings from reconstruction size limitations. The 1989 amendment permits ohana owners to rebuild to original floor areas nonconforming dwellings destroyed by accidental means.[173] Section 6.20-1 states:

> A. When an "Ohana" accessory dwelling unit which exceeds the floor area limitations set forth in Section 6.20 is destroyed to the extent of more than 50 percent of the "Ohana" unit's replacement value, it may be rebuilt to its original size provided it meets the following conditions:
>
> 1. Rebuilding is necessitated by the destruction of the original "Ohana" dwelling unit by accidental means, such as fire, flood, hurricane, tsunami, earth movement, or other calamity.
>
> 2. It can be demonstrated that the "Ohana" dwelling unit was legally constructed.
>
> 3. It can be demonstrated that the replacement "Ohana" dwelling unit will meet all current development standards, including height limits, required yards, and parking.
>
> B. Any "Ohana" accessory dwelling unit covered by paragraph A above shall not be expanded to increase the floor area beyond the size legally approved prior to its destruction.[174]

The amendment's provision perpetuating nonconforming ohana dwellings is inconsistent with three zoning goals: the attainment of controlled state and county development; the creation of zoning district

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[170] *Testimony on Proposed Amendment to Ohana Law*, CITY COUNCIL, 1989 CITY & COUNTY OF HONOLULU 3-4 (testimony of Ohana Homeowners Network, Oct. 31, 1989) [hereinafter *Testimony*].

[171] *Id.* at 4.

[172] ZONING COMM. REP. No. 704, *supra* note 89, at 2.

[173] Honolulu, Haw., Ordinance 89-155 § 21A-6.20-1(A) (Dec. 28, 1989).

[174] *Id.* at § 21A-6.20-1(A)-(B).

homogeneity; and the termination of nonconforming dwellings. The perpetuation of such dwellings is also inconsistent with the policy underlying the concept of nonconformity. First, one major goal of zoning is the regulation of state and county growth.[175] This goal implies restriction, rather than encouragement of exceptions to local zoning regulations.[176] Nonconforming buildings are inconsistent with this zoning goal because they prevent the attainment of comprehensive county and state-wide development plans.[177]

Second, perpetuating nonconforming ohana dwellings is inconsistent with the zoning goal of district homogeneity because floor area maximums may limit one dwelling's size while not restricting neighboring nonconforming dwellings. The amendment twice limits property owners building ohana dwellings subsequent to its passage. First, initial dwellings must conform with the amendment's maximum size limitations for that zoning district.[178] Second, maximum floor size limitations control the reconstruction of these dwellings. The size restrictions very seldom apply to nonconforming dwellings.[179]

The amendment provisions also affect zoning homogeneity by creating different reconstruction standards for nonconforming principal dwellings and nonconforming ohana dwellings. The L.U.O. requires owners of nonconforming principal dwellings to comply with all current building regulations when reconstructing destroyed homes. The amendment exempts owners of nonconforming ohana dwellings from size compliance when reconstructing destroyed dwellings. The City Council considered the problems owners of nonconforming ohana dwellings encountered in obtaining insurance and home loans. Owners of other nonconforming dwellings encounter similar problems, but must rebuild conforming dwellings. Inconsistency occurs because zoning conformity restricts reconstruction of owners' nonconforming principal dwellings, but not the reconstruction of their nonconforming ohana dwellings.

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[175] Parks v. Board of County Comm'rs of Tillamook Cty, 501 P.2d 85, 97 (Or. App. 1972).

[176] A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 62-1 (3rd ed. 1974).

[177] Eklund v. Clackamas County, 583 P.2d 567, 570 (Or. App. 1978); Parks v. Board of County Comm'rs of Tillamook Cty, 501 P.2d 85, 95 (Or. App. 1972).

[178] The maximum floor space sizes for ohana dwellings range from 700 square feet in R-3.5, R-5, and R-7.5 districts to 900 square feet in R-10 districts and 1,000 square feet in R-20 districts. Honolulu, Haw., Ordinance 89-155 § 21A-6.20-1(C).

[179] The amendment exempts only nonconforming dwellings destroyed by accidental means. *Id.* at § 21A-6.20-1A(1). Thus, maximum floor area restrictions apply to intentionally destroyed nonconforming dwellings.

Third, perpetuating nonconforming ohana dwellings is inconsistent with zoning goals advocating termination of nonconforming structures. Zoning principals advocate terminating nonconforming uses and structures because they seldom disappear naturally.[180] Nonconforming uses and structures thrive because their unique characteristics enable them to occupy monopolistic positions in communities.[181] Larger ohana dwellings command higher rental and sale prices. Owners of nonconforming dwellings enjoy these benefits indefinitely. While most zoning codes, including Honolulu's L.U.O., gradually eliminate nonconforming dwellings through reconstruction and expansion restrictions[182], the 1989 ordinance provision perpetuates them indefinitely.

Finally, perpetuating nonconforming ohana dwellings is inconsistent with the zoning policy underlying the concept of nonconformity. The concept of nonconforming buildings protects owners' existing property investments through zoning code exemptions.[183] The owner's investment, and thus the justification for zoning code exemption, disappears with the building's destruction or substantial damage.[184] The owner then occupies the same position as an owner of unimproved property, and current zoning and building regulations apply.[185] Owners of nonconforming ohana dwellings should lose their zoning code exemption with destruction of or substantial damage to their dwellings.

The City Council revised the ohana ordinance to remedy hardships encountered by owners of ohana dwellings made nonconforming by the provisions of the 1988 amendment. In doing so they indefinitely perpetuated a class of nonconforming dwellings which appears inconsistent with zoning policy and goals.

V. Has the Sale of Ohana Dwellings Been Consistent with Legislative Goals?

Ohana zoning law gives property owners the right to construct second dwellings on their residential lots. It does not give the ohana dwelling

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[180] City of Univ. Park v. Benners, 485 S.W.2d 773, 778 (Tex. 1972), *appeal dismissed*, 411 U.S. 901 (1973).

[181] *Id.*

[182] Aron, *Eliminating Nonconforming Uses By Amortization*, 55 Fla. B. J. 339 (1981).

[183] City and County of Denver v. Board of Adjustment of City and County of Denver, 177 Colo. Ct. App. 277, 285, 505 P.2d 44, 47 (1972).

[184] *Id.*

[185] *Id.*

a property interest in the land.[186] For example, financial institutions generally consider ohana dwellings as extensions of principal dwellings and use both dwellings and the underlying property as loan security.[187] Property owners may use one of two procedures to legally separate their property. First, owners may subdivide land under chapter 22 of the Revised Ordinances of Honolulu.[188] So far, this method remains unused in Honolulu.[189] Second, owners may sell ohana dwellings by converting their property interests to condominium forms of ownership under the Condominium Property Regime (C.P.R.) law.[190] Property owners use this method to sell their ohana dwellings.[191]

A. Amendment's Provision Excluding Nondesignated Ohana Dwellings from Size Conformity

In 1989, the City Council revised the ohana ordinance in response to problems caused by the prior amendment's characterization of ohana dwellings as accessory and establishment of maximum floor area sizes.[192] Prior to the 1988 amendment's passage, Honolulu's ohana ordinance permitted the construction of two dwellings on one residentially zoned lot provided the property owner met particular infrastructure requirements.[193] The ordinance drew no distinctions between the two dwellings and imposed no size restrictions. Both dwellings could be of the same

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[186] JAWOROWSKI, *supra* note 4, at 27.

[187] *Id.*

[188] HONOLULU, HAW., REV. ORDINANCES § 22 (1983 & Supp. 1987).

[189] JAWOROWSKI, *supra* note 4, at 28.

[190] HAW. REV. STAT. § 514A-11 (1985). Under the Condominium Property Regime, "condominium" refers to a type of ownership in which individual units with common elements are situated on property within a condominium property regime. Owners of land containing an ohana unit and a principal dwelling may sell the unit under the Condominium Property Regime by complying with the statute's requirements. The landowner and the prospective buyer expressly declare their intent to submit the property to the statute's restrictions and regulations. The owner then executes and records a master deed along with a declaration of his or her intent to submit to the property regime. The declaration must be in conformity with section 514A-11 which requires the declaration to state descriptions of the land, buildings, common elements, limited common elements, percentage of undivided interest in the common elements for each apartment, and resale information. Owners must also meet parking stall and mailbox requirements. *Id.*

[191] *Testimony*, *supra* note 170, at 2.

[192] ZONING COMM. REP. NO. 704, *supra* note 89, at 2-3.

[193] LAND USE ORDINANCE, *supra* note 9, at § 21A-6.20.

size, and each enjoyed principal dwelling status.[194] As principal dwellings, the same rights and benefits applied to each.

Property owners constructed over 1800 ohana dwellings prior to the passage of the 1988 amendment.[195] Some property owners submitted both dwellings to the C.P.R. and sold the "ohana dwelling." Thus, two different families held the legal ownership of two dwellings located on one residential lot.[196] Homeowners bought the "ohana dwellings" with the understanding that the same reconstruction and enlargement rights applied to their dwellings as applied to the other dwelling on the lot.[197]

The 1988 amendment's characterization of ohana dwellings as "accessory to the principle single-family residence" and establishment of maximum floor area sizes[198] created two problems for owners of dwellings sold under the C.P.R. First, the amendment made nonconforming all existing ohana dwellings which exceeded the floor area sizes. As discussed in the previous section on nonconforming dwellings, nonconforming status in turn created additional hardships on ohana homeowners. As the amendment restrictions applied only to the dwelling designated as ohana, the owner of the other dwelling on the lot experienced none of these hardships.

Second, the 1988 amendment created problems for owners of dwellings designated as neither principal nor ohana. The sale of nondesignated dwellings caused equity problems between the owners of the dwellings on the lot: which dwelling was principal and which was "accessory"?[199] The L.U.O. permitted the expansion of principal dwellings, while the 1988 amendment restricted the size of and reconstruction of accessory ohana dwellings.

In 1989 the City Council amended the ohana ordinance to except from maximum floor size conformity owners of nondesignated dwellings owned under the Condominium Property Regime law. The amendment accomplished this by treating both nondesignated dwellings as principal dwellings:

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[194] *Testimony*, *supra* note 170, at 1-2.

[195] *Position Paper on Proposed Ohana Accessory Dwelling Unit Amendment*, CITY COUNCIL, 1989 CITY & COUNTY OF HONOLULU 2 (testimony of Ohana Homeowners Network).

[196] *Testimony*, *supra* note 170, at 2.

[197] *Id.*

[198] LAND USE ORDINANCE, *supra* note 9, at § 21A-6.20(D).

[199] ZONING COMM. REP. No. 704, *supra* note 89, at 3.

> C. Notwithstanding Section 21A-6.20 and Section 21A-6.20-1.B., any Ohana dwelling unit, owned under the provisions of Chapter 514-A, Hawaii Revised Statutes, for which the Declaration of Condominium Property Regime, or Declaration of Horizontal Property Regime was filed with the Bureau of Conveyances of the State of Hawaii on or before December 31, 1988, for which a building permit was issued prior to April 28, 1988, and which has not been determined by the Building Superintendent to be a principal dwelling under the rules adopted by the Building Department and the Department of Land Utilization, shall be deemed, for the purposes of this section, a principal dwelling, subject to the following:
>
> 1. The use of such dwelling units shall be restricted to residential use only;
>
> 2. The size of such units may be expanded, up to a maximum expansion not to exceed the ratio of common interest assigned to that unit (under the applicable Condominium Property Regime documents) to the total common interest of all units on the same zoning lot (under the applicable Condominium Property Regime documents), multiplied by the differences between the maximum building area for such zoning lot, as specified in the development standards for the applicable zoning district and the existing built area. Any such expansion shall conform to any setback requirements and other development standards for the applicable zoning district; and
>
> 3. In the event the maximum building area has already been reached, or exceeded, no additional expansion shall be permitted.[200]

Section 21A-6.20-1(C) of the 1989 ordinance alleviates problems created by the sale of ohana dwellings under the C.P.R. By doing so, the City Council indicates its acceptance of and approval of the sale of ohana dwellings. Section 21A-6.20-1(A) alleviates hardships encountered by owners of nonconforming ohana dwellings. This, in turn, encourages their sale because maximum floor area restrictions do not restrict nonconforming dwellings. As discussed in preceding sections, owners of nonconforming ohana dwellings and nondesignated dwellings sold under the C.P.R. enjoy benefits denied owners of other ohana dwellings. By alleviating the problems associated with nonconformity and maximum size restrictions, the City Council has made the ownership of ohana dwellings attractive. Thus, property owners are readily able to sell the ohana dwellings under the Condominium Property Regime. The issue of whether the sale of ohana dwellings is inconsistent with the State's legislative intent is far from settled.

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[200] Honolulu, Haw., Ordinance 89-155 § 21A-6.20-1(C) (Dec. 28, 1989).

B. *Non-Affordable Ohana Dwellings*

A review of the House and Senate Conference Committee Reports indicates the primary legislative goal was to increase the supply of affordable housing.[201] Act 229, establishing ohana zoning, stated its purpose was "to assist families to purchase affordable individual living quarters."[202]

Thus, providing families with affordable housing was a specific legislative goal.[203] Arguably, the legislature intended ohana dwellings provide affordable housing through low cost rentals and sales.[204] Free or low cost rentals enable families to save money for down payments on homes of their own.[205] The sale of highly priced ohana dwellings is inconsistent with increasing affordable housing for low and middle income families.[206] Individuals with money and land resources to build ohana homes often live in upper-class neighborhoods and build solely for speculative purposes. In Manoa, ohana dwellings have been sold to non-relatives for over $250,000.[207] Similarly high-priced ohana dwellings can be expected in other upscale ohana-approved neighborhoods such as Kahala.[208] Property owners target these ohana dwellings at the segment of the population already capable of affording homes. Many families cannot afford ohana dwellings selling within the $200,000 to $300,000 range.[209] The sale of highly priced ohana dwellings fails to serve the legislative goal and deprives lower income individuals of home ownership.

The purchase or construction of ohana dwellings for investment purposes is inconsistent with providing affordable housing. Such ohana dwellings are strictly investment ventures because owners rent them for maximum profit. Rents reflect what the market will bear, not the owner's desire to provide affordable housing. The sale of ohana dwellings for use as highly-priced rentals is inconsistent with the legislative

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[201] CONF. COMM. REP. No. 41, 1981 HAW. LEG. SESS., SENATE J. 916; CONF. COMM. REP. No. 42, 1981 HAW. LEG. SESS., HOUSE J. 923.

[202] Act of June 22, 1981, No. 229, § 1, 1981 Haw. Sess. Laws 440-42.

[203] *Id.*

[204] JAWOROWSKI, *supra* note 4, at 4-5.

[205] *Id.*

[206] *Id.* at 28-29.

[207] *Id.* at 28.

[208] *Id.*

[209] *Id.* at 28-29; D.L.U. ASSESSMENT, *supra* note 76, at 9.

goal in two ways. First, costly rentals deprive families of affordable temporary housing. This, in turn, prevents families from saving money for home down payments. Second, the purchase of ohana dwellings for rental income purposes decreases the supply of ohana dwellings available for affordable home ownership.

VI. Conclusion

The City Council continues to refine the ohana ordinance. The recent 1989 ordinance, intended to remedy controversies arising from the 1988 amendment, appears to create additional controversies. Particular ordinance sections are inconsistent with common law, zoning law, and legislative goals.

First, the characterization of ohana dwellings as "accessory" is inconsistent with common law interpreting accessory uses. Traditionally, accessory uses such as kennels, pets, and tennis courts are minor uses dependent on primary residential dwellings. The City Council established maximum ohana floor areas, but function, not size determines whether or not a use is "accessory." Ohana dwellings, as independent homes, serve the same housing functions as the primary residences to which they are "accessory." The City Council appears to ignore precedent by interpreting "accessory use" flexibly enough to include second homes on single residential lots.

Second, the indefinite perpetuation of nonconforming ohana dwellings by excluding them from reconstruction size conformity is inconsistent with zoning goals. The perpetuation of nonconforming ohana dwellings frustrates zoning goals by: preventing the attainment of state development plans; preventing district homogeneity; and preventing the gradual termination of nonconforming dwellings. Owners of nonconforming ohana dwellings occupy monopolistic positions, enjoying benefits unavailable to owners of conforming ohana dwellings. The use of reasonable amortization measures would both allow owners to recoup their investments and further the attainment of zoning goals.

Third, ordinance sections condone and encourage the sale of ohana dwellings which may be inconsistent with the legislative goal of increasing the supply of affordable housing. The sale of ohana dwellings under the C.P.R. encourages property owners to build expensive ohana dwellings as speculative ventures. The sale of highly priced ohana dwellings or their purchase or construction for use as highly priced rentals does nothing to further the legislative goal of increasing the supply of affordable housing.

With proper regulation, the construction of ohana dwellings may increase the supply of affordable housing. Many issues regarding the sale of ohana dwellings, their use as speculation devices, and their impact on neighborhood character and infrastructure require further legislative resolution. Thus, the City Council must continue to refine Honolulu's ohana zoning ordinance to best accommodate both Oahu's housing needs and legitimate concerns of those affected by ohana zoning.

Jody Lynn Kea

The Hostile Work Environment: Are Federal Remedies Hostile, Too?

I. Introduction

Under federal law, several statutes allow an employee to sue his or her employer for employment discrimination based on one or more of the following categories: sex, race, color, religion or national origin. This article explores the extent to which three of those laws, sections 1981, 1983 and 2000e of Title 42 of the United States Code (sections 1981, 1983, and Title VII, respectively), regulate the work place by providing redress for "hostile work environment" types of sexual or racial harassment claims. These statutes, enacted to protect victims, may not provide adequate remedies for employees. At the same time, these laws may not be providing employers with adequate notice of when they are or are not liable for hostile work environments.

This article begins by looking at employment discrimination in the work place today, its effects in terms of psychological and economic costs to employers and employees alike and explores the background of the "hostile work environment" cause of action. Part III presents the remedies available for hostile environment employment discrimination based on either sex or race under Title VII, section 1981 and section 1983. Part IV looks at the protection afforded by these three federal statutes and suggests that changes in the law would allow employee-victims of hostile work environments to be more fully compensated for their injuries and provide incentive for them to bring suit. These changes in the law might also give the employer better guidelines in determining the policies they can implement to reduce both hostile work environment discrimination in the work place and their exposure to liability for illegal discrimination.

II. Employment Discrimination

In the employment context, interaction takes place daily involving employers, employees, clients and customers and the general public.

Interaction, verbal exchanges and conduct, sometimes is made on the basis of sex or race. When a pattern of words and/or conduct harasses an employee on the basis of his or her sex or race, negative psychological and economic consequences occur and may give rise to liability.

Although harassment in the work place is not new, only recently have employee-victims been able to bring suit for redress solely due to the harassment. The Supreme Court, in *Meritor Savings Bank v. Vinson*,[1] agreed with a growing number of lower courts in holding that sexual harassment creating a hostile work environment is actionable as a discrimination claim under Title VII. The Court has made it clear that victims can prevail on this type of claim.[2]

A. Sexual Harassment

Women have long been subjected to sexual harassment at work.[3] It has been suggested that "the historically inferior position of women in a male-dominated work force . . . has resulted in the disproportionate exposure of women to heterosexual sexual harassment."[4] Studies reveal that up to seventy-five to eighty-five percent of female respondents are subjected to sexual harassment at some time during their careers.[5]

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[1] 477 U.S. 57 (1986), *aff'g in part* Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).

[2] *See infra* notes 58-77 and accompanying text.

[3] *See* Note, *Meritor Savings Bank v. Vinson: Clarifying the Standards of Hostile Working Environment Sexual Harassment*, 25 HOUS. L. REV. 441, 441 n.3 (1988) (("[t]he problem [of sexual harassment in the federal government] is not only epidemic, it is pandemic, an everyday, everywhere occurrence") quoting Sexual Harassment in the Federal Government: Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 1 (1979) (statement of Rep. Hanley)).

Men can also be victimized by sexual harassment. *See* Waks and Starr, *The "Sexual Shakedown" in Perspective: Sexual Harassment in Its Social and Legal Contexts*, 7 EMPLOYEE REL. L.J. 567, 568 n.4 (1982) (citing U.S. MERIT SYSTEMS PROTECTION BOARD OFFICE OF MERIT REVIEW AND STUDIES, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 35 (1981)). For ease of discussion, however, this article will address the problem of sexual discrimination from the point of view of the female as the victim.

[4] Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1449 n.1 (1984).

[5] Note, *Sexual Harassment in the Workplace: Title VII's Imperfect Relief*, 6 J. CORP. L. 625, 625 n.2 (1983) (authored by Lynne E. Stanley-Elliott). *See also* Comment, *An Employer's Guide to Understanding Liability for Sexual Harassment Under Title VII*, 55 U.

Sexual harassment includes a wide range of verbal and non-verbal conduct.[6] The conduct may or may not amount to illegal sexual harassment.[7] While some amount of "innocent" touching may not amount to a hostile environment claim, the extent or pervasiveness of propositions, threats, touching or other harassing behavior will, at some point, give rise to such a claim.[8]

Continued explicit propositions,[9] sexual horseplay,[10] as well as a preference for female workers who submit to sexual advances[11] have

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CIN. L. REV. 1181, 1194 n.100 (1987) citing *Sexual Harassment*, GLAMOUR, Jan. 1981, at 31 (including sexual comments, innuendos, jokes and explicit sexual invitations). *See also* Note, *Meritor Savings Bank v. Vinson: Sexual Harassment at Work*, 10 HARV. WOMEN'S L.J. 203, 207 & n.20 (1987) (authored by Grace M. Dodier), citing U.S. MERIT SYSTEMS PROTECTION BOARD OFFICE OF MERIT REVIEW AND STUDIES, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 3 (1981), *reprinted in* 107 Lab. Rel. Rep. (BNA) no. 23 (News and Background Information Part II: Sexual Harassment and Labor Relations) 28 (July 20, 1981) [hereinafter, Merit Systems Protection Board Study] (estimating that 42% of female federal employees experienced sexual harassment during two year period 1978-1980).

Approximately the same number of female federal employees reported incidents of sexual harassment in 1987 as they did in 1980. Ellison v. Brady, 924 F.2d 872, 880 n.15 (9th Cir. 1991) (citing U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 11 (1988)).

[6] Examples of sexual harassment include:

> [S]taring, ogling, any kind of unsolicited touching (including 'accidental' brushing), verbal and nonverbal criticizing and commenting upon an individual's body, unsolicited grabbing, kissing, squeezing, smacking, pinching, and pulling part of an individual's body (including hair), unsolicited propositions, . . . posting or placing near an individual's work environment an obscene picture (excluding recognized artwork), derogatory jokes and pictures, and forced sexual activity (including rape).

Andrews, *The Legal and Economic Implications of Sexual Harassment*, 14 N.C. CENT. L.J. 113, 119 (1983).

[7] *See, e.g.*, Scott v. Sears Roebuck & Co., 798 F.2d 210 (7th Cir. 1986) (evidence of one pat on the buttocks, winks, a suggestion of a rubdown and invitation to dinner was insufficient to survive defendant's motion for summary judgment); Jones v. Flagship Int'l., 793 F.2d 714 (5th Cir. 1986) (no illegal harassment based on several propositions and display of statues of barebreasted mermaids used as table centerpieces for office Christmas party).

[8] Continued explicit propositions constitute sexual harassment. *See, e.g.*, Woerner v. Brzeczek, 519 F. Supp. 517 (N.D. Ill. 1981) (male supervisor subjected female patrol officer to repeated sexual advances, embarrassing and belittling remarks in front of fellow officers, constant ridicule during roll call and the interception of mail and phone messages).

[9] *See* Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc., 755 F.2d 599,

been found to constitute sexual harassment. Such treatment may undermine the employee's motivation and work performance, and deprive her and other female employees of promotions and job opportunities, and thus be compensable.[12]

A recent EEOC policy guideline distinguishes illegal harassment from preferential treatment which is based on a consensual romantic relationship.[13] However, widespread favoritism may be the basis for a valid claim of hostile environment harassment.[14]

601-02 (7th Cir. 1985) (supervisor subjected female employee to repeated sexual advances such as leers, obscene gestures, lewd comments, remarks about her sexual needs since her husband had left her, and promises to "make it easy" if employee would go out with him).

[10] In Spencer v. General Elec. Co., 697 F. Supp. 204 (E.D. Va. 1988), the supervisor engaged in horseplay of a sexual nature on a daily basis with his female subordinates by sitting on their laps and touching them in an intimate manner on their knees or between their legs. *Id.* at 213. During his testimony, the supervisor acknowledged throwing pennies down one female worker's blouse and unbuttoning several buttons on another's skirt. *Id.* at 213-14. The supervisor also made lewd comments such as telling jokes and stories about the length of his penis and making comments about female staff members, such as whether the plaintiff was "any good in bed". *Id.* at 213. He made derogatory comments about women including statements that women "have shit for brains" and should be "barefoot and pregnant." *Id. See also* Delgado v. Lehman, 665 F. Supp. 460, 468 (E.D. Va. 1987) (hostile environment created by supervisor's derogatory attitude toward, and remarks about, plaintiff and other women).

[11] *See* Broderick v. Ruder, 685 F. Supp. 1269, 1278-79 (D.D.C. 1988) (female employees of the Securities and Exchange Commission established a prima facie case of sexual harassment based on such preferential treatment).

[12] *Id. See also* King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985), *reh'g denied*, 40 Fair Empl. Prac. Cas. (BNA) 190 (1986) (plaintiff was unlawfully denied promotion to supervisory forensic/clinical nurse when position was awarded to employee who had sexual relationship with person responsible for promotions); Priest v. Rotary, 634 F. Supp. 571, 576, 581 (N.D. Cal. 1986) (employer/owner of a lounge, dining room and coffee shop advantaged female employees who reacted favorably to his sexual advances by easing work duties, tolerating substandard work and assigning preferential work schedule); Toscano v. Nimmo, 570 F. Supp. 1197, 1199, 1200 (D. Del. 1983) (promotion on the basis of sexual favors where supervisor made frequent sexual advances, engaged in suggestive behavior and boasted of sexual encounters with female employees he supervised).

[13] According to *EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism*, Daily Labor Report (BNA) (Feb. 15, 1990), "[a]n isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders." *Id.*

[14] If favoritism based upon the granting of sexual favors is widespread in a

B. Racial Harassment

During Reconstruction following the Civil War, three Constitutional amendments were ratified: the thirteenth amendment[15] declaring that all former slaves were free; the fourteenth amendment[16] guaranteeing protection to victims of discrimination through the privileges and immunities, due process and equal protection clauses; and the fifteenth amendment[17] guaranteeing citizens the right to vote regardless or race or color. Congress also passed a series of acts in 1866 to 1867, known as the Reconstruction Civil Rights Statutes, to enforce the fourteenth amendment's guarantee of protection for the rights of the new citizens.[18]

Despite the enactment of these amendments and statutes racial discrimination, like sexual discrimination, persists. In fact, recent studies have indicated that conditions are probably worsening.[19] Evidence of race discrimination exists in the numerous cases brought before the EEOC and courts.[20]

> workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is "sufficiently severe or pervasive 'to alter the conditions of [their] employment and create an abusive working environment.' "

Id.

[15] U.S. CONST. amend. XIII.

[16] U.S. CONST. amend. XIV.

[17] U.S. CONST. amend. XV.

[18] *See* D. MCWHIRTER, YOUR RIGHTS AT WORK 80 (1989).

[19] *See* Holmes, *Retreat on Civil Rights?*, AMERICAN VISIONS, October, 1989, at 20, 24 ("economic and social gains achieved by blacks since the 1940s have been halted during the last two decades and . . . poverty, discrimination and joblessness could worsen in the immediate future").

See also Hylton, *Working in America*, BLACK ENTERPRISE, August, 1988 at 63, 66 (1988 survey of black magazine readership finds 61% of all respondents encounter discrimination on the job. In 1982, 74.5% of respondents annually earning more than $35,000 reported discrimination suggesting increased resistance to black employees who move up the corporate ladder).

[20] In the federal courts alone, 44% of all civil rights cases heard in 1988 involved allegations of job discrimination. Holmes, *supra* note 19 at 20, 21. Racial discrimination continues to be the major enforcement area of the Equal Employment Opportunity Commission (hereinafter "EEOC") which administers and enforces Title VII. *Interview with Clarence Thomas, Chairman, Equal Employment Opportunity Commission*, U.S. NEWS &

As with sexual discrimination, racial discrimination takes on various verbal, non-verbal and physical forms. And, as with sexual discrimination, establishing racial discrimination requires more than a few isolated incidents. Sporadic or accidental racial comments are usually construed as merely part of casual conversation.[21] However, a working environment dominated by racial slurs or a "steady barrage of opprobrious racial comment" constitutes racial discrimination.[22] Racial discrimination through exclusion from work-related social activities may also amount to a hostile environment.[23]

C. Costs to Parties

1. Economic costs

Loss of employment is the most obvious economic cost to victims of harassment. An employee-victim of sexual harassment may "lose" her

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WORLD REP., March 14, 1983, at 67, 68. 94,460 of the charges brought before the EEOC in 1981 had merit; estimates that half of the case load is based on race discrimination means that approximately 47,000 cases involved race discrimination.

[21] EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 384 (D. Minn. 1980). *See also* Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981) (racial discrimination defined as a working environment dominated by racial slurs or a "steady barrage of opprobrious racial comment"; therefore, plaintiffs, who were called "niggers" by supervisors and fellow employees, did not suffer racial discrimination because use of racial terms was infrequent, limited to casual conversation among employees and usually not directed toward plaintiffs).

[22] *Johnson*, 646 F.2d at 1250. Similarly, the repeated and continuous use of racially offensive terms such as "nigger-rigged" and "black-ass" constituted harassment in Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982). Defendant Ford's managers in *Walker* stated that such racial slurs were "just something a black man would have to deal with in the South." *Walker*, 684 F.2d at 1359. *See also* Blanco v. Hallmark Cards, Inc., 681 F. Supp. 692, 694-95 (D. Kan. 1987) (repeated use of the racial slurs "nigger" and "taco" were sufficient for Mexican American plaintiff to survive a motion for partial summary judgment); Taylor v. Jones, 653 F.2d 1193, 1198-99, 1203 (8th Cir. 1981) (overwhelming evidence of "dismal" racial atmosphere at Arkansas Army National Guard consisted of numerous instances of racial slurs, epithets and jokes; physical threats by supervisor; and fight instigated with black individuals).

[23] *See Murphy Motor*, 488 F. Supp. at 385 (black employee ostracized due to co-workers' avoidance of sitting and eating at one table in the work lunchroom known as plaintiff's table; when plaintiff began eating his lunch in another room it was designated as the "nigger lunchroom"). *See also* Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514 (8th Cir. 1977) (court found existence of segregated supper clubs where whites excluded black co-workers "highly offensive").

job in different ways: the victim may be fired in retaliation for refusing to submit to sexual advances and/or for reporting the harassment, or the victim may suffer constructive discharge. "Constructive discharge" occurs when a victim of harassment feels compelled to quit rather than endure on-going work place harassment.[24] Fired or constructively discharged victims sustain economic losses such as lost wages and expenses in finding a new job. These victims also lose indirect economic benefits that flow from job seniority that do not accrue to them upon discharge. Finally, there are the costs of decreased physical and mental health—the attendant costs for time off from work or looking for work as well as costs for victims who seek professional help for psychological and/or physical injuries due to the harassment.[25]

Employers also bear costs resulting from the harassment. Racially or sexually harassed victims who stay on the job and others around her may become less productive due to distraction, avoidance and lack of motivation.[26] And when a victim leaves her job, voluntarily or not, the employer pays for employee turnover by way of training costs and lost productivity.

Additionally, employers pay the costs of defending sexual and racial harassment suits including attorneys' fees and lost productivity of the parties and other employee-witnesses.[27] Sexually harassed employees

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[24] *See, e.g.*, Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (employer commits constructive discharge in violation of Title VII when "an employee involuntarily resigns in order to escape intolerable and illegal employment requirements" to which he or she is subjected because of race, color, religion, sex, or national origin).

[25] *See* Andrews, *supra* note 6, at 142.

[26] *Id.* at 167 n.379 citing Working Women's Institute, The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women, Research Series Report No. 3 (1979).

[27] Sexual harassment claims may have cost the federal government a minimum of 180 million dollars during the period of May 1978 to May 1980. Andrews, *supra* note 6, at 167 (citing Merit Systems Protection Board Study). This represents the cost of employee turnover (replacing those who left work due to sexual harassment), the cost of medical insurance benefits and sick leave as well as the cost of reduced productivity. *Id.* The cost of sexual harassment in the private sector is probably similar to that of the federal government, based on government employees surveyed who had prior work experience. *Id.*

The federal government expended $267 million from May 1985 to May 1987 for sexual harassment, including productivity losses, costs of sick leave and employee replacement. Ellison v. Brady, 924 F.2d 872, 880 n.15 (9th Cir. 1991) (citing U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 39 (1988)).

who prevail in Title VII cases may be entitled to back pay and attorneys' fees.[28] Employers who do business with the government may also be prevented from bidding for future government contracts.[29] Employer costs for racial discrimination may be greater than for sexual discrimination because victims of the former may seek recovery under section 1981 which allows compensatory and punitive damage awards usually unavailable in Title VII cases.[30]

2. Non-economic costs

Sexual harassment victims also suffer non-economic costs. These include negative emotional or psychological stress symptoms such as nervousness, fear, anger and sleeplessness[31] and physical stress symptoms such as physical pain, headaches, nausea, weight changes and tiredness.[32] Women who are sexually harassed may feel humiliated and degraded.[33] A sense of guilt and helplessness is also common.[34] These feelings and symptoms may in turn interfere with marital and other family relationships.[35]

The non-economic costs to racially harassed employees are similar:

> [R]acial harassment is detrimental to the self-esteem and self-respect of the object of the harassment, and causes—as the perpetrators of the harassment intend—humiliation and embarrassment. Loss of personal

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[28] These awards may be substantial. For instance, in EEOC v. Sage Realty Corp., 26 Fair Empl. Prac. Cas. (BNA) 1319 (1981), the lobby attendant, required to wear a sexually provocative uniform, endured sexual comments from passersby for two days. She was fired for insubordination when she refused to wear the uniform again. The court awarded her more than $33,000 in back pay and interest and $90,000 in attorneys' fees. *Id.* at 1327.

If an employee also prevails on a related claim under sections 1981 or 1983 or state laws (such as a tort or employment discrimination claim), she may be awarded compensatory and punitive damages. Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 191, 295-96 (1987); Frost, *Sexual Harassment in the Workplace*, 71 WOMEN'S L. J. 19, 21 (1985).

[29] *Interview with Clarence Thomas*, *supra* note 20.

[30] *See infra* notes 94-98 and accompanying text.

[31] *See* Andrews, *supra* note 6, at 167.

[32] *Id.*

[33] Sexual harassment "reinforces sexual stereotypes of female inadequacy and fosters low self-esteem," serving to discourage women from wanting to succeed. Frost, *Sexual Harassment In the Workplace*, 71 WOMEN'S L.J. 19 (1985).

[34] *Id.*

[35] *Id.*

> dignity, psychic injury, and emotional pain may result. . . . Studies have shown that the psychological responses to racial prejudice include feelings of humiliation, isolation, and self-hatred. Indeed, the psychic injury may increase where the racial insult is made in front of others or by a person in a position of authority (e.g., a supervisor). Long-term emotional pain may be incurred, particularly since the racial prejudice reinforces stigmas of inferiority.[36]

Other physical and emotional symptoms include depression, hypertension, and anxiety reactions, such as insomnia and impotence.[37]

Non-economic employer costs include public relations harm if a case is highly publicized, even if the employer wins the case.[38] It is likely that the employer's diminished image in the eyes of the public harms the employer's ability to recruit and/or keep employees as well as customers and clients.

These economic and non-economic costs of employment discrimination demonstrate that it is in the best interest of employers, employees and society to provide avenues for redress so as to make employees whole and offer them incentives to assert their grievances while encouraging employers to address and eliminate the problems of employment discrimination.

III. Federal Remedies

A. Title VII

Under Title VII of the 1964 Civil Rights Act,[39] discrimination against any individual on the basis of his or her race, color, religion, sex, or

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[36] Denis, *Race Harassment Discrimination: A Problem That Won't Go Away?*, 10 Employee Rel. L.J. 415, 418 (1984) (referring to symptoms afflicting the employee in Ben Citchen v. Firestone Steel Products Co., Nos. 12190-EM & 15389-EM (Michigan Civil Rights Commission May 23, 1984), *reported in* 1984 Michigan Civ. Rts. Commission, Case Digest 13).

[37] *Id.* at 435. Citchen's psychiatric problems were attributed to the intensity of racial hatred he suffered while employed at Firestone. Citchen, a black employee, was subjected for nine years to what his employer called "horseplay": a noose hanging in his work area, welding of his locker lock, a dead mouse, fishbones, a kerosene-soaked cross in his locker, repeated taunts, racist slurs and death threats. *Id.* at 415-16. Repeated hate messages included "Get out, n—-r, you ain't wanted here," "N—-r Ben, KKK," "KKK for you Ben." *Id.* at 415. The Civil Rights Commission awarded the employee $1.5 million in damages. *Id.* at 416.

[38] 1981 Lab. Rel. Yearbook at 132 (BNA ed. 1981).

[39] 42 U.S.C. § 2000e-2 to § 2000e-17 (1982). The portion of the Civil Rights Act of 1964 which is concerned with employment discrimination is commonly called Title VII.

national origin is an unlawful employment practice. The prohibition against this discrimination applies to a broad range of employers[40] and to a variety of employment situations such as hiring, discharge, compensation, terms, conditions, or privileges of employment.[41] For purposes of this article which focuses on the hostile environment type of discrimination, the relevant language of Title VII is limited to the following:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
> (1) . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, . . . [or] sex . . . .[42]

A hostile work environment case relies on the above language of Title VII and asserts that harassment to which the employee is subjected affects a term, condition or privilege of employment.

1. Hostile work environment

a. Sex discrimination

Title VII, administered and enforced by the Equal Employment Opportunity Commission ("EEOC"), has extensive powers to receive

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[40] 42 U.S.C. § 2000e-(b) (employer must employ at least 15 employees and be engaged in an industry affecting commerce). Among the employers affected are employment agencies, 42 U.S.C. § 2000e-2(b); labor organizations, 42 U.S.C. § 2000e-2(c); state governments and their political subdivisions and agencies, 42 U.S.C. § 2000e-(a) - § 2000e-(b); and the federal government, 42 U.S.C. § 2000e-16(a).

[41] 42 U.S.C. § 2000e-2(a)(1); *see also*, B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (2d ed. 1983) [hereinafter, SCHLEI & GROSSMAN]. These situations include the limitation, segregation, or classification of employees or applicants for employment, 42 U.S.C. § 2000e-2(a)(2); failure to refer by an employment agency, 42 U.S.C. § 2000e-(b); exclusion or expulsion from membership of a labor organization, 42 U.S.C. § 2000e-2(c)(1); causing an employer to discriminate, 42 U.S.C. § 2000e-2(c)(3); retaliation, 42 U.S.C. § 2000e-3(a); or printing or publishing a discriminatory employment notice or advertisement, 42 U.S.C. § 2000e-3(b).

[42] 42 U.S.C. § 2000e-2(a)(1).

and process discrimination charges and to prevent persons from engaging in any unlawful employment practice.[43]

In 1980 the EEOC established Guidelines on Discrimination Because of Sex ("Guidelines on Sex Harassment").[44] These Guidelines on Sex Harassment "define" sexual harassment as that which 1) results in negative economic consequences to the victim or 2) creates an "intimidating, hostile, or offensive work environment"[45] without the resulting negative economic consequences to the victim. The first type of sexual harassment, "harassment that involves the conditioning of concrete employment benefits on sexual favors,"[46] has been termed "quid pro quo" harassment. The second type, known as "hostile environment" harassment, occurs when a hostile or offensive working environment leads to noneconomic injury.[47] The Guidelines on Sex Harassment state:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[48]

Although they do not have the force and effect of law,[49] many courts have given great deference to EEOC Guidelines in interpreting Title VII.[50]

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[43] 42 U.S.C. § 2000e-5(a) (1982). EEOC functions include issuing regulations interpreting the act, 42 U.S.C. § 2000e-12; conducting investigations of possible discrimination, 42 U.S.C. § 2000e-5 - § 2000e-6; negotiating settlements between employers and employees, 42 U.S.C. § 2000e-5; and filing lawsuits to stop discrimination, 42 U.S.C. § 2000e-6. *See also* D. McWHIRTER, YOUR RIGHTS AT WORK 81 (1989).

[44] 45 Fed. Reg. 74676-74677 (1980) (codified at 29 C.F.R. § 1604.11(a)-(g)).

[45] *Id.*

[46] Meritor Savings Bank v. Vinson, 477 U.S. 57, 62, 65 (1986), *aff'g in part* Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).

[47] *Id.*

[48] 29 C.F.R. § 1604.11(a) (1985) (footnote omitted) ("The principles involved here continue to apply to race, color, religion or national origin.").

[49] General Elec. Co. v. Gilbert, 429 U.S. 125, 140-45 (1976), *reh'g denied*, 429 U.S.

The courts began recognizing quid pro quo sex harassment as a violation of Title VII even before the promulgation of EEOC Guidelines on Sex Harassment. In *Barnes v. Costle*,[51] the Circuit Court of Appeals for the District of Columbia found that plaintiff was fired because she refused the sexual advances of her male supervisor and held that the employer violated Title VII.[52] Other courts followed with similar rulings[53] where sexual discrimination culminated in discharge or other negative economic consequences.

In 1981 the same court which decided *Barnes* went even further in *Bundy v. Jackson*[54] when it held that a work environment with pervasive sexual harassment and intimidation violated Title VII "regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination".[55] In reaching its decision, the court analogized to cases holding that a racially offensive work environment violated Title VII.[56]

1079 (1977) (EEOC Guidelines are merely interpretative, rather than substantive, regulations).

[50] Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

[51] 561 F.2d 983 (D.C. Cir. 1977).

[52] *Id.* at 995.

[53] *E.g.*, Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978) (employee's refusal of supervisor's sexual advances was basis for discharge, therefore employer was liable).

[54] 641 F.2d 934 (D.C. Cir. 1981). In *Bundy*, sexual intimidation was a "normal condition of employment". *Id.* at 939. Bundy, a vocational rehabilitation specialist, was subjected to sexual harassment and sexual advances by both of her supervisors. When she complained to their superior, he dismissed the complaint stating, "any man in his right mind would want to rape you"; he then proceeded to proposition the plaintiff. *Id.* at 940.

[55] *Id.* at 943-44.

[56] For example, the *Bundy* court specifically relied on Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The plaintiff in *Rogers* was a Hispanic who claimed that her employer gave discriminatory service to its Hispanic clients, thereby creating a discriminatory and offensive work environment for its Hispanic employees. *Bundy*, 641 F.2d at 944. The *Rogers* court explained that

> the phrase "terms, conditions, or privileges of employment" . . . is an expansive concept which sweeps within its protective ambit the practice of creating a work environment heavily charged with ethnic or racial discrimination. . . . I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

454 F.2d at 238.

Although some courts were unwilling to follow the District of Columbia's lead in holding that a hostile environment constituted illegal discrimination,[57] in 1986 the Supreme Court settled the issue in an unanimous opinion. In *Meritor Savings Bank v. Vinson*,[58] the Court ruled that a hostile environment claim can be the basis of a Title VII violation, whether or not the plaintiff suffered a tangible job detriment as a result of the harassment.[59]

In *Vinson*,[60] the plaintiff, an employee of Meritor Savings Bank, was initially hired as a teller-trainee but thereafter advanced to the position of assistant branch manager. While her promotions were based solely on merit, Vinson was subsequently discharged by the bank for excessive use of sick leave.[61] Vinson brought suit against her supervisor (Taylor) and the bank under Title VII, alleging sexual harassment by Taylor. She claimed that Taylor repeatedly made demands for sexual favors and that, although refusing his initial overtures, she eventually agreed to sexual relations out of fear of losing her job. Vinson allegedly had intercourse with Taylor between 40 and 50 times over the course of several years. In addition, Taylor "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."[62]

In adopting the hostile environment theory, the Supreme Court based its decision on the EEOC Guidelines on Sex Harassment and

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[57] For example, in Halpert v. Wertheim and Co., 27 Fair Empl. Prac. Cas. (BNA) 21 (S.D.N.Y. 1980), the court denied relief under Title VII based on hostile environment sexual harassment. As a female securities broker, the plaintiff alleged sexual harassment based on language used by traders on the desk. The court acknowledged that plaintiff was often made the subject of this language stating, "[t]he language of this market place was coarse, and frequent references were made to male and female genitalia and to sexual activity. . . . [however,] I find that such language did not constitute harassment . . . or demonstrate an intent to discriminate on the part of the defendant. *Id.* at 23-24. *See also* Morlacci, *Sexual Harassment Law and the Impact of Vinson*, 13 EMPLOYEE REL. L.J. 501, 510-11 (1987).

[58] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), *aff'g in part* Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).

[59] *Id.* at 65. For a more detailed discussion of *Vinson*, *see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 124-25, 145-46 (2d ed. Supp. 1989) [hereinafter, SCHLEI & GROSSMAN Supp.]

[60] *Vinson*, 477 U.S. at 57.

[61] In September 1978, Vinson notified her supervisor that she was taking sick leave for an "indefinite period". On November 1, 1978, she was fired. *Id.* at 60.

[62] *Id.*

earlier court decisions and held "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[63] The Court rejected the employer's argument that Title VII only applies when there is "economic" or "tangible" discrimination[64] noting that the language of Title VII is not so limited and that the EEOC Guidelines on Sex Harassment fully support the view that harassment leading to noneconomic injury can violate Title VII.[65]

Earlier cases had established that the sexual harassment, to be actionable, "must be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment."[66] Therefore, a "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee"[67] does not rise to the level of a Title VII violation because the harassment does not significantly affect the "terms, conditions, or privileges of employment"[68] within the meaning of Title VII.

In *Vinson*, the Court found error in the lower court's conclusion that no actionable harassment occurred because Vinson voluntarily participated in the sexual relationship.[69] The Supreme Court held that a victim of sexual harassment need only show that she did not welcome the sexual advances, not that her part was not voluntary: "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[70] To the employer's benefit, the Court also

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[63] *Vinson*, 477 U.S. at 66.

[64] *Id.* at 64; SCHLEI & GROSSMAN Supp., *supra* note 59, at 124.

[65] *Vinson*, 477 U.S. at 64, 65.

[66] Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1982) (chief of police created hostile and offensive work environment for women; female dispatcher subjected to demeaning sexual inquiries and vulgarities, as well as repeated sexual advances); Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (air traffic controller subjected to extremely vulgar and offensive sexually related epithets addressed to and employed about her by supervisors and co-workers; supervisor suggested that plaintiff submit to co-worker's advances after she complained about the advances).

[67] Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

[68] 42 U.S.C. § 2000e-2(a)(1) (1982).

[69] *Vinson*, 477 U.S. at 68.

[70] *Id.* (citation omitted).

clarified that evidence regarding the plaintiff's provocative dress and sexual fantasies were "obviously relevant" to the issue of whether the alleged sexual advances were unwelcome.[71]

The *Vinson* Court, however, declined to issue a "definitive rule" with respect to employer liability. The lower court had concluded that the bank did not have notice of Taylor's alleged conduct, that "notice to Taylor was not the equivalent of notice to the bank,"[72] and therefore the bank could not be held liable. The Court of Appeals disagreed, holding that "an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct."[73] Relying on agency law,[74] the Supreme Court majority rejected both rules. The Court said that while employers are not "always automatically liable for sexual harassment by their supervisors", lack of notice does not necessarily insulate employers from liability.[75]

The majority also rejected the bank's final defense that because it had adopted a policy against discrimination and a grievance procedure which Vinson did not use, the bank was not liable. The Court did comment, however, that the bank's argument might have been "substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."[76] The issue of the bank's liability was remanded for further proceedings.[77]

b. Race discrimination

Both the EEOC and the courts have long recognized that racial harassment is a violation of Title VII because Title VII prohibits "the practice of creating a working environment heavily charged with ethnic

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[71] *Id.* at 69. The Court of Appeals ruled favorably for employee-victims when it concluded that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation". Vinson v. Taylor, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985). The Supreme Court, however, held that there is no *per se* ruling against admissibility of this type of evidence; instead, it was for the district court to decide whether the relevance of such evidence was outweighed by the potential for unfair prejudice. *Vinson*, 477 U.S. at 69.

[72] *Vinson*, 477 U.S. at 69.

[73] *Id.* at 69-70.

[74] RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958).

[75] *Vinson*, 477 U.S. at 72.

[76] *Id.* at 73.

[77] *Id.*

or racial discrimination.''[78] The EEOC has ruled that an employer is responsible for maintaining "a 'working environment free of racial intimidation' and that the requirement includes 'positive action where positive action is necessary to redress or eliminate employee intimidation.''[79]

The racial harassment must consist of more than a few isolated incidents of harassment. There is no Title VII violation for racial comments that are merely a part of casual conversation, are accidental, or are sporadic.[80] Rather, the existence of a hostile racial environment may be established by evidence of the continuous use of racial epithets or the telling of racial jokes, coupled with insufficient remedial action by the employer.[81]

In *EEOC v. Murphy Motor Freight Lines, Inc.*,[82] the court held that the plaintiff, Ray Wells, was subjected to "vicious, frequent, and reprehensible instances of racial harassment.''[83] The harassment consisted of slurs and epithets written on chalkboards affixed to loading dock carts such as "Ray Wells is a nigger," "The only good nigger is a dead nigger," "Ray Wells is a mother," "Send all blacks back to Africa," and "Niggers are a living example that the Indians screwed buffalo." Wells was also ostracized and subjected to racial hostility in the employee lunchroom: one table became the "Ray Wells table" and no one else would eat there; notes containing derogatory messages were left at the table; employees engaged in exchanges across the lunchroom such as "What are you reading?" "I am reading a book

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[78] Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

[79] EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 384 (D. Minn. 1980) (referring to EEOC Dec. 72-0779, 4 Fair Empl. Prac. Cas. (BNA) 317 (1971); EEOC Dec. 72-1561, 4 Fair Empl. Prac. Cas. (BNA) 852 (1972)).

[80] *Id. See also* Winfrey v. Metropolitan Utils. Dist., 467 F. Supp. 56, 60 (D. Neb. 1979) (no liability for discrimination due to isolated incident of foreman referring to black plaintiff as "boy"); Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985) (continuing use of racial slurs is required for a violation of Title VII). *Cf.* Pierson v. Norcliff Thayer, Inc., 605 F. Supp. 273 (E.D. Mo. 1985) (four specific instances of racially derogatory language not sufficient to establish Title VII violation); Ellison v. C.P.C. Int'l, Best Foods Div., 598 F. Supp. 159 (E.D. Ark. 1984) (evidence of isolated racial slurs not sufficient to establish a violation of Title VII).

[81] *See* Butler v. Coral Volkswagen, 629 F. Supp. 1034 (S.D. Fla. 1986) (employer's tolerance of, and participation in, racial jokes and racial epithets established hostile environment in view of employer's refusal to take sufficient remedial action).

[82] 488 F. Supp. 381 (D. Minn. 1980).

[83] *Id.* at 384.

about a black guy named Sambo. He's got a pancake." When Wells began eating lunch in a separate room, it was designated as the "nigger lunchroom" for "niggers only".[84]

The court also found that Wells proved the second element, that the employer failed "to take reasonable steps to prevent the racial harassment."[85] Some courts have held that supervisory personnel must participate in the harassment (for example where members of management address employees in racially derogatory terms)[86] while others, like *Murphy Motor*, have held that as long as management knew or should have known of the harassment, there is a Title VII violation[87] (for example where an employer tolerates racially offensive or derogatory language in the work place).

2. Remedies for hostile work environment discrimination under Title VII

Congress provided for the award of equitable remedies for violations of Title VII:

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[84] *Id.*

[85] *Id.* (quoting Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1191 (E.D. Pa. 1977)).

[86] EEOC Dec. 72-0779, 4 Fair Empl. Prac. Cas. (BNA) 317 (1971) (Caucasian assistant supervisor calling employee "Nigger"); EEOC Dec. 71-909, 3 Fair Empl. Prac. Cas. (BNA) 269 (1970) (supervisor's habitual reference to Negro employees as "Niggers").

[87] EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 386 (citing Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1194 (E.D. Pa. 1977)). *See also*, Snell v. Suffolk County, N.Y., 782 F.2d 1094 (2d Cir. 1986) (employer held responsible for working environment so heavily polluted with discrimination that it destroyed emotional and psychological stability of minority group workers); Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986) (employer liable for not dealing more effectively with what management level employees knew to be vicious campaign of racial harassment against black employee by co-workers); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) (employer maintained hostile work environment by refusing to act on complaints by Hispanic supervisor that he was subjected to racial epithets from employees whom he supervised); Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (employer tolerated pervasive use of racial slurs at automobile dealership and when plaintiff objected, employer advised him that racial slurs were "just something a black man would have to deal with in the South"); Oden v. Southern Ry., 35 Fair Empl. Prac. Cas. (BNA) 913 (N.D. Ga. 1984) (employer discriminated against black plaintiff by condoning and encouraging racially hostile environment). *See, e.g.*, Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 706 (W.D. La. 1977) (company not responsible for racial slurs or jokes of employees absent encouragement or condonation by supervisors).

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.[88]

In addition, at the court's discretion, the prevailing party may recover reasonable attorney's fees as part of its costs.[89] Equitable remedies are often in the form of injunctive relief. The injunctions usually include forbidding the harassing conduct, reinstating the employee to her former position,[90] mandating the establishment of grievance procedures and in some cases affirmative action measures.[91] Reinstatement includes all seniority and benefits which would have accrued if the employee had not been discriminated against[92] whereas awards of back pay are only allowed for two years prior to the filing of a charge with the EEOC.[93]

Most courts have disallowed relief in the form of compensatory and punitive damages under Title VII.[94] Courts disallow punitive and compensatory damages either because of the notable absence of these remedies in the Remedies section in the act,[95] or because these damages

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[88] 42 U.S.C. § 2000e-5(g) (1982).

[89] 42 U.S.C. § 2000e-5(k).

[90] *E.g.*, Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 945 n.26 (D.N.J. 1978). *Cf.* Meyers v. ITT Diversified Credit Corp., 527 F. Supp. 1064, 1070 (E.D. Mo. 1981) (the court refused to award relief in the form of reinstatement due to hostility between the parties; the employee was awarded $3,000 in lieu of reinstatement).

[91] Some courts view particular forms of affirmative relief extreme, *e.g.*, imposition of quotas, and will not readily impose such relief. *See* Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 401-02 (3d Cir. 1976) (court refused to uphold the imposition of a quota as district court did not articulate its reasons for the action).

[92] Franks v. Bowman Transp. Co., 424 U.S. 747, 769-70 (1976).

[93] 42 U.S.C. § 2000e-5(g) (1982).

[94] *See* Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981); Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981) ("great weight of authority" against compensatory and punitive damages in Title VII cases). *But see* Claiborne v. Illinois Cent. R.R., 401 F. Supp. 1022 (E.D. La. 1975) (affirming award of $50,000 in punitive damages; punitive damages further aims of Title VII by deterring violations, encouraging plaintiffs to seek relief); Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973) (denying defendant's motion to strike portion of complaint because plaintiff properly stated a claim for relief for compensation of psychic injuries under Title VII).

[95] One court viewed it significant that when Congress amended Title VII it also enacted the Fair Housing Laws which specifically provided for actual and punitive

seem to run contrary to the restitutionary/corrective nature of the act.[96] The denial of compensatory damages may work an actual unfairness on the employee who is not fully compensated for her injuries.[97] Furthermore, without punitive or exemplary awards, there may be less incentive to correct pervasive discrimination.

Relief afforded by Title VII may be inadequate because compensatory damages for physical and mental suffering are not allowed.[98] This criticism is shared by numerous members of Congress who proposed the Civil Rights Act of 1990.[99] This legislation proposed, in part, to amend Title VII, providing compensatory damages for intentional discrimination and punitive damages in egregious cases and providing for the right to a jury trial.[100]

B. Section 1981

Initially enacted as part of section 1 of the Civil Rights Act of 1866,[101] section 1981 provides that "all persons within the jurisdiction

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damages; because Congress did not provide for these remedies in amending Title VII, Congress could not have intended this type of award for Title VII. Whitney v. Greater New York Corp. of Seventh Day Adventists, 401 F. Supp. 1363, 1370 (S.D.N.Y. 1975).

[96] *E.g.*, Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 836-38 (N.D. Cal. 1973) (Title VII instituted to eliminate discrimination in employment and is not a punitive measure).

[97] *E.g.*, Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 197-98 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979) (victim of hostile work environment discrimination who resigned voluntarily was ineligible for reinstatement because she was not discharged; also, plaintiff was ineligible for relief under Title VII and could not recover attorneys' fees because she was not a "prevailing party" as required by Title VII).

[98] *See e.g.*, Andrews, *supra* note 6, at 142, 146.

[99] On February 7, 1990, a bipartisan group of legislators from both chambers introduced the Civil Rights Act of 1990 as S. 2104, 101st Cong., 2d Sess. (1990) and H.R. 4000, 101st Cong., 2d Sess. (1990). 136 CONG. REC. S991 (daily ed. Feb. 7, 1990). *See also Thornburgh Announces Bush Administration is Drafting Alternative Civil Rights Bill*, Daily Lab. Rep., at A-8 (daily ed. February 9, 1990) ("S. 2104 was introduced with 34 co-sponsors, including six Republicans, while H.R. 4000 has over 100 co-sponsors, including 11 Republicans"). Both the Senate and the House passed revised versions of the original bill on July 18 and August 3, respectively. 136 CONG. REC. S9940 (daily ed. Jul. 18, 1990); 136 CONG. REC. H6769 (daily ed. Aug. 3, 1990). On October 24, 1990, however, President Bush vetoed S.2104 and the Senate failed to override that veto. 136 CONG. REC. S16562 (daily ed. Oct. 24, 1990) (veto message of President Bush as read by the clerk).

[100] S. 2104, 101st Cong., 2d Sess. § 8 (1990); H.R. 4000, 101st Cong., 2d Sess. § 8 (1990). *See Summary of Civil Rights Act of 1990*, Daily Lab. Rep. D-1 (Feb. 6, 1990). *See infra* note 229.

[101] Act of Apr. 9, 1866, ch. 31 § 1, 14 Stat. 27.

of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . .''[102] The Civil Rights Act of 1866 (commonly called a ''Reconstruction'' statute because of the era during which it was enacted) was originally directed against the southern states' restrictions on the freedom of black citizens.[103] Section 1981 has been interpreted by case law ''to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.''[104]

Originally, section 1981 was only deemed applicable in the event of ''state action''.[105] However, in 1968 the Supreme Court in *Jones v. Alfred H. Mayer Co.*[106] revitalized the law when it held that section 1982,[107] which was also derived from section 1 of the 1866 Act, bars private as well as public racial discrimination with respect to housing sales and rentals.[108] Because of the common origins of sections 1981 and 1982, the rationale in *Jones* has been held applicable to section 1981.[109] The circuit courts subsequently held that the section 1981 protection of the right to make and enforce contracts applied to racial discrimination in the area of private employment.[110] By the time the Supreme Court decided *Johnson v. Railway Express Agency, Inc.*,[111] the Court acknowledged that ''it is well settled among the Federal Courts of Appeals—and we now join them—that section 1981 affords a federal remedy against discrimination in private employment on the basis of race.''[112] Only federal employees do not enjoy the protection of section 1981.[113]

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[102] 42 U.S.C. § 1981 (1982).

[103] L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 3:2 at 309 (2d ed. 1988).

[104] Runyon v. McCrary, 427 U.S. 160, 170 (1976) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968)).

[105] SCHLEI & GROSSMAN, *supra* note 41, at 669 (citing Civil Rights Cases, 109 U.S. 3, 16 (1883)). *See also* Hurd v. Hodge, 334 U.S. 24, 31 (1948).

[106] 392 U.S. 409, 442 n.78 (1968).

[107] 42 U.S.C. § 1982 (1982).

[108] *See* 2 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION § 21.2, at 463 (2d ed. 1988) [hereinafter EMPLOYMENT DISCRIMINATION].

[109] Runyon v. McCrary, 427 U.S. 160 (1976).

[110] *See* EMPLOYMENT DISCRIMINATION, *supra* note 108, at 464 n.21.

[111] 421 U.S. 454 (1975).

[112] *Id.* at 459-60. This issue was reexamined by the Supreme Court in Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) and reaffirmed when the court decided not to overrule its decision in Runyon v. McCrary. *Patterson*, 109 S.Ct. at 2369-72.

[113] Brown v. General Servs. Admin., 425 U.S. 820 (1976) (plaintiffs, federal employees alleging employment discrimination, sought relief under section 1981 after their Title VII claim had been dismissed as untimely. The Supreme Court decided

The scope of its coverage was restricted when the Supreme Court in *Patterson v. McLean Credit Union*[114] limited section 1981's application solely to the right to make and enforce contracts as opposed to Title VII which reaches discrimination concerning "terms, conditions, or privileges of employment".[115] The Court held that because the alleged racial harassment was "postformation conduct . . . relating to the terms and conditions of continuing employment,"[116] it was "not actionable under section 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process."[117]

Patterson involved a black woman employed by McLean Credit Union as a teller and file coordinator beginning in May 1972.[118] After being laid off in July 1982 she filed suit against her employer alleging harassment, failure to promote her to an intermediate accounting clerk position and discharge, all due to her race.[119]

The Court stated that,

> [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer *after the contract relation has been established*, including breach of the terms of the contract or

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that when Congress amended Title VII in 1972 it wanted to enable federal employees to seek relief under Title VII due to the lack of any other effective remedy. Therefore the Title VII remedy was intended to be the exclusive remedy for federal employees). *See* 1 [Sex] Empl. Discrimination (MB) § 7.31(a) at 2-159 n.4 (1989). *See also* E. Larson, SUE YOUR BOSS 161 (1981) (the law does not apply to federal agencies to the extent that they are protected by Title VII).

[114] *Patterson*, 109 S.Ct. at 2363.

[115] 42 U.S.C. § 2000e-2(a) (1982).

[116] *Patterson*, 109 S. Ct. at 2374.

[117] *Id.*

[118] *Id.* at 2368-69.

[119] *Id.* Patterson's testimony, as summarized by the Court of Appeals, indicated that Patterson's supervisor (a) periodically stared at her for several minutes at a time; (b) gave her too many tasks, causing her to complain about the pressure; (c) assigned her tasks such as sweeping and dusting, jobs not given to white employees; (d) told her that blacks are known to work slower than whites; and (e) criticized her, but not white employees, during staff meetings. *Id.* at 2373, citing Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986).

> In addition, another of respondent's managers testified that when he recommended a different black person for a position as a data processor, petitioner's supervisor stated that he did not "need any more problems around here," and that he would "search for additional people who are not black."

Patterson, 109 S.Ct. at 2373 n.2.

> imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, *matters more naturally governed by state contract law and Title VII.*[120]

The Court was circumspect in its interpretation of section 1981, deciding that the statute's scope did not "extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights."[121] In other words, the

> rights enumerated in § 1981 [that is, other than the right to "make" contracts,] *i.e.*, the rights "to sue, be parties, give evidence," and "*enforce* contracts" accomplishes [nothing] other than the removal of *legal* disabilities to sue, be a party, testify or enforce a contract. Indeed, it is impossible to give such language any other meaning.[122]

This language implies that section 1981 creates no legal entitlements of its own to injured employees but is merely a federal avenue to contract enforcement.

However, legislation proposed last year in Congress would have reversed *Patterson* to clarify that racial harassment on the job *is* actionable under section 1981.[123] The proposed Civil Rights Act of 1990[124] defined the right to make and enforce contracts to include "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."[125] This proposed legislation would have expanded

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[120] *Id.* at 2373 (emphasis added).

[121] *Id.*

[122] *Id.* (quoting Runyon v. McCrary, 427 U.S. 160, 195 n.5 (1976) (dissenting opinion) (emphasis in original)).

[123] *Thornburgh Announces Bush Administration is Drafting Alternative Civil Rights Bill*, Daily Lab. Rep., at A-7 & A-8 (February 9, 1990) (The Civil Rights Act of 1990 (S. 2104 and H.R. 4000) was introduced by a bipartisan group of legislators from both chambers on February 7, 1990). *See also* Daily Lab. Rep., at E-1 (February 21, 1990) (Civil Rights Protection Act of 1990 (the civil rights bill backed by the Bush Administration) to be introduced on February 21, 1990). *See also supra* note 99 and *infra* note 229.

[124] S. 2104, 101st Cong., 2d Sess. § 12 (1990); H.R. 4000, 101st Cong., 2d Sess. § 12 (1990).

[125] S. 2104, 101st Cong., 2d Sess. § 12 (1990); H.R. 4000, 101st Cong., 2d Sess. § 12 (1990). *Cf. Civil Rights Protection Act of 1990*, Daily Lab. Rep., at E-1 (February 21, 1990) (Proposed legislation specifies that "Section 1981 protects against racial discrimination, not only in the formation and enforcement of a contract but in the performance, breach and termination of a contract, and in the setting of its terms and conditions, as well.")

the scope of the statute as defined by the Supreme Court in *Patterson*, and addressed the division in the lower courts prior to *Patterson* as to whether section 1981 covered harassment.[126] Had the *Patterson* court applied this proposed legislative clarification of section 1981 to the *Patterson* case, plaintiff who allegedly had been injured by harassment and denials of wage increases, promotions[127] or training for higher level jobs, all due to her race, would have fallen under the ambit of section 1981.

1. Persons protected from employment discrimination under section 1981

a. Race discrimination

It is clear that section 1981 applies to racial discrimination.[128] It has also been held to protect white persons in a reverse discrimination situation. In *McDonald v. Santa Fe Trail Transportation Co.*,[129] the Supreme Court held that based on the language and history of the statute, "Section 1981 is applicable to racial discrimination in private employment against white persons."[130] The Court concluded that the statute was intended to prohibit discrimination with respect to the making or enforcement of contracts "against, or in favor of, *any* race."[131]

b. Sex discrimination

As discussed, section 1981 was originally enacted to address discrimination against black slaves who had been newly proclaimed free people.

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[126] *Hearings on Proposed Civil Rights Bill Begin; Likely Scope of What Will be Enacted is Unclear*, Daily Lab. Rep., at C-4, C-8, C-9 (February 20, 1990).

[127] The Supreme Court remanded plaintiff's claim of discrimination for failure to promote under section 1981, stating that such a claim is actionable, but "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." *Patterson v. McLean Credit Union*, 109 S.Ct. 2363, 2377 (1989). On remand, the district court dismissed this claim because the new position was not an opportunity for a new and distinct relation with her employer: both positions were paid on an hourly wage basis, in the same office and under the same working conditions. *Patterson v. McLean Credit Union*, 729 F. Supp. 35, 36 (M.D.N.C. 1990).

[128] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

[129] 427 U.S. 273 (1976).

[130] *Id.* at 286-87.

[131] *Id.* at 295 (emphasis added).

Although the statute provides that "*all persons* . . . have the same right . . . as white citizens"[132] numerous courts have held that this law does not apply to claims of gender discrimination;[133] because of its general acceptance, courts rarely analyze the issue any longer.[134] The Supreme Court has also indicated its agreement in dictum.[135]

2. *Remedies available under section 1981*

In *Johnson v. Railway Express Agency*,[136] the Supreme Court stated that under section 1981 both equitable and legal relief could be awarded, "including compensatory, and under certain circumstances, punitive damages."[137] Courts have awarded damages for lost wages,[138] out-of-court expenses,[139] and mental distress.[140] Although courts were divided as to whether compensatory damages can be recovered for the deprivation of substantive constitutional rights,[141] a recent Supreme Court decision answered in the negative.[142]

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[132] 42 U.S.C. § 1981 (1982) (emphasis added).

[133] *See, e.g.*, Bobo v. ITT Continental Baking Co., 662 F.2d 340 (5th Cir. 1981), *cert. denied*, 456 U.S. 933 (1982); Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979).

[134] SCHLEI & GROSSMAN, *supra* note 41 at 674-75 n.23.

[135] Runyon v. McCrary, 427 U.S. 160, 167 (1976) ("[these cases] do not present any question of the right of a private school to limit its student body to boys, to girls, or to adherents of a particular religious faith, since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity").

[136] 421 U.S. 454 (1975).

[137] *Id.* at 460.

[138] Allen v. Amalgamated Transit Union, 554 F.2d 876, 881 (8th Cir. 1977), *cert. denied*, 434 U.S. 981 (1977); Faraca v. Clements, 506 F.2d 956, 959-60 (5th Cir. 1975), *cert. denied*, 422 U.S. 1006 (1975); Guerra v. Manchester Terminal Corp., 498 F.2d 641, 652-53 (5th Cir. 1974), *reh'g denied*, 503 F.2d 567 (5th Cir. 1974); Young v. International Tel. & Tel. Co., 438 F.2d 757, 758 (3d Cir. 1971).

[139] Knapp v. Whitaker, 757 F.2d 827, 847 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985); Woods-Drake v. Lundy, 667 F.2d 1198, 1203 (5th Cir. 1982).

[140] *E.g.*, Ramsey v. American Air Filter Co., 772 F.2d 1303, 1304 (7th Cir. 1985); Carter v. Duncan-Huggens, Ltd., 727 F.2d 1225, 1238 (D.C. Cir. 1984); Block v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1242 (8th Cir. 1983); Gore v. Turner, 563 F.2d 159 (5th Cir. 1977); Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976); McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 423 U.S. 1045 (1976).

[141] *See* Bell v. Little Axe School Dist., 766 F.2d 1391, 1392 (10th Cir. 1985) (parents entitled to compensatory damages for violation of their first amendment rights which occurred when public school permitted religious meetings on school grounds during

Recently, the Tenth Circuit Court of Appeals held that, with respect to the determination of punitive damages under federal civil rights statutes, federal standards, rather than state standards govern.[143] Therefore, punitive damages can only be awarded for discrimination that is "malicious, willful, and in gross disregard of [plaintiff's] rights."[144] This decision may weaken the power of section 1981 by tying it to the typically more difficult federal standard for punitive damages. On the other hand, it ensures a more even treatment for employers who may suffer larger awards based solely upon the state in which they reside.

Attorneys' fees may also be awarded pursuant to section 1988[145] which provides: "In any action or proceeding to enforce a provision of sections 1981, 1982 [or] 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[146]

C. Section 1983

Section 1983, as the conduit for rights granted by the Constitution and federal laws,[147] encompasses a wide variety of claims including

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school hours); Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) (compensatory damages recoverable for deprivation of constitutional right which is substantive, rather than procedural due process). *But see* Crawford v. Garnier, 719 F.2d 1317, 1325 (7th Cir. 1983) (additional award of $10,000 for injury to civil rights reduced to $1 because plaintiff was well compensated for lost wages and fringe benefits, out-of-pocket costs, injury to reputation and pain and suffering); Familias Unidas v. Briscoe, 619 F.2d 391, 402 (5th Cir. 1980) (plaintiff suing for violation of associational rights under section 1983 entitled to nominal rather than compensatory damages due to absence of proof of actual injury).

[142] Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (holding that damages based on the abstract "value" or "importance" of constitutional rights are not a permissible element of compensatory damages). *See* EMPLOYMENT DISCRIMINATION, *supra* note 108, at § 23.1.4.

[143] Jackson v. Pool Mortgage Co., 868 F.2d 1178 (10th Cir. 1989).

[144] *Id.* at 1181 (citing EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984)).

[145] 42 U.S.C. § 1988 (1982).

[146] *Id.*

[147] Section 1983 does not set forth its own substantive rights for protection but is a vehicle for seeking a federal remedy for violations of federally protected rights. It is the Constitution and federal laws which define the substantive rights that may be asserted in an action under section 1983. 7 Empl. Coordinator (Research Inst. Am.) § 10,106 (Jan. 15, 1990).

employment discrimination claims.[148] Its protection extends to all persons within the jurisdiction of the United States who are deprived, under color of state law, of rights guaranteed by the Constitution or federal laws.[149] The statute provides:

> 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.[150]

Although section 1983 provides no substantive rights of its own, the following has been stated as to the purpose of the 1871 Civil Rights Act:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, 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.[151]

The problem, then, was not that state laws were inadequate, but that black people were not enjoying equal treatment under state law.

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[148] A. RUZICHO, L. JACOBS & L. THRASHER, EMPLOYMENT DISCRIMINATION LITIGATION § 5.04 at 241 (1989) [hereinafter, RUZICHO, JACOBS].

[149] Section 1983 was passed along with 42 U.S.C. §§ 1985 and 1986 (1982) pursuant to the powers granted to Congress in section 5 of the fourteenth amendment, U.S. CONST., amend. XIV, § 5. Sections 1981, 1983, 1985 and 1986 were originally enacted as the Civil Rights Act of 1871, Act of Apr. 20, 1871, 17 Stat. 13. This Act, known as the Ku Klux Klan Act, aimed at providing redress for harmful activities of the Ku Klux Klan. H. Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 5 (1985).

This statute formerly provided a civil remedy for deprivations of Constitutional rights only if the deprivation occurred under color of state law. In 1874, an amendment expanded the scope of protected rights to include rights "secured by the Constitution *and laws*." *Id.* at 5 n.12.

In 1980, the Supreme Court concluded that "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." Maine v. Thiboutot, 448 U.S. 1, 4 (1980).

[150] 42 U.S.C. § 1983 (1982).

[151] Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 18 (1985) (citing Monroe v. Pape, 365 U.S. 167, 180 (1961)).

Section 1983 is a viable avenue for redress of violations of constitutional or federal law rights under color of state law when state remedies may be unavailable or insufficient.

A cause of action under section 1983 requires a deprivation of a right secured by the Constitution or a federal law and that deprivation is caused by a person acting under color of state authority.[152] The requirement for "state action" is easily met when the discrimination has been carried out by a governmental agency or official. For instance, discriminatory practices held to be covered are those which have been carried out by police[153] and fire departments,[154] public schools, colleges and universities,[155] public and semipublic hospitals,[156] and state agencies.[157]

However, suits brought against private entities[158] raise the more difficult question of whether the entity's actions can be held attributable to the state. For example, it has been held that the mere receipt of government funds does not make every act of a private employer "state action" for the purposes of section 1983.[159]

In a liberal interpretation of what constituted "state action", the Supreme Court held in *Burton v. Wilmington Parking Authority*[160] that

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[152] Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970); *See* RUZICHO, JACOBS, *supra* note 148, at 242.

[153] Chicano Police Officers' Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975), *vacated and remanded*, 426 U.S. 944 (1976); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).

[154] Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) *modified*, 452 F.2d 327 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Western Addition Community Org. v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972).

[155] Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Jackson v. Wheatley School Dist. No. 28, 430 F.2d 1359 (8th Cir. 1970); League of Academic Women v. Regents of Univ. of Calif., 343 F. Supp. 636 (N.D. Cal. 1972).

[156] Chiaffitelli v. Dettmer Hosp., Inc., 437 F.2d 429 (6th Cir. 1971); Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967).

[157] Johnson v. Louisiana State Empl. Serv. in Shreveport, 301 F. Supp. 675 (W.D. La. 1968).

[158] Section 1983 applies to actions of governmental entities, not private individuals. 7 Empl. Coordinator, *supra* note 147, at § 10,107; *See, e.g.*, Wood v. Exxon Corp., 674 F. Supp. 1277, 1284 (S.D. Tx. 1987) (private employer cannot be sued under section 1983 unless employer was acting under color of state law); Williams v. Yellow Cab Co. of Pittsburgh, Pa., 200 F.2d 302, 307 (3d Cir. 1952) (section 1983 is directed only to state action; invasion of individual rights by other individuals is not within its purview).

[159] 7 Empl. Coordinator, *supra* note 147, at § 10,107; *See, e.g.*, Modaber v. Culpeper Memorial Hosp., Inc., 674 F.2d 1023 (4th Cir. 1982).

[160] 365 U.S. 715 (1961).

discriminatory state action existed in violation of the Equal Protection Clause of the fourteenth amendment when a black man was denied service in a private restaurant. The Court found that because a private organization leased the restaurant from a public parking authority which owned and operated the building and adjoining parking facilities, the restaurant operated "as an integral part of a public building."[161] Therefore, the Court held that by its inaction, the parking authority "and through it the State, . . . not only made itself a party to the refusal of service, but . . . elected to place its power, property and prestige behind the admitted discrimination."[162] Because the state "so far insinuated itself into a position of interdependence"[163] with the restaurant, the Court characterized it as a joint participant in the discrimination and concluded that state action was present.

In *Rendell-Baker v. Kohn*,[164]the Supreme Court limited the concept of "state action" as defined in *Burton*. *Rendell-Baker* concerned the employment practices of a school which, although privately owned, received over ninety percent of its funds from state and federal agencies by way of tuition funding plans.[165] The plaintiffs, discharged for protesting school policies, included at least one person hired pursuant to a grant which required hiring approval by a state committee.[166] Despite these connections, the Court found no state action due to insufficient state funding and regulation, no allegation that education was a public function and no "symbiotic relationship" as was present in *Burton*.[167] Although no bright lines have been drawn, state action requires a sufficient amount of state funding and regulation, as well as a symbiotic relationship between the employer and the state.

1. Section 1983 discrimination claims based on violations of constitutional rights

As long as the defendants act under color of state law, section 1983 covers discrimination based on race[168] and sex.[169] More specifically,

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[161] *Id.* at 724.

[162] *Id.* at 725.

[163] *Id.* The court relied on a number of factors in deciding that the entities were interdependent. *Id.* at 719-20. *See also* SCHLEI & GROSSMAN, *supra* note 41, at 679.

[164] 457 U.S. 830 (1982).

[165] *Id.* at 832.

[166] *Id.* at 833.

[167] *See generally* SCHLEI & GROSSMAN, *supra* note 41, at 680.

[168] *E.g.*, Scott v. University of Del., 385 F. Supp. 937 (D. Del. 1974).

[169] *E.g.*, Woerner v. Brzeczek, 519 F. Supp. 517, 518-21 (N.D. Ill. 1981).

with respect to the hostile environment type of discrimination claim, the Tenth Circuit Court of Appeals recently held that the sexual harassment of a county employee by her supervisor violated the employee's equal protection rights under the fourteenth amendment.[170]

In *Starrett v. Wadley*,[171] a supervisor made repeated sexual advances to the plaintiff and asked to meet her during business hours at his house or at other secluded locations. On occasion, the supervisor pinched plaintiff's buttocks, put his arm on her leg and invited her to his hotel room.[172] The supervisor often made obscene gestures to the plaintiff.[173]

After plaintiff spurned his advances and complained about harassment, her supervisor began to scrutinize her work more carefully and singled out her work for special review. He became hostile to plaintiff, hinted about her discharge and ultimately fired her. The Tenth Circuit Court of Appeals, affirming the district court's judgment in part, found that "the jury reasonably could have concluded that [the supervisor's] conduct toward the plaintiff discriminated against her because of her sex and thereby deprived her of the right to equal protection of the laws."[174]

An action for hostile environment discrimination under section 1983 may also be based on a deprivation of due process under the fifth or fourteenth amendments.[175] In *Carrero v. New York City Housing Authority*,[176] the female plaintiff had been employed by the Housing Authority for more than four years. Her supervisor "was constantly touching Carrero and attempting to bestow unasked for and unacceptable kisses

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[170] Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989). *See also*, Bohen v. City of East Chicago, Ind., 799 F.2d 1180, 1185 (7th Cir. 1986) ("Sexual harassment of female employees by a state employer constitutes sex discrimination for purposes of the equal protection clause of the fourteenth amendment"); Headley v. Bacon, 828 F.2d 1272, 1274-75 (8th Cir. 1987) (section 1983 claim for sexual harassment permitted in addition to Title VII claim).

[171] 876 F.2d 808 (10th Cir. 1989).

[172] *Id.* at 814-15.

[173] *Id.* at 815.

[174] *Id.* (footnote omitted).

[175] *E.g.*, Scott v. University of Del., 385 F. Supp. 937, 940 (D. Del. 1974) (black assistant professor stated section 1983 claim for relief based on equal rights and deprivation of rights under the thirteenth and fourteenth amendments of the Constitution).

[176] 890 F.2d 569 (2d Cir. 1989). The court also found Title VII violations for a hostile working environment based on the supervisor's sexual advances (touching plaintiff and trying to kiss her). *Id.* at 578.

upon her."[177] The court held that plaintiff had stated a valid section 1983 claim against her supervisor because his actions violated plaintiff's right to equal protection and due process under the fourteenth and fifth amendments.[178]

2. Preemption and exclusivity

Until 1982, it was generally accepted that a plaintiff could bring suit for employment discrimination under both section 1983 and Title VII.[179] For instance, in *Grano v. Department of Development of City of Columbus*,[180] the Sixth Circuit Court acknowledged that a plaintiff alleging unequal treatment essentially asserts the same claim under either section 1983 or Title VII.[181] However, a number of federal courts have recently addressed the issue of whether a Title VII claim displaces a cause of action under section 1983.[182]

Whether Title VII provides an exclusive avenue of relief was first considered in *Huebschen v. Department of Health and Social Services*.[183] The court allowed Huebschen, a demoted state employee alleging sexual harassment, to bring suit under both statutes even though the Title VII violation was the only basis for the section 1983 claim.[184] On appeal, however, the court did not reach the question of whether Title VII provided the exclusive remedy for employment discrimination and thus preempted a section 1983 cause of action.[185]

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[177] *Id.*

[178] *Id.* at 576-77.

[179] Levit, *Preemption of Section 1983 by Title VII: An Unwarranted Deprivation of Remedies*, 15 HOFSTRA L. REV. 191, 279 (1987) ("courts assumed that section 1983 and Title VII afforded parallel remedies").

See generally P. Gudel, *Title VII Preemption of Employment Discrimination Actions Under 42 U.S.C. Section 1983*, 76 ILL. B.J. 910 (Dec. 1987).

[180] 637 F.2d 1073 (6th Cir. 1980).

[181] *Id.* at 1082.

[182] *E.g.*, Ratliff v. City of Milwaukee, 608 F. Supp. 1109 (E.D. Wis. 1985), *rev'd in part*, 795 F.2d 612 (7th Cir. 1986).

[183] 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd on other grounds*, 716 F.2d 1167, 1171 (7th Cir. 1983) (reversed on grounds that plaintiff could not bring section 1983 action against supervisor when based on Title VII; however, district court properly rejected equal protection claim due to insufficient evidence).

[184] Levit, *supra* note 179, at 285. Circuit court held that district court erred in allowing plaintiff to maintain the section 1983 action based on Title VII because plaintiff's supervisor was not a person who could be sued directly under Title VII.

[185] *Huebschen*, 716 F.2d at 1170-71.

Torres v. Wisconsin Department of Health and Social Services[186] also considered the exclusive remedy issue.[187] The district court relied on the rationale provided in an earlier Supreme Court case which held that because Title VII provides a comprehensive statutory scheme, it preempts a separate section 1985 cause of action.[188] *Torres* involved claims under Title VII and sections 1985(3) and 1983.[189] The court dismissed the causes of action under sections 1985(3) and 1983, holding that Title VII provides plaintiffs' exclusive remedy.[190] The *Torres* court reasoned that the plaintiffs' section 1983 "allegations are so tied up with their cause of action under Title VII that they are . . . nearly unidentifiable as discrete claims".[191]

Within a year, a Seventh Circuit district court denied a cause of action under section 1983 in *Ratliff v. City of Milwaukee*.[192] The plaintiff in *Ratliff* alleged illegal discharge from employment in violation of Title VII and sections 1983 and 1985.[193] The *Ratliff* court, like that in *Torres*, refused to allow the plaintiff's section 1983 claim based on race discrimination, conspiracy and equal protection because the claim duplicated her Title VII cause of action.[194] The court stated that the plaintiff's claims were premised upon the alleged race discrimination which "Congress intended to prohibit and [to] provide a remedy for by means of Title VII."[195] On appeal, however, the circuit court held that although the section 1983 claims were properly dismissed, the district court "erred as a matter of law"[196] in holding that Title VII was plaintiff's exclusive remedy.[197] The circuit court ultimately affirmed

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[186] 592 F. Supp. 922 (E.D. Wis. 1984).

[187] Prior to *Torres*, Huebschen v. Department of Health and Social Servs., 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983), considered whether Title VII provides an exclusive avenue of relief.

[188] *Torres*, 592 F. Supp. at 930. *See also* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979). *Novotny* involved a claim under 42 U.S.C. § 1985 (1982) which, like section 1981, was formerly part of the 1871 Civil Rights Act.

[189] *Torres*, 592 F. Supp. at 923.

[190] *Id.* at 930. Levit, *supra* note 179, at 280.

[191] *Torres*, 592 F. Supp. at 930.

[192] 795 F.2d 612 (7th Cir. 1986).

[193] *Id.* at 614.

[194] Ratliff v. City of Milwaukee, 608 F. Supp. 1109, 1128 (D.C. Wis. 1985), *aff'd*, 795 F.2d 612 (7th Cir. 1986). *See also* Levit, *supra* note 179, at 280.

[195] *Ratliff*, 608 F. Supp. at 1128.

[196] *Ratliff*, 795 F.2d at 623.

[197] *See also* Zewde v. Elgin Community College, 601 F. Supp. 1237, 1245 n.10

the lower court's dismissal of the section 1983 claims based on the merits of the case.[198]

The Supreme Court has yet to address the issue of whether Title VII preempts a section 1983 cause of action. Given the limited remedies available under Title VII, such a court decision of exclusivity would leave some plaintiffs with uncompensated injuries. This decision should therefore first include a "sensitive inquiry into the nature of the remedies afforded to plaintiffs and how effectively those remedies address violations of fundamental constitutional rights."[199] Upon such inquiry the court should find that Title VII relief is limited and some plaintiffs will be afforded complete relief only if Title VII and section 1983 can be used in tandem.[200] For this reason, the court must conclude that it was not congressional intent to preclude multiple claims.

2. *Remedies available under section 1983*

The damages available for plaintiffs under section 1983 are substantially similar to those available under section 1981.[201] Both equitable and legal remedies are available, as are attorneys' fees for prevailing plaintiffs pursuant to section 1988.[202]

IV. Analysis

A. *Employee Protection for Hostile Environment Harassment under Title VII, Section 1981 and Section 1983*

Currently, employees are not afforded adequate protection from hostile work environments under the federal law. First, not all em-

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(N.D. Ill. 1984) (plaintiff alleging racial or national origin discrimination allowed to maintain both section 1983 and Title VII causes of action because the discrimination violated the equal protection clause of the fourteenth amendment).

[198] *Ratliff*, 795 F.2d at 612.

[199] Levit, *supra* note 179, at 298.

[200] *Id.* at 295.

[201] Employment Discrimination, *supra* note 108, § 23.1 at 524.

[202] 42 U.S.C. § 1988 (1982). *See supra* notes 137-40 and 145-46 and accompanying text.

ployees are eligible to file suit under one or more of these laws. Section 1981 applies only to racial discrimination and under *Patterson*, victims of hostile environment racial discrimination are generally excluded.[203] Section 1983 applies only if state action is involved, barring suit by victims of purely private discrimination. Under Title VII, the employer must have a minimum of fifteen employees,[204] and those who do not meet the employer-employee relationship requirement, such as independent contractors,[205] are not covered. Title VII covers a broader range of employees than sections 1981 and 1983 but may exclude certain plaintiffs due to its rigid procedural requirements. Second, although Title VII may apply to a greater number of employees, plaintiffs are often faced with inadequate remedies.

Of the three statutes, Title VII is the only one which has procedural requirements, making it far more restrictive than the other two statutes in this respect. Under Title VII, employees must exhaust EEOC administrative requirements within short deadlines.[206] In contrast, sections 1981 and 1983 do not require exhaustion of administrative steps before the employee files suit and applicable statutes of limitations afford employees a more lenient time frame.[207] Assuming she has a valid cause of action under section 1981 and/or section 1983, an employee who misses the EEOC deadlines may still bring suit under those statutes.

The remedial framework of Title VII calls for equitable remedies—usually reinstatement, back pay and injunctive relief—to the exclusion of compensatory or punitive damages, which are available under sections 1981 and 1983. Back pay and reinstatement are unavailable

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[203] *See supra* notes 114-22 and accompanying text.

[204] 42 U.S.C. § 2000e(b) (1982).

[205] *E.g.*, Cobb v. Sun Papers, Inc., 673 F.2d 337 (11th Cir. 1982); Lutcher v. Musicians Union Local 47, 633 F.2d 880 (9th Cir. 1980); Spirides v. Reinhardt, 613 F.2d 826 (D.D.C. 1979).

[206] The employee must exhaust administrative steps prior to filing suit under Title VII. Employee must file complaint with the EEOC within 180 days of the alleged discrimination or unlawful employment practice, 42 U.S.C. § 2000e-5(e) (1982). The EEOC may attempt to reconcile employer and employee. If no agreement is reached, the EEOC issues a "right-to-sue" letter authorizing the employee to file suit no later than 90 days after receipt of that letter. 42 U.S.C. § 2000e-5(f) (1982).

[207] Generally, state statutes of limitations for tort claims apply. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975) (lacking federal statute of limitation which is specifically stated for or otherwise relevant to a section 1981 cause of action, appropriate state statute of limitation ordinarily controls).

unless the employee suffered negative tangible consequences such as loss of income or job advancement[208] due to real or constructive discharge[209] or lack of promotion. An award of back pay under Title VII is limited to two years prior to the filing of a charge of discrimination with the EEOC;[210] the time period allowed under section 1983 is governed by state statute and may be longer than the Title VII limitation.[211]

With respect to equitable remedies under the three statutes, the court may deny reinstatement if it finds that the parties are irreconcilably hostile toward each other.[212] When reinstatement is inappropriate or impractical, the court may award front pay for some future period, reasonably estimating the time that the plaintiff could have worked if not for the discrimination.[213] In practical terms, reinstatement may be unsatisfactory because it leaves an employee in the same position in which she first complained.[214]

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[208] *See*, Morlacci, *Sexual Harassment Law and the Impact of Vinson*, 13 EMPLOYEE REL. L.J. 501, 517 (1987).

[209] *See supra* note 24 and accompanying text.

[210] 42 U.S.C. § 2000e-5(g) (1982).

[211] *See* Williams v. Anderson, 562 F.2d 1081, 1091 (8th Cir. 1977); Wilson v. Garcia, 471 U.S. 261 (1985) (section 1983 claims are best characterized as personal injury actions, therefore state's personal injury statute of limitations applies); Burnett v. Brattan, 468 U.S. 42 (1984) (section 1981 action governed by state's three year statute of limitations for all civil actions rather than six month limitation governing state administrative employment discrimination complaints).

[212] *See, e.g.*, Mays v. Williamson Sons Janitorial Servs., 591 F. Supp. 1518, 1522 (E.D. Ark. 1984), *aff'd*, 775 F.2d 258 (8th Cir. 1985); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627 (hostile environment sexual harassment victim who suffered constructive discharge was awarded back pay in lieu of reinstatement due to the "intense hostility which had developed between the parties"); Starrett v. Wadley, 876 F.2d 808, 824 (10th Cir. 1989) (court refused to order reinstatement where affidavit from psychologist indicated that "reinstatement was not appropriate at the time and would be detrimental to plaintiff's health"); Meyers v. ITT Diversified Credit Corp., 527 F. Supp. 1064, 1070 (E.D. Mo. 1981) (reinstatement denied due to hostility between parties; $3,000 awarded to employee in lieu of reinstatement).

[213] Hostility as a Bar to Reinstatement, 12 Equal Employment Compliance Update 69 (February 1990). *See, e.g.*, EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd without opinion*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); *but see* Jackson v. City of Albuquerque, 890 F.2d 225, 226 (10th Cir. 1989) (reversing front pay award to plaintiff alleging racial discrimination and retaliation despite finding that "hostility [was] far too high to make reinstatement a feasible remedy").

[214] *E.g.*, Starrett v. Wadley, 876 F.2d 808, 824 (10th Cir. 1989) (noting holding in Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980), that denial of reinstatement was appropriate where atmosphere of hostility existed).

Courts have consistently held that legal damages are not available under Title VII.[215] Therefore, plaintiffs seeking compensatory damages (*e.g.*, damages for pain and suffering) must file suit under the Reconstruction statutes, if applicable, and/or for related state claims.[216]

Under section 1981, the court may issue a preliminary injunction to prevent the employer from continuing the alleged discriminatory practices while the case is being litigated. On the other hand, injunctive relief is not available in a Title VII case while the charge is being investigated by the EEOC.[217]

Attorneys' fees are awarded to prevailing parties under all three statutes at the discretion of the court. Under sections 1981 and 1983, however, prevailing employers must meet a higher standard and cannot

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[215] *See supra* notes 94-96 and accompanying text.

[216] States may provide redress under civil rights statutes similar to Title VII. For instance, under Haw. Rev. Stat. § 368-17 (1989) plaintiffs may recover legal and equitable remedies, including attorneys' fees and punitive damages. For a summary of state civil rights statutes and constitutional provisions, *see* D. McWHIRTER, *supra* note 18, at 99-103 (Table 7-1).

Also, employees may obtain compensation for expenses due to physical injuries caused by the discrimination. However, victims are usually barred by state worker's compensation laws from subsequently suing their employers in tort. For instance, Haw. Rev. Stat. § 386-5 (1986) provides that worker's compensation remedies "exclude all other liability of the employer to the employee". *See, e.g.*, Brooms v. Regal Tube Co., 881 F.2d 412, 426 (7th Cir. 1989); *In re* Agent Orange Product Liab. Litig., 611 F. Supp. 1285, 1289 (E.D.N.Y. 1985); Kamali v. Hawaiian Elec. Co., 54 Haw. 153, 157-58, 504 P.2d 861, 864 (1972). *See also* Hanagami v. China Airlines, Ltd., 67 Haw. 357, 362-63, 688 P.2d 1139, 1143 (1984) (holding in *Kamali* reflects holdings of great majority of jurisdictions including Alaska, Michigan, Missouri, Pennsylvania, Texas and Washington).

See, e.g., Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981) (intentional infliction of emotional distress, invasion of privacy); Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D.N.J. 1978) (tortious interference with contract). However, state tort actions have drawbacks: the primary tortfeasor, rather than the employer, may be solely liable to the employee. Note, *Continental Can Co. v. Minnesota: Sexual Harassment by Nonsupervisory Employees Makes Employer Liable*, 10 CAP. U.L. REV. 625, 628 (1981), and plaintiff may be unable to satisfy the difficult requirements of state tort laws. *See* Hunter v. Countryside Ass'n for the Handicapped, Inc., 723 F. Supp. 1277 (N.D. Ill. 1989) (plaintiff's claim under state tort law failed due to inability to meet requirement that supervisor was acting in the scope of his employment when he beat and raped her); Paroline v. Unisys Corp., 879 F.2d 100, 112-13 (4th Cir. 1989) (state tort claim dismissed because supervisor's unwanted touching, kissing and suggestive remarks were not sufficiently "outrageous" to meet high tort standard of prohibited conduct).

[217] W. OUTTEN AND N. KINIGSTEIN, THE RIGHTS OF EMPLOYEES 87 (1983).

recover fees unless the suit was brought in bad faith.[218] Under Title VII, a prevailing employee who is granted equitable relief without at least a nominal damage award may be refused attorneys' fees.[219]

While jury trials are generally unavailable under Title VII because the remedies are equitable in nature,[220] they are available under the Reconstruction statutes unless the employee seeks solely equitable relief.[221] However, when causes of action exist under Title VII and section 1981 and/or section 1983, the right to jury trial exists with respect to the legal claims and all issues common to both legal and equitable claims.[222] Punitive damages, not available under Title VII, are awarded when the discrimination is "malicious, willful, and in gross disregard of [plaintiff's] rights."[223]

Limitations as to the causes of action open to victims of hostile environment discrimination as well as the remedies available under these three statutes give employees little or no incentive to file suit. The employee who stands the best chance to be made "whole" is one who can pursue causes of action under all three statutes in the alternative so as to obtain both equitable and legal relief, including compensatory and punitive damages, where warranted.[224]

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[218] E. LARSON, SUE YOUR BOSS 169 & n.52 (1981) (the suit must be frivolous or brought for purposes of harassment for prevailing employers to recover fees).

[219] *E.g.*, Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979). *See supra* note 97.

[220] *E.g.*, Moore v. Sun Oil Co. of Pa., 636 F.2d 154 (6th Cir. 1980) (no jury trial is available for back pay). *See also* Saad v. Burns Int'l Sec. Servs., Inc., 456 F. Supp. 33, 34 (D.D.C. 1978); Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136 (W.D. Okla. 1977); Flores v. Local 25, IBEW, AFL-CIO, 407 F. Supp. 218 (E.D.N.Y. 1976). The Civil Rights Act of 1990, proposed by Senator Kennedy, would have amended Title VII to provide the right to a jury trial. *See infra* note 229 and accompanying text.

[221] Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1976).

[222] *See, e.g.*, Bibbs v. Jim Lynch Cadillac, 653 F.2d 316, 319 (8th Cir. 1981); Jones v. Metropolitan Hosp., 88 F.R.D. 341, 344 (E.D. Mich. 1980); Clarke v. American Cyanamid Co., 24 Fair Empl. Prac. Cas. (BNA) 873, 874 (D.N.J. 1980); Carillo v. Douglas Aircraft Co., 18 Fair Empl. Prac. Cas. (BNA) 830 (C.D. Cal. 1987).

[223] Jackson v. Pool Mortgage Co., 868 F.2d 1178, 1181 (10th Cir. 1989) (citing EEOC v. Gaddis, 733 F.2d 1373, 1380 (10th Cir. 1984)).

[224] The "ideal" plaintiff in a hostile environment discrimination case falling within the ambit of all three statutes is employed by a private employer with fifteen or more employees (under Title VII), her employer has engaged in state action (for section 1983 purposes), and she alleges racial discrimination with respect to conduct which interferes with her right to enforce her contract obligations through the legal system or racial discrimination based on failure to promote where the new position involves an opportunity to enter into a distinct and new contract with her employer (for section 1981 coverage).

B. *Employer can Guard Against Hostile Environment Discrimination Liability*

Under current federal laws, most employers can insulate themselves from hostile environment liability. Under *Patterson*,[225] they can avoid liability for racial discrimination under section 1981 as long as they do not interfere with an employee's right to enforce her established contract obligations by legal process.[226] Employers may avoid section 1983 liability by refraining from "state conduct". And if the claim is under Title VII, the employer is given the chance to reconcile before the employee actually files suit.

Additionally, the *Vinson*[227] case is instructive for employers desiring to limit their liability under Title VII. The Supreme Court suggested that employers: 1) have a strong policy against discrimination 2) which puts employees on notice as to the specific kinds of discrimination which will not be tolerated (*e.g.*, sexual and racial) and 3) allows employees to air complaints with someone besides their immediate supervisor and 4) is strongly enforced.[228]

Some uncertainty exists as to when employers are strictly liable for harassing conduct of its supervisory employees or by co-employees or non-employees. Despite this uncertainty, however, employers can avoid liability for the most part if they follow the EEOC guidelines and the Court's suggestions in *Vinson*.

C. *Strengthening Employee Rights in Hostile Environment Discrimination Cases*

Employees who are victims of hostile environment discrimination must be given a real opportunity to seek redress and be made "whole"

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[225] Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989).

[226] *Id.* at 2377. The Court also indicated that refusing to promote in certain instances may be actionable under section 1981 if the promotion "involved the opportunity to enter into a new contract with the employer." *Id.* Employers, therefore, should exercise caution with respect to denying promotions.

[227] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[228] These suggestions are consistent with the EEOC Guidelines concerning the prevention of harassment:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1985).

through full compensation for their injuries. Victims can be given more of an opportunity to be heard if less stringent time limits are required under Title VII. The law must clarify that compensatory and punitive damages are available under Title VII,[229] as they are under sections 1981 and 1983. This would also afford plaintiffs the right to jury trials when they seek legal remedies.

Plaintiffs must be able to bring suit under alternative causes of action so as to achieve complete relief. In this vein, section 1981 should be available to victims of hostile environment discrimination—section 1981 must be amended or judicially re-interpreted to avoid the narrow application which precludes relief for conduct subsequent to forming the employment contract. Similarly, a cause of action under one federal law ought not to be viewed as exclusive, for instance, Title VII cannot be interpreted to preempt a cause of action under section 1983.

V. Conclusion

The civil remedies available under sections 1981 and 1983 emerged as a response to early discrimination and have been applied in work

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[229] The Civil Rights Act of 1990 was introduced in Congress on February 7, 1990 by identical bills. The sponsors intended that the bill 1) restore civil rights protections that were dramatically limited by recent Supreme Court decisions, including *Patterson*, 109 S. Ct. 2363 (1989) and 2) strengthen existing protection and remedies under federal civil rights laws to deter discrimination and adequately compensate victims. S. 2104, 101st Cong., 2d Sess. § 2(b) (1990); H.R. 4000, 101st Cong., 2d Sess. § 2(b) (1990).

S. 2104 would amend Title VII by allowing compensatory and punitive damages and giving parties the right to demand a jury trial. In response to *Patterson*, S. 2104 provides that "the right to 'make and enforce contracts' [in section 1981] shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." S. 2104, 101st Cong., 2d Sess. § 12 (1990); H.R. 4000, 101st Cong., 2d Sess. § 12 (1990).

Unfortunately, the Civil Rights Act of 1990 was vetoed by President Bush on October 24, 1990, 136 Cong. Rec. S16562 (daily ed. Oct. 24 1990), in part because the bill would induce employers to hire by quotas in order to avoid liability. *Id.* Despite the veto and the Senate's failure to override it, Senator Kennedy, the original sponsor of the bill, has indicated that similar civil rights legislation will be introduced, maybe as early as January, 1991. Wash. Insider, Oct. 25, 1990.

As this article goes to print, the civil rights bills introduced in Congress this year lack the comprehensive coverage of the proposed Civil Rights Act of 1990. Among other things, the relevant acts propose to amend section 1981 by expanding "the right to make and enforce contracts" as suggested in the Civil Rights Act of 1990, and to amend Title VII to provide for compensatory damages. H.R. 1, 102nd Cong., 1st Sess. §§ 8, 12 (1991); S. 478, 102nd Cong., 1st Sess. §§ 8, 11 (1991); H.R. 1375, 102nd Cong., 1st Sess. §§ 6, 8 (1991).

place discrimination cases; Title VII emerged more recently specifically in response to discrimination in the American work place. The federal statutes have served to compensate certain victims but as vehicles to cure work place discrimination, they have shown certain weaknesses. The ineffectiveness of the remedies is due, in part, to recent court decisions that are inconsistent with affording victims the broadest range of remedies possible to make them whole and to serve as an incentive for them to seek redress. Holding employers accountable for on the job discrimination, including compensatory damages, punitive damages if necessary, and attorneys' fees, would give employers incentive to rid the work place of discrimination. Last year, Congress made an unsuccessful attempt to revise the civil rights statutes to ensure that employment discrimination victims have fair opportunities to seek legal remedies and to be made whole through compensatory damages. Because discrimination is a "fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose,"[230] there is urgent need for such legislation. All of us will benefit—employer and employee, and consumers to whom the cost of discrimination is passed on—from legislation restoring and strengthening our civil rights laws with respect to the American work place.

Shauna K. Candia

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[230] 136 CONG. REC. S16562 (daily ed. Oct. 24, 1990) (veto message from President Bush regarding Civil Rights Bill of 1990).

State v. Kumukau: A Case for the Application of Eighth Amendment Proportionality Analysis

I. Introduction

In *State v. Kumukau*,[1] the Hawaii Supreme Court held that consecutive mandatory minimum terms of imprisonment are authorized by Hawaii Revised Statutes section 706-660.1[2] and that its imposition without the possibility of parole is not cruel and unusual punishment under either the United States or the Hawaii State Constitution.[3] The court explained that notwithstanding the constitutionality of a statute, courts may review sentences as applied to particular defendants to determine whether the sentence is unconstitutionally cruel and unusual[4] or for abuse of discretion.[5] The court then ruled that the trial court abused its discretion in imposing the maximum terms possible on each and every count for which Kumukau was convicted.[6] Since the court remanded *Kumukau* for resentencing,[7] the court did not address Ku-

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[1] 71 Haw. 218, 787 P.2d 682 (1990).

[2] *Id.* at 226, 787 P.2d at 687. Kumukau contended that Haw. Rev. Stat. § 706-660.1(a) (Supp. 1989) (amended 1990), relating to sentences of imprisonment for use of a firearm in a felony, did not authorize consecutive terms of imprisonment. *Id.* at 222, 787 P.2d at 685.

[3] *Id.* at 227, 787 P.2d at 687. The court held that Haw. Rev. Stat. § 706-660.1 (Supp. 1989) (amended 1990) "is not unconstitutional on its face." *Id.*

[4] *Id.* at 227, 787 P.2d at 687-88 (citing State v. Iaukea, 56 Haw. 343, 360, 537 P.2d 724, 735 (1975)).

[5] *Id.* at 227, 787 P.2d at 688 (citing State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 17 (1979)).

[6] *Id.* at 228, 787 P.2d at 688.

[7] *Id.*

mukau's contention that his sentence itself was unconstitutionally cruel and unusual.[8]

This note focuses on statutory, constitutional, and discretionary concerns raised by the court's decision in *Kumukau*[9]. Section II provides the facts of *Kumukau*. Section III commences with a background of legislative and judicial spheres of power, then examines the history of the law. Section IV comments on the Hawaii Supreme Court's rationale in the *Kumukau* decision. Lastly, section V explores the impact of *Kumukau* on sentencing courts.

II. Facts

On March 3, 1988,[10] Melvin Kumukau and two others, armed with guns, robbed seven participants at a dice game.[11] Kumukau made his getaway by appropriating a vehicle[12] and, while driving away from the scene of the robbery, fired two shots at plainclothes police officers with a shotgun.[13] On August 24, 1988, a jury found Kumukau guilty of seven counts of robbery in the first degree; seven counts of kidnapping; one count of burglary in the first degree; one count of attempted murder in the second degree; one count of possession of a firearm by a person convicted of certain crimes; one count of unauthorized control of a propelled vehicle; and one count of reckless endangering in the first degree.[14] On October 20, 1988,[15] Kumukau was sentenced to an

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[8] *Id.* (citing State v. Lo, 66 Haw. 653, 657, 675 P.2d 754, 757 (1983)). The court in State v. Lo, 66 Haw. 653, 675 P.2d 754 (1983), noted that if the court can decide a case on statutory construction or general law, it is not obliged to pass on constitutional questions. *Id.* at 657, 675 P.2d at 757 (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). Thus, the *Lo* court ruled that "bugging" or electronic eavesdropping was not permitted in a private place thus passing on the defendant's statutory but not constitutional right to privacy. *Id.* at 662, 675 P.2d at 760.

[9] 71 Haw. 218, 787 P.2d 682 (1990).

[10] Answering Brief of the State of Hawaii at 2, State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367).

[11] *Kumukau*, 71 Haw. at 220, 787 P.2d at 684.

[12] *Id.* The getaway vehicle belonged to one of the robbery victims. *Id.*

[13] Answering Brief of the State of Hawaii, *supra* note 10, at 6.

[14] Opening Brief of Defendant-Appellant at 2, State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367).

[15] *Id.*

extended term of eight consecutive life terms plus 200 years.[16] Further, under mandatory minimum sentencing,[17] Kumukau was mandated to serve 136 years of imprisonment before eligibility for parole was possible.[18]

On appeal to the Hawaii Supreme Court, Kumukau contended that the imposition of consecutive mandatory minimum terms of imprisonment is not authorized by statute, or is unconstitutionally cruel and unusual punishment under the federal and state constitutions, or an

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[16] *Kumukau*, 71 Haw. at 221, 787 P.2d at 684. The sentence was imposed pursuant to HAW. REV. STAT. §§ 706-661 (1985) and 706-662 (Supp. 1989) (amended 1990). *Id.*

[17] *Id.* HAW. REV. STAT. § 706-668.5 (Supp. 1989) permits consecutive terms of imprisonment. *Id.* at 224, 787 P.2d at 686. The court also construed §706-660.1(a) (Supp. 1989) (amended 1990) as permitting consecutive terms of imprisonment. *Id.* at 226, 787 P.2d at 687. *See infra* note 106 for text of § 706-660.1(a) (Supp. 1989) (amended 1990).

[18] *Id.* at 221, 787 P.2d at 684. The sentences imposed follow:

Count	Class of Felony	Extended Term	Mandatory Minimum
1. Robbery	A	Life w/Parole	10 years
2. Robbery	A	Life w/Parole	10 years
3. Robbery	A	Life w/Parole	10 years
4. Robbery	A	Life w/Parole	10 years
5. Robbery	A	Life w/Parole	10 years
6. Robbery	A	Life w/Parole	10 years
7. Robbery	A	Life w/Parole	10 years
8. Kidnapping	B	20 years	5 years
9. Kidnapping	B	20 years	5 years
10. Kidnapping	B	20 years	5 years
11. Kidnapping	B	20 years	5 years
12. Kidnapping	B	20 years	5 years
13. Kidnapping	B	20 years	5 years
14. Kidnapping	B	20 years	5 years
15. Burglary 1	B	20 years	5 years
16. Att Murder 2	Life	Life w/ Parole	15 years
21. Firearm*	C	10 years	3 years
22. U.C.P.V.**	B	20 years	5 years
23. R.E. 1 ***	C	10 years	3 years
		8 Life w/parole plus 200 years	136 years

* Possession of Prohibited Firearm
** Unauthorized Control of Propelled Vehicle
*** First Degree Reckless Endangering

Id. at 221 n.1, 787 P.2d at 684-85 n.1.

abuse of discretion.[19] First, Kumukau argued *inter alia* that "consecutive mandatory minimum terms which, in effect, become life terms without parole" are not intended by the legislature."[20] Second, the imposition of consecutive mandatory minimum terms is cruel and unusual punishment, and therefore, the statute which allows it is constitutionally invalid.[21] And third, the imposition of his sentence was an abuse of discretion.[22]

III. History Of The Law

The primary legal issues in *Kumukau*[23] involve statutory and constitutional principles of law and judicial discretion. This section begins with a background on the legislative and judicial spheres of power as it relates to the sentencing decision.

A. Legislative Discretion

It is within legislative prerogative to prescribe penalties for criminal offenses.[24] Legislatures usually allow courts wide latitude in determining

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[19] *Id.* at 222, 787 P.2d at 685. The court did not pass on the issue of the constitutionality of Kumukau's sentence. *Id.* at 228, 787 P.2d at 688.

[20] *Id.* at 223, 787 P.2d at 686.

[21] *Id.* at 226, 787 P.2d at 687. The court notes that Kumukau is essentially arguing that Haw. Rev. Stat. § 706-660.1 (Supp. 1989) (amended 1990) is constitutionally invalid on the grounds that when a sentence imposed within statutory limits is cruel and unusual, the statute itself is unconstitutional. *Id.* (citing Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960); State v. Freitas, 61 Haw. 262, 267, 602 P.2d 914, 919-20 (1979)).

[22] *Id.* at 222, 787 P.2d at 685.

[23] 71 Haw. 218, 787 P.2d 682 (1990).

[24] State v. Johnson, 68 Haw. 292, 296, 711 P.2d 1295, 1298 (1985) (quoting *Freitas* 61 Haw. at 267, 602 P.2d at 919). In upholding the constitutionality of a statute, the court in *Freitas* noted:

> Thus, the legislature by statutory enactment describes crime and prescribes punishment and for a court to refuse imposition of prescribed penalties by the devise of indefinite suspension of sentence or similar means, would constitute judicial usurpation of legislative power.

61 Haw. at 274, 602 P.2d at 923-24 (quoting Missouri v. Motley, 546 S.W.2d 435, 438 (Mo. App. 1976)). The *Freitas* court further noted:

> In our tripartite system of government it is unquestionable that the Legislature has the authority to determine what conduct shall be punishable and to prescribe penalties [citations omitted]. Although it is the court's function to impose sentences upon conviction, it is for the Legislature to establish criminal sanctions

the selection and severity of sentences.[25] For example, the United States

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> and, as one of its options, it may prescribe a mandatory minimum term of imprisonment [citations omitted]. If we were to conclude that the judiciary could exercise its discretion to suspend imposition or execution of sentence despite statutory proscription, a serious question concerning the separation of powers would arise, for, taking this proposition to its logical extreme, it would mean that the judiciary impliedly possesses the power to nullify the Legislature's authority.

Id. at 275, 602 P.2d at 924 (citation omitted). *See, e.g.*, Rummel v. Estelle, 445 U.S. 263 (1980).

Parole is also a legislative prerogative. In *Freitas*, the court stated that "parole is a matter of legislative grace, and the denial of it to certain offenders is within legislative discretion." 61 Haw. at 270, 602 P.2d at 921. *See also* Gore v. United States, 357 U.S. 386, 393 (1958) (severity of punishment is legislative policy); United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988) (parole is not constitutional nor inherent right, and absence of parole for some offenses is not per se unconstitutional) (citations omitted); Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960) (Congressional decision to prohibit parole, probation or suspension of sentence in an effort to fight the escalation of repeat narcotic trafficking by first offenders does not shock the sense of justice. "At worst it merely forbids . . . the discretionary granting of special benefits which Congress did not have to permit in the first place.").

It is not clear whether the possibility of parole influences a court when evaluating the proportionality of a sentence. For example, in State v. Iaukea, 56 Haw. 343, 361, 537 P.2d 724, 736 (1975), the defendant's eligibility for parole was a distinguishing factor in determining the proportionality of his sentence. Conversely, in Rummel v. Estelle, 445 U.S. 263, 294 (1980) (Stewart, J. dissenting), the dissent noted that a convicted person has no right to early release and that the possibility of parole does not enter into eighth amendment analysis. Thus, a life sentence deprives a person of his right to freedom for the rest of his life regardless of the possibility of parole. The *Rummel* majority, however, recognized the possibility that Rummel would "not actually be imprisoned for the rest of his life" and distinguished Rummel's life sentence with the possibility of parole from sentences of life without parole. *Id.* at 279-81.

Subsequently, the Court in Solem v. Helm, 463 U.S. 277, 301-03 (1983), argued that the facts in *Rummel* were distinguishable because unlike Rummel, Solem was not eligible for parole and that the *Rummel* Court relied on the fact that Texas had a liberal policy to grant parole. Chief Justice Burger's dissenting opinion in *Solem*, however, argued that the differences in *Rummel* and *Solem* are insubstantial, that it was "inaccurate to say . . . that the *Rummel* holding relied on the fact that Texas had a relatively liberal parole policy[,]" and thus, *Rummel* was binding precedent on the *Solem* Court. *Id.* at 316.

[25] *Johnson*, 68 Haw. at 296, 711 P.2d at 1298 (citing State v. Murray, 63 Haw. 12, 25, 621 P.2d 334, 342 (1980)). A statute, however, cannot give a sentencing judge unfettered discretion in imposing a sentence. The court in State v. Huelsman, 60 Haw. 71, 89, 588 P.2d 394, 405 (1978), held that HAW. REV. STAT. § 706-662(4) (1972) (current amendment 1990) failed to provide due process because it allowed the sentencing judge wholly unguided discretion and failed to provide safeguards against

Supreme Court in *Rummel v. Estelle*[26] stated that sentences imposed in felony cases are "purely a matter of legislative prerogative,"[27] and the line-drawing between sentences and criminal acts is within the province of the legislature, subject to the strictures of the eighth amendment.[28] Similarly, in *Solem v. Helm*,[29] the United States Supreme Court noted that "reviewing courts . . . should grant *substantial deference*" to the legislature's authority in prescribing punishment and to the discretion allowed to trial courts in sentencing.[30] The dissent in *Solem* further noted that "the Court's traditional abstention from reviewing sentences . . . is well founded in history" and that legislatures are in a better position than courts are to balance competing societal interests.[31]

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arbitrary and capricious action. The *Huelsman* court noted that article I, section 4 of the Hawaii State Constitution guarantees against the deprivation of liberty without due process, *Id.* at 88, 588 P.2d at 405, the "[t]ouchstone of due process is protection against arbitrary action of government[,]" so the statute must define a standard of sentencing discretion, *Id.* (citing Wolff v. McDonnell, 418 U.S. 539, 558 (1974)), and an inquiry into the defendant's character, potential for rehabilitation, and threat to society provide sufficient safeguards against arbitrary and capricious action by the sentencing judge. *Id.* at 89, 588 P.2d at 405. *See infra* note 51 for further discussion of the *Huelsman* decision.

[26] 445 U.S. 263 (1980).

[27] *Id.* at 274.

[28] *Id.* at 275. The *Rummel* Court noted that objective factors must inform eighth amendment judgments and not the subjective views of the Justices. *Id.* at 274. Consequently, the Court declined to extend eighth amendment analysis to a felony case not involving a capital offense or a grossly disproportionate sentence. *Id.* at 274-85. The dissent, however, argued that objective criteria were identifiable and could minimize judicial subjectivity. *Id.* at 295. *See also* Ingraham v. Wright, 430 U.S. 651, 667 (1977) (eighth amendment applies to persons convicted of crimes, the kinds of punishment imposed, proportionality of the sentence to the severity of the crime, and limits as to "what can be made criminal and punished as such . . . ."); Gregg v. Georgia, 428 U.S. 153, 174 (1976) ("Eighth Amendment is a restraint upon the exercise of legislative power."); Trop v. Dulles, 356 U.S. 86, 100 (1958) ("the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.").

[29] 463 U.S. 277 (1983).

[30] *Id.* at 290 (emphasis added). The *Solem* Court also noted that "no penalty is per se constitutional" and embarked on a proportionality test guided by objective factors. *Id.* The *Solem* dissent, however, emphasized the holding in *Rummel*, 445 U.S. 263, as binding precedent and argued that "it is error for appellate courts to second guess legislatures as to whether a sentence of imprisonment is excessive in relation to the crime." *Solem*, 463 U.S. at 311 (Burger, C.J., dissenting).

[31] *Solem*, 463 U.S. at 314 (Burger, C.J., dissenting). Chief Justice Burger's dissenting opinion stressed *Rummel* as *stare decisis* in limiting appellate review to capital

Subsequently, in *United State v. Rosenberg*,[32] the United States Court of Appeals for the Third Circuit held that the "principle of substantial deference" restricted appellate review of sentences, except in rare cases.[33] The dissent in *Rosenberg* added that the principle requiring courts to strictly construe criminal laws is founded on "the plain principle, that the power of punishment is vested in the legislative, not the judicial department."[34]

Federal courts also recognize that there is a state interest in prescribing a harsher sentence in recidivist statutes for repeat criminals who violate the norms of society as prescribed by criminal laws.[35] Moreover, intrusion by federal courts in a state's sentencing decision may violate principles of federalism on the grounds that "the Constitution recognizes a sphere of state activity free from federal interference."[36]

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offenses and rare cases involving bizarre punishment. *Id.* at 304-18. For example, in Weems v. United States, 217 U.S. 349, 366 (1910), the appellant was convicted of falsifying a public record and received a 12 year sentence at hard and painful labor while constantly chained at the ankle and wrist and thereafter, forever under the authority of the criminal magistrate - a "perpetual limitation of his liberty." Not until *Solem* did the Court apply the *Weems* doctrine of excessive punishment to a sentence consisting solely of imprisonment. *Solem*, 463 U.S. at 313 n.6. *See, e.g.*, United States v. Rosenberg, 806 F.2d 1169 (3rd Cir. 1986).

[32] 806 F.2d 1169 (3rd Cir. 1986).

[33] *Id.* at 1175 (citing *Solem*, 463 U.S. at 290). In *Rosenberg*, the appellate court upheld the imposition of maximum terms of imprisonment to be served consecutively, totalling 58 years, for nine counts of possession of firearms, explosives, and false identification documents. *Id.* at 1180.

[34] *Id.* at 1183 (Higgenbotham, Jr., J. dissenting in part) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

[35] *Rummel*, 445 U.S. 263, 276 (1980). The *Rummel* court noted that the Texas recidivist statute, Article 63, is a societal decision to impose life imprisonment with or without parole. *Id.* at 278. *E.g.* Solem v. Helm, 463 U.S. 277 (1983); State v. Freitas, 61 Haw. 262, 602 P.2d 914 (1979).

[36] *Rummel*, 445 U.S. at 303 (Powell, J., dissenting). In recognizing state sovereignty, Justice Powell cautioned:

> Each State has sovereign responsibilities to promulgate and enforce its criminal law. In our federal system we should never forget that the Constitution "recognizes and preserves the autonomy and independence of the States, - independence in their legislative and independence in their judicial departments. (citing Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938) (quoting Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 402 (1893)) (Field, J., dissenting). But even as the Constitution recognizes a sphere of state activity free from federal interference, it explicitly compels the States to follow certain constitutional commands. When we apply the Cruel and Unusual Clause against the States,

B. Judicial Duty

The court's "primary duty is to ascertain and implement the intention of the legislature."[37] "In ascertaining legislative intent, the lan-

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we merely enforce an obligation that the Constitution has created.

Rummel, 445 U.S. at 303 (Powell, J., dissenting). Justice Powell maintained that the Court can identify and apply objective criteria in eighth amendment judgments so as not to "intervene in state criminal justice systems at will." *Id.* at 304.

[37] State v. Saufua, 67 Haw. 616, 618, 699 P.2d 988, 990 (1985) (citing Kaiama v. Aguilar, 67 Haw. 549, 554, 696 P.2d 839, 842 (1985)). *See also* Gore v. United States, 357 U.S. 386, 394 (1958) ("In every instance, the problem is to ascertain what the legislature intended."); State v. Murray, 63 Haw. 12, 18, 621 P.2d 334, 339 (1980) (primary obligation is to seek intent of legislature). The *Saufua* court ruled that the legislature intended that maximum indeterminate sentences authorized by HAW. REV. STAT. §§ 706-659 (Supp. 1984) and 706-660 (Supp. 1984) (amended 1986) should be served consecutive to a prior sentence. *Saufua*, 67 Haw. at 618-20, 699 P.2d at 990-91. The construction that a mandatory minimum term for repeat offenders authorized by HAW. REV. STAT. § 706-606.5(2)(a) (Supp. 1984) (current amendment 1990) is logically subsumed within the maximum sentence for the underlying offense is in harmony with the statutory sentencing scheme, and the court may not increase the maximum indeterminate sentence by tacking on the mandatory minimum term. *Id.* at 619-20, 699 P.2d at 991.

HAW. REV. STAT. § 706-659 (Supp. 1984) in relevant part reads:

> Sentence of imprisonment for class A felony. . . . [A] person who has been convicted of a class A felony shall be sentenced to an indeterminate term of imprisonment of twenty years without possibility of suspension of sentence or probation. . . .

HAW. REV. STAT. § 706-660 (Supp. 1984) (amended 1986) in relevant part reads:

> Sentence of imprisonment for Class B and C felonies; ordinary terms. A person who has been convicted of a class B or class C felony may be sentenced to an indeterminate term of imprisonment except as provided for in section 706-660.1 relating to the use of firearms in certain felony offenses. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
>
> (1) For a class B felony - 10 years; and
>
> (2) For a class C felony - 5 years.
>
> . . . .

HAW. REV. STAT. § 706-606.5 (Supp. 1984) (current amendment 1990) in relevant part reads:

> Sentencing of repeat offenders. . . .
>
> . . . .
>
> (2) Notwithstanding section 706-669 and any other law to the contrary, any person convicted under section . . . 708-841 relating to robbery in the second degree . . . who has a prior conviction or prior convictions for one or more offenses enumerated in subsection (1) or this subsection in this or another

guage of the provision must be read in the context of the entire statute and construed in a manner consistent with its purposes"[38], and "laws in pari materia, or upon the same subject matter, . . . [are] construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."[39]

Generally, in interpreting a statute, courts start with the language of the statute itself.[40] Absent evidence of legislative intent and purpose

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jurisdiction, within the time of the maximum sentence of any prior conviction, shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:
(a) One prior conviction - 3 years[.]

. . . .

[38] *Saufua*, 67 Haw. at 618, 699 P.2d at 990 (citing Foster Village Community Ass'n v. Hess, 4 Haw. App. 463, 667 P.2d 850 (1983)).

[39] State v. Aguinaldo, 71 Haw. 57, 60-61, 782 P.2d 1225, 1227 (1989) (quoting HAW. REV. STAT. § 1-16 (1985)). The *Aguinaldo* court ruled that when HAW. REV. STAT. §§ 286-162.5 (1985) and 286-162.6 (Supp. 1987), which authorize the police to set up intoxication roadblocks, and § 286-116 (1985), which pertain to police powers to ensure highway safety, are read in conjunction with each other, the police are authorized to demand to inspect a driver's license and insurance identification card at valid roadblocks.

HAW. REV. STAT. § 286-162.5 (1985) in relevant part reads:

Authorization to establish intoxication control roadblock programs. The police departments of the respective counties are authorized to establish and implement intoxication control roadblock programs in accordance with the minimum standards and guidelines provided in section 286-162.6. . . .

HAW. REV. STAT. § 286-162.6 (Supp. 1987) in relevant part reads:

Minimum standards for roadblock procedures. (a) Every intoxication control roadblock program shall:

(1) Require either that all motor vehicles approaching roadblocks be stopped, or that certain motor vehicles be stopped by selecting motor vehicles in a specified numerical sequence or pattern.

. . . .

HAW. REV. STAT. § 286-116 (1985) in relevant part reads:

License, insurance identification card, possession, exhibition. (a) Every licensee shall have a valid driver's license in the licensee's immediate possession at all times, and a valid no-fault insurance identification card applicable to the motor vehicle operated as required under section 294-8.5, when operating a motor vehicle, and shall display the same upon demand of a police officer. Every police officer or law enforcement officer when stopping a vehicle or inspecting a vehicle for any reason shall demand that the driver or owner display the driver's or owner's license and insurance identification card. . . .

[40] State v. Lo, 66 Haw. 653, 659, 675 P.2d 754, 758 (1983) (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). The *Lo*

to the contrary, statutory language controls.[41] The Hawaii Supreme Court has "rejected an approach to statutory construction which limits . . . [it] to the words of a statute, no matter how clear."[42] Thus, the court does not "seek refuge in strict construction," but rather legislative purpose and intent inform the court's interpretation.[43] For example, in *State v. Murray*,[44] the Hawaii Supreme Court held that under Hawaii Revised Statutes section 706-605,[45] the State qualified as a "victim" of a crime because the legislature intended a punitive and rehabilitative goal in compelling a criminal to repay the victim and society.[46] Simi-

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court, noting that the plain language of HAW. REV. STAT. § 803-42(b)(3) (Supp. 1981) (current amendment 1989) proscribes the "bugging" of a private place, and that the legislature intended to prohibit such court-ordered bugging, rejected the State's contention that the legislature intended to allow consensual bugging and consensual wiretapping pursuant to HAW. REV. STAT. §§ 803-41 to 803-50 (Supp. 1981) (current amendments omitted). *Id.* at 659-61, 675 P.2d at 758-59. In *Lo*, the lower court granted the defendant's motion to exclude evidence obtained by electronic surveillance of a hotel room inasmuch as one party consented to the bugging as allowed by the Hawaii Wiretap Law, HAW. REV. STAT. §§ 803-41 to 803-50 (Supp. 1981) (current amendments omitted). *Id.* at 656-57, 675 P.2d at 757. *E.g.* State v. Eline, 70 Haw. 597, 778 P.2d 716 (1989).

[41] *Lo*, 66 Haw. at 659, 675 P.2d. at 758-59. *E.g. Eline*, 70 Haw. 597, 778 P.2d 716 (1989).

[42] *Lo*, 66 Haw. at 659, 675 P.2d at 758 (quoting Crawford v. Financial Plaza Contractors, 64 Haw. 415, 420, 643 P.2d 48, 52 (1982)). *See also Eline*, 70 Haw. 597, 602, 778 P.2d 716, 719 (1989) (clearly expressed legislative policy precludes literal application of a statute).

[43] *Lo*, 66 Haw. at 659, 675 P.2d at 759 (quoting Black Construction Corp. v. Agsalud, 64 Haw. 274, 284, 639 P.2d 1088, 1094 (1982)). *See also Eline*, 70 Haw. 597, 602-03, 778 P.2d 716, 720 (1989) (it is obligatory upon the court to impose a condition that the convicted person not commit another offense during the term of suspension to carry out an expressed legislative objective of just punishment and deterrence inasmuch as HAW. REV. STAT. §706-605(3) (Supp. 1989) (current amendment 1990) is silent as to conditions a court may impose); State v. Murray, 63 Haw. 12, 18, 621 P.2d 334, 339 (1980) ("while established rules of construction may be of aid in ascertaining and implementing . . . intent, they may not be used to deflect legislative purpose and design.") (citing State v. Smith, 59 Haw. 456, 461-62, 583 P.2d 337, 341-42 (1978); State v. Prevo, 44 Haw. 665, 668-69, 361 P.2d 1044, 1047 (1961)).

[44] 63 Haw. 12, 621 P.2d 334 (1980).

[45] HAW. REV. STAT. § 706-605 (Supp. 1980) (current amendment 1990).

[46] *Id.* at 18-20, 621 P.2d at 339. In *Murray*, the defendant was ordered to repay the medical expenses incurred by the State on behalf of the victim, a fellow inmate.

HAW. REV. STAT. § 706-605(1)(e) (Supp. 1980) (current amendment 1990) in relevant

larly, in *State v. Johnson*,[47] the court ruled that when the sentencing court orders the defendant to make restitution and reparation to a victim "in an amount he can afford to pay" pursuant to Hawaii Revised Statutes sections 706-605(1)(e) and 706-624(2)(i),[48] the restitution amount is the actual loss or damage to the victim, but the manner of payment must be reasonable in light of the defendant's financial circumstances.[49] Also, in *State v. Huelsman*,[50] the court held

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part reads:

> Authorized disposition of convicted defendants. (1) Except as provided in section 706-606 and subject to the applicable provisions of this Code, the court may suspend the imposition of sentence on a person who has been convicted of a crime, may order the person to be committed in lieu of sentence in accordance with 706-606, or may sentence the person as follows:
>
> . . . .
>
> (e) To make restitution or reparation to the *victim or victims of the person's crime in an amount the person can afford to pay*, for loss damage caused thereby in addition to paragraph (a), (b), (c), (d), or (f) of this subsection (1)[.] (emphasis added).

H.R. STAND. COMM. REP. No. 425, 1975 HAW. LEG. SESS. HOUSE J. 1148 in relevant part reads:

> Reparation and/or restitution by wrongdoers to their victims is basic to justice and fair play. The penal system should not be excluded from this concept. Your Committee believes that by imposing the requirement that a criminal repay not only "society" but the persons injured by the criminal's acts, society benefits not once, but twice. The victim of the crime not only receives reparation and restitution, but the criminal should develop or regain a degree of self respect and pride in knowing that he or she righted, to as great a degree as possible, the wrong that he or she had committed.

S. STAND. COMM. REP. No. 789, 1975 HAW. LEG. SESS., SENATE J. 1132 in relevant part reads:

> Your Committee finds that in the criminal justice system, the victim of crime is almost always neglected. By requiring the "convicted person" to make restitution and reparation to the victim, justice is served. In so doing, the criminal repays not only "society" but the persons injured by the criminal's acts. There is a dual benefit to this concept: The victim is repaid for his loss and the criminal may develop a degree of self-respect and pride in knowing that he or she has righted the wrong committed.

[47] 68 Haw. 292, 711 P.2d 1295 (1985).

[48] HAW. REV. STAT. § 706-624 (Supp. 1984) (current amendment 1989).

[49] *Id.* at 297, 711 P.2d at 1299. In *Johnson*, the defendant was convicted of forgery and third degree theft and was sentenced to five years probation for forgery and six months probation for theft on the condition that she make restitution to the victim for the amount stolen. *Id.* at 293, 711 P.2d at 1296. The court noted that the legislature intended that criminals make restitution to victims and society and thus, regain a

that it could remedy Hawaii Revised Statutes section 706-662(4) by restricting it to constitutional limits because the statute's legislative history did not preclude the court from doing so.[51]

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sense of self-respect and pride in righting the wrong committed. *Id.* at 296 n.6, 711 P.2d at 1298 n.6.

HAW. REV. STAT. §706-624 (Supp. 1984) (current amendment 1989) in relevant part reads:

> Conditions of suspension of sentence or probation. (1) When the court suspends the imposition of sentence on a person who has been convicted of a crime or sentences him to be placed on probation, it shall attach such reasonable conditions, authorized by this section, as it deems necessary to insure that he will lead a law-abiding life or likely to assist him to do so.
>
> (2) The court, as a condition of its order, may require the defendant:
>
> . . . .
>
> (i) to make restitution of the fruits of his crimes or to make reparation, in an amount he can afford to pay, for the loss or damage caused thereby[.]
>
> . . . .

See supra note 46 for relevant parts of HAW. REV. STAT. § 706-605(1)(e) (Supp. 1980) (current amendment 1990), H.R. STAND. COMM. REP. No. 425, 1975 HAW. LEG. SESS., HOUSE J. 1148, and S. STAND. COMM. REP. No. 789, 1975 HAW. LEG. SESS., SENATE J. 1132.

[50] 60 Haw. 71, 588 P.2d 394 (1978).

[51] *Id.* at 89-91, 588 P.2d at 405-07. The *Huelsman* court held that HAW. REV. STAT. § 706-662(4) (Supp. 1972) (current amendment 1990) afforded the court standardless sentencing discretion which violated a defendant's right of due process. *Id.* at 89, 588 P.2d at 405. The court remedied the statute by judicial construction since there was no evidence that the legislature would not have allowed a limit to the court's discretion, and therefore, was not an invasion of legislative prerogative. *Id.* at 89-91, 588 P.2d at 405-07. In curing the deficiency, the *Huelsman* court construed HAW. REV. STAT. § 706-662(4) (Supp. 1972) (current amendment 1990) as authorizing the court to impose an extended term sentence when *necessary for the protection of the public*, *Id.* at 91, 588 P.2d at 407, which is in concert with the limitation in HAW. REV. STAT. §§ 706-662(1) to -662(3) (Supp. 1972) (current amendment 1990). HAW. REV. STAT. § 706-662 (Supp. 1972) (current amendment 1990) in relevant part reads:

> § 706-662 Criteria for sentence of extended term of imprisonment for felony. The court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this section. The finding of the court shall be incorporated in the record.
>
> (1) Persistent offender. The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public. . . .
>
> (2) Professional criminal. The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public. . . .
>
> (3) Dangerous person. The defendant is a dangerous person whose commit-

Courts must also construe statutes "as part of and in harmony with the law of which it forms a part."[52] Even in the case of penal statutes, which as a rule are construed strictly, the court must not ignore the meaning that best harmonizes with the goal or purpose of the statutory design.[53] For example, in *State v. Murray*,[54] the court held that restitution orders for victims pursuant to Hawaii Revised Statutes section 706-605 could not compel payment from a source protected by statute.[55]

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ment for an extended term is necessary for the protection of the public. . . .

(4) Multiple offender. The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted. . . .

. . . .

The *Huelsman* court further held that the trial court must satisfy a two step process before imposing an extended term. First the defendant must fall within the class of offenders to which the sub-section applies, and second, commitment under the extended term is necessary for the protection of the public. *Id.* at 76-77, 588 P.2d at 398. *E.g.* State v. Melear, 63 Haw. 488, 499-500, 630 P.2d 619, 628 (1981) (defendant sentenced to 20 year extended prison term).

[52] State v. Murray, 63 Haw. 12, 23, 621 P.2d 334, 341 (1980) (quoting New Hampshire v. Millette, 112 N.H. 458, 465, 299 A.2d 150, 154 (1972) (other citations omitted)). *See also* State v. Saufua, 67 Haw. 616, 619-20, 699 P.2d 988, 991 (1985) (mandatory minimum period of imprisonment without possibility of parole is logically subsumed within maximum sentence imposed for offense).

[53] *Murray*, 63 Haw. at 18, 621 P.2d at 339 (citing State v. Smith, 59 Haw. 456, 461-62, 583 P.2d 337, 341-42 (1978); State v. Prevo, 44 Haw. 665, 668-69, 361 P.2d 1044, 1047 (1961)).

[54] 63 Haw. 12, 621 P.2d 334 (1980).

[55] *Id.* at 23-4, 621 P.2d at 342-43. In *Murray*, the court ruled that a restitution order compelling payment from moneys earned from correctional labor was void. *Id.* at 26, 621 P.2d at 343. The defendant was ordered to make restitution to the State of Hawaii for the medical expenses incurred on behalf of a fellow prisoner whom the defendant shot. *Id.* at 14, 621 P.2d at 336. The court said that a restitution order pursuant to HAW. REV. STAT. § 706-605 (Supp. 1980) (current amendment 1990) that compels payment from a source protected by HAW. REV. STAT. § 353-30 (1976) (current version at § 353-22 (Supp. 1990)) is not in harmony with the law of which it forms a part. *Id.* at 23, 621 P.2d at 342. The court noted that when HAW. REV. STAT. § 353-30 (1976) (current version at § 353-22 (Supp. 1990)) is read together with § 353-28 (1976) (current version at § 353-21 (Supp. 1990)), there is a significant policy decision to allow prisoners a vested right to moneys earned while in a correctional facility. *Id.* at 22, 621 P.2d at 341. The language allowing forfeitures as disciplinary measures in § 5 of Act 181, 1917 HAW. SESS. LAWS 332, the original forerunner of § 353-28 (1976) (current version at § 353-21 (Supp. 1990)) was repealed in 1970 by Act 201, 1970 HAW. SESS. LAWS. 469. *Id.* HAW. REV. STAT. § 353-30 (1976) (current

In *State v. Teves*,[56] it was an inconsistent and unharmonious reading of Hawaii Revised Statutes section 701-110(3)[57] that subsequent prosecution for the same offense constitutes double jeopardy when the guilty plea in the former trial was validly vacated by the court pursuant to Rule 11(f), Hawaii Rules of Penal Procedure.[58] The *Teves* court also took note of Hawaii Revised Statutes section 701-110(4)(b)(ii),[59] which specifically allows prosecution when the former prosecution is terminated.[60] Similarly, in *State v. Aguinaldo*,[61] the court ruled that when

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version at § 353-22 (Supp. 1990)) reads:

> Earnings exempt from garnishment, etc. No moneys earned by such prisoner and held by the department of social services and housing shall, to any amount whatsoever, be subject to garnishment, levy, or any like process of attachment for any cause or claim against the prisoner.

Act 181, § 7, 1917 HAW. SESS. LAWS 334 read:

> No moneys earned by such prisoner and held by the warden shall, to any amount whatsoever, be subject to garnishment, levy or any like process of attachment for any cause or claim against said prisoner.

Act 181, § 5, 1917 HAW. SESS. LAWS 333-34 read:

> The board may, in its discretion, allow the prisoner, under its direction, to draw from the moneys to his credit account in the hands of the warden, to such amount and for such purposes as it may deem proper; *provided, however, that if such prisoner be of bad conduct, break the rules and regulations, or in any way does not conform to the discipline of the prison, the board may, in its discretion, declare forfeited the whole or any portion of said moneys standing and held for him and to his credit, and all sums so forfeited shall be deposited with the treasurer of the Territory as a realization.* (Italicized portion deleted in 1970).

H.R. STAND. COMM. REP. NO. 309, 1970 HAW. LEG. SESS., HOUSE. J. 899-900 reads in pertinent part:

> This Section also provided that if any prisoner is of bad conduct, breaks the rules and regulations, or in any way fails to conform to discipline or training, the Department may declare forfeited the full or any portion of money held to his credit. Your Committee has repealed this provision, and finds that the rehabilitated [sic] process will be best served if prisoners are allowed a vested right in any monies to which they become entitled under the law.

[56] 4 Haw. App. 566, 670 P.2d 834 (1983).

[57] HAW. REV. STAT. § 701-110(3) (1976).

[58] HAW. R. PENAL P. 11(f).

[59] HAW. REV. STAT. § 110(4)(b)(ii) (1976).

[60] 4 Haw. App. at 571, 670 P.2d at 838. In *Teves*, the defendant pleaded guilty to theft in the first degree, which requires that a person obtain or exert control over the property of another. *Id.* at 570, 670 P.2d at 837. However, because the record showed that Teves admittedly tried to steal a heifer, his admission did not constitute theft in the first degree for which he entered his guilty plea. *Id.* The *Teves* court noted that HAW. REV. STAT. § 701-110(3) (1976) states the general rule that jeopardy attaches

statutes pertaining to police powers in ensuring highway safety are construed together, it is not unreasonable search and seizure for the police to demand production of the driver's license and no-fault insurance card whenever the vehicle is validly stopped at an intoxication control roadblock even if there was no reasonable belief that the defendant violated any safety law.[62]

Finally, when imposing a particular sentence, the court must exercise discretion "in fitting the punishment to the crime as well as the needs of the individual defendant and the community."[63] Since there is no "mathematical yardstick" to follow in imposing the appropriate sentence, the sentencing judge must exercise broad discretion and consider

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when a guilty plea is accepted by the court. *Id.* at 571, 670 P.2d at 837-38. However, when a guilty plea is validly set aside, the interpretation that a subsequent prosecution does not constitute double jeopardy is consistent with HAW. REV. STAT. § 701-110(4)(b)(ii) (1976), which allows for prosecution when the former prosecution is terminated when "[t]here is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law." *Teves*, 4 Haw. App. at 571, 670 P.2d at 838 (citing § 701-110(4)(b)(ii)). The court recognized that statutes should be construed harmoniously as a whole "and give sensible and intelligent effect to each." *Id.* at 571-72, 670 P.2d at 838. (quoting State v. Davis, 63 Haw. 191, 624 P.2d 376 (1981) (citations omitted)). HAW. REV. STAT. § 701-110 (1976) reads in part:

> When prosecution is barred by former prosecution for the same offense. When a prosecution is for an offense under the same statutory provision and is based on the same facts as a former prosecution, it is barred by the former prosecution under any of the following circumstances:
>
> . . . .
>
> (3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty or nolo contendere accepted by the court.

HAW. R. PENAL P. 11(f) states:

> Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

[61] 71 Haw. 57, 782 P.2d 1225 (1989).

[62] *Id.* at 61, 64, 782 P.2d at 1228-29. *See supra* note 39 for discussion and pertinent parts of applicable statutes.

[63] State v. Teves, 4 Haw. App. 566, 573, 670 P.2d 834, 838 (1983) (citing Idaho v. Seifart, 100 Idaho 321, 324, 597 P.2d 44, 47 (1979)). In *Teves*, while released on his own recognizance and prior to sentencing, the defendant was convicted of two petty misdemeanors. *Id.* at 572, 670 P.2d at 838. The defendant was sentenced to imprisonment for one year as a condition of his probation because there was an undue risk that the defendant would commit another crime during his probation. *Id.*

and weigh all factors and circumstances.[64] For example, in *State v. Eline*,[65] the court took notice of the shift from a rehabilitation model to a just punishment model of sentencing, which mandated that courts consider factors in Hawaii Revised Statutes section 706-606[66] when imposing a sentence.[67] Similarly, in federal cases, a mechanical approach to sentencing conflicts with the sentencing guidelines set down by the United States Supreme Court which calls for individualized sentencing that is "tailored to fit the offender."[68]

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[64] State v. Sacoco, 45 Haw. 288, 293, 367 P.2d 11, 14 (1961). Sacoco and Cuaresma were convicted for the indecent assault of a child under twelve years of age and sentenced to imprisonment for terms of five years. *Id.* at 289, 367 P.2d at 12. The defendants were good and frugal workers, had good records, had no previous offense of this nature, and expressed repentance, but the trial judge determined that the need for imprisonment for the protection of the public was greater than that of rehabilitation for the defendant. *Id.* at 289-90, 293-94, 367 P.2d at 12, 14. The fact that the "defendants' acts of lechery consisted not merely of fondling the female child by the use of their hands, but of actually using their private organs" and because the defendants could have been charged with assault with intent to have sexual relations and subject to the penalty of carnal abuse, the sentencing judge was moved to impose imprisonment rather than probation. *Id.* at 294, 367 P.2d at 14.

[65] 70 Haw. 597, 778 P.2d 716 (1989).

[66] HAW. REV. STAT. § 706-606 (Supp. 1988) (current amendment 1990).

[67] *Id.* at 602, 778 P.2d at 719. Although there was no express authority to attach a condition to the suspension of a sentence pursuant to HAW. REV. STAT. § 706-605(3) (Supp. 1989) (current amendment 1990), the court ruled that the sentencing court was obligated to impose a condition that the defendant not commit another offense during the period of his suspended sentence in compliance with legislative intent to punish and deter crime. *Id.* at 602-03, 778 P.2d at 719-20.

HAW. REV. STAT. § 706-606 (Supp. 1988) (current amendment 1990) in relevant part reads:

> Factors to be considered in imposing a sentence. The court, in determining the particular sentence to be imposed, shall consider:
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) The need for the sentence imposed:
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
> (b) To afford adequate deterrence to criminal conduct;
> (c) To protect the public from further crimes of the defendant; and
> (d) To provide the defendant with needed educational or vocational training; medical care, or other correctional treatment in the most effective manner;
> (3) The kinds of sentences available; and
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

[68] Woolsey v. United States, 478 F.2d 139, 143-44 (8th Cir. 1973). In sentencing

C. Constitutional Law: Cruel and Unusual Punishment

"What constitutes an adequate penalty necessary for the prevention of crime is addressed to the sound judgment of the legislature and the courts will not interfere with its exercise, unless the punishment prescribed appears clearly and manifestly to be cruel and unusual."[69] In

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Woolsey to a five year prison term, the maximum authorized by law for refusing induction into the military, the sentencing judge said that it was his policy to sentence such violators to the same sentence. *Id.* at 140. At the time of sentencing, Woolsey was married, 19 years old, steadily employed, an expectant father, and a Jehovah's Witness whose belief prevented him from bearing arms or serving in civilian duties at the order of the Selective Service Board. *Id.* The appellate court ruled that such mechanical sentencing, which imposed identical punishment for offenses in similar legal categories without regard to the past life and habits of the offender, conflicted with the guidelines set out by the United States Supreme Court in Williams v. New York, 337 U.S. 241 (1949), and Williams v. Oklahoma, 358 U.S. 576 (1959). In his concurring opinion, Chief Judge Matthes stated that relevant factors a judge should consider are the nature of the offense, the history and background of the defendant, and the interest and concerns of society. *Woolsey*, 478 F.2d at 148.

In Williams v. New York, the Court ruled:

> A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. . . .
>
> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.

Williams v. New York, 337 U.S. at 247 (citing People v. Johnson, 252 N.Y. 387, 392, 169 N.E. 619, 621 (1930)). Subsequently, Williams v. Oklahoma, reaffirmed the sentencing guidelines:

> Necessarily, the exercise of a sound discretion in [sentencing] required consideration of all the circumstances of the crime, for "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment. . . ." (citation omitted). In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.

Williams v. Oklahoma, 358 U.S. at 585 (citing Williams v. New York, 337 U.S. 241). *See also* United States v. Rosenberg, 806 F.2d 1169 (3rd Cir. 1986) (court of appeals affirmed the imposition of maximum terms of imprisonment totalling 58 years for possession of firearms, explosives and false identification documents based on defendant's lack of remorse and potential for rehabilitation).

[69] State v. Freitas, 61 Haw. 262, 267, 602 P.2d 914, 919 (1979). In *Freitas*, the defendant was convicted of burglary in the first and second degree and sentenced to ten years imprisonment without the possibility of parole for five years pursuant to Act

some cases, the statute may be constitutional on its face, but the sentence prescribed may be unconstitutionally cruel and unusual.[70] If

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181, 1976 HAW. SESS. LAWS 338 (codified as HAW. REV. STAT. § 706-606.5 (Supp. 1990)) for the former offense, and to a concurrent term of five years for the latter offense. The court held that Act 181, relating to the sentencing of repeat offenders, did not offend the cruel and unusual punishment provision of both the Hawaii State and United States Constitutions. *Id.* at 270-71, 602 P.2d at 921. The court also noted that the "approach to the common problem of crime in our society . . . [is] [a] constitutional exercise[] of legislative judgment." *Id.* at 270, 602 P.2d at 921. *See also* Gregg v. Georgia, 428 U.S. 153, 175 (1976) ("in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity.").

[70] State v. Iaukea, 56 Haw. 343, 360, 537 P.2d 724, 735 (1975) (citations omitted). In *Iaukea*, the defendant did not challenge the constitutionality of the recidivist statutes but contended that the extended sentence imposed on him was cruel and unusual punishment under the federal and state constitutions. *Id.* at 358-59, 537 P.2d at 734-35. The defendant had three prior assaults against women and a rape charge pending against him. *Id.* at 345, 537 P.2d at 727. Iaukea was convicted of rape in the first degree, sodomy in the first degree, robbery in the first degree, and unauthorized operation of a propelled vehicle. *Id.* In affirming a sentence of life imprisonment with the possibility of parole pursuant to HAW. REV. STAT. §§ 706-661 (Supp. 1975) (current amendment 1976) and 706-662 (Supp. 1975) (current amendment 1990), the court held that in view of the defendant's crimes and extensive record and in light of developing concepts of decency and fairness, life imprisonment in *Iaukea* was not so disproportionate as to shock the conscience or outrage the moral sense of the community. *Id.* at 361, 537 P.2d at 736. HAW. REV. STAT. § 706-661 (Supp. 1975) (current amendment 1976) in relevant part reads:

> Sentence of imprisonment for felony; extended terms. In the cases designated in section 706-662, a person who has been convicted of a felony may be sentenced to an extended indeterminate term of imprisonment. When ordering such a sentence, the court shall impose the maximum length of imprisonment which shall be as follows:
>
> (1) For a class A felony - life;
>
> . . . .

HAW. REV. STAT. § 706-662 (Supp. 1975) (current amendment 1990) in relevant part reads:

> Criteria for sentence of extended term of imprisonment for felony. The court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this section. The finding of the court shall be incorporated in the record.
>
> . . . .
>
> (4) Multiple offender. The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted. The court shall not make such a finding unless:
>
> (a) The defendant is being sentenced for two or more felonies or is already

the sentence prescribed by statute is cruel and unusual within the meaning of the eighth amendment, then the statute itself is unconstitutional and the sentence must be set aside.[71]

The eighth amendment's[72] proscription against cruel and unusual punishment includes barbaric as well as disproportionate punishment.[73] Historically, the principle of proportionality has its beginnings in the Magna Carta.[74] Subsequently, the common law applied the principle to prison sentences, and the English Bill of Rights repeated the principle[75] which was later adopted by the eighth amendment.[76] The United States

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under sentence of imprisonment for felony[.]

. . . .

See also Gallego v. United States, 276 F.2d 914 (9th Cir. 1960) (five years imprisonment for first drug offense not cruel and unusual punishment). *See infra* note 71 for discussion of this case.

[71] Gallego v. United States, 276 F.2d 914, 918 (9th Cir. 1960) (citing Weems v. United States, 217 U.S. 349 (1910)). In *Gallego*, the defendant was convicted of unlawful importation of marijuana and sentenced to five years imprisonment pursuant to 21 U.S.C. § 176(a) (1958) with no possibility of suspension, probation or parole pursuant to 26 U.S.C. § 7237(d) (1958). The court ruled that Congress' intent to curtail the first offender peddler problem did not work to render punishment under 26 U.S.C. § 7237(d) (1958) so out of proportion to the crime committed as to shock a balanced sense of justice. *Id. See also* State v. Freitas, 61 Haw. 262, 602 P.2d 914 (1979) (ten years imprisonment without possibility of parole for five years not cruel and unusual when defendant is a repeat offender for burglary).

[72] The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980).

[73] *Solem*, 463 U.S. at 284. *E.g. Rummel*, 445 U.S. 263 (1980); State v. Iaukea, 56 Haw. 343, 537 P.2d 724 (1975). *See also* McCleskey v. Kemp, 481 U.S. 279, 315 (1987) ("Eighth Amendment is not limited . . . to capital punishment, but applies to all penalties.") (citing *Solem*, 463 U.S. 277, 289-90 (1983)); Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (conditions of confinement "must not involve the wanton and unnecessary infliction of pain, nor . . . be grossly disproportionate to the severity of the crime."); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (deliberate indifference to prisoner's medical care violates eighth amendment); Gregg v. Georgia, 428 U.S. 153, 170 (1976) (drafters of eighth amendment primarily concerned with proscribing "tortures and other barbarous methods of punishment.") (citation omitted); Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . .").

[74] *Solem*, 463 U.S. at 284. *E.g.* Trop v. Dulles, 356 U.S. 86, 100 (1958).

[75] *Solem*, 463 U.S. at 285. The English Bill of Rights reads in part: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." *Id.* (citation omitted).

[76] *Id.*

Supreme Court has recognized a constitutional principle of proportionality for almost a century.[77] In the lead case, *Weems v. United States*,[78] the United States Supreme Court "endorsed the principle of proportionality as a constitutional standard."[79]

Under both the Hawaii State and United States Constitutions, the standard by which a sentence is judged as cruel and unusual is "whether, in the light of developing concepts of decency and fairness, the prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community."[80] The court

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[77] *Solem*, 463 U.S. at 286 (citing O'Neil v. Vermont, 144 U.S. 323 (1892)) (Field, J., dissenting).

[78] 217 U.S. 349 (1910).

[79] *Solem*, 463 U.S. at 287. In *Weems*, 217 U.S. 349 (1910), the Court held that the defendant's sentence of fifteen years imprisonment that included hard labor and permanent civil disabilities was not proportionate to his crime of falsifying a public document. In Rummel v. Estelle, 445 U.S. 263 (1980), the Court noted that the *Weems* decision was not based only on punishment but on the relationship between crime and punishment. 445 U.S. at 274. The *Rummel* Court held that a sentence of life imprisonment with the possibility of parole for the conviction of a third felony of obtaining $120.75 by false pretenses did not constitute cruel and unusual punishment. *Id.* at 285. *See infra* note 87 for a discussion of *Rummel*. *See also* Enmund v. Florida, 458 U.S. 782 (1982) (death penalty was cruel and unusual punishment when defendant did not take a life, attempt nor intend to take a life, nor intend to use lethal force); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty disproportionate and excessive for crime of rape); Robinson v. California, 370 U.S. 660 (1962) (90 day sentence for crime of being a narcotics addict was cruel and unusual punishment); State v. Renfro, 56 Haw. 501, 542 P.2d 366 (1975) (imprisonment not cruel and unusual punishment for possession of marijuana).

[80] State v. Freitas, 61 Haw. 262, 267-68, 602 P.2d 914, 920 (1979). *See supra* note 72 for relevant text of U.S. CONST. amend. VIII. HAW. CONST. art. I, § 12 reads in part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. . . ." *E.g.* Rhodes v. Chapman, 452 U.S. 337, 346 (1981). *See also Solem*, 463 U.S. 277 (there is no strict rule of appellate review but guided by objective factors); *Rummel*, 445 U.S. 263 (sentence is excessive if serves no social purpose or disproportionate to crime, but harsh sentence not necessarily unconstitutional); Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .'") (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968); Gregg v. Georgia, 428 U.S. 153, 171-173 (1976) (eighth amendment prohibition "interpreted in a flexible and dynamic manner" and is not a "static concept"); Woodson v. North Carolina, 428 U.S. 280, 288, (1976) ("indicia of societal values . . . include history and traditional usage, legislative enactments, and jury determinations.") (citations omitted); Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The Amendment must draw its

in *State v. Freitas*[81] noted that although not "conclusive nor dispositive of the question" of whether punishment prescribed by a statute is cruel and unusual, interpretive techniques such as a three prong test used by the California Supreme Court were "helpful guidelines for inquiry."[82]

Noting that the duty of appellate courts is to decide whether the sentence imposed is within constitutional limits, the Court in *Solem v. Helm*[83] adopted the use of an objective criteria test.[84] The Court considered the gravity of the offense and the harshness of the penalty, sentences imposed on other criminals in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions.[85] Previ-

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meaning from the evolving standards of decency that mark the progress of a maturing society."); United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir 1988) (10 year sentence without possibility for parole not disproportionate to crime of conspiracy to and possession with intent to distribute 2,000 grams of cocaine); *Gallego*, 276 F.2d 914, 918 (9th Cir. 1960) (five years imprisonment for first drug offense not disproportionate that it shocks a balanced sense of justice); State v. Melear, 63 Haw. 488, 500, 630 P.2d 619, 628 (1981) (20 year extended term with five year mandatory minimum did not constitute cruel and unusual punishment in light of sentence imposed in *Rummel*); State v. Iaukea, 56 Haw. 343, 537 P.2d 724 (1975) (life sentence with possibility of parole not cruel and unusual in view of offense and pessimistic outlook for rehabilitation); State v. Renfro, 56 Haw. 501, 506, 542 P.2d 366, 370 (1975) (studies are inconclusive and do not show that marijuana is so harmless that criminal sanctions for possession is arbitrary and irrational) (citing State v. Baker, 56 Haw. 271, 535 P.2d 1394 (1975)).

[81] 61 Haw. 262, 602 P.2d 914 (1979).

[82] *Freitas*, 61 Haw. at 268, 602 P.2d at 920 (citing Bosco v. Justice Court of Exeter, 77 Cal. App. 3d 179, 143 Cal. Rptr. 468 (1978)). The *Freitas* Court outlined and used the three prong test applied in In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 104 Cal. Rptr. 217 (1973) which follows:

> (1) the nature of the offense and/or the offender, with particular regard to the degree of danger posed by both to society;
>
> (2) the extent of the challenged penalty as compared to the punishments prescribed for more serious crimes within the same jurisdiction; and
>
> (3) the extent of the challenged penalty as compared to the punishment prescribed for the same offense in other jurisdictions.

Freitas, 61 Haw. at 268, 602 P.2d at 920.

[83] 463 U.S. 277 (1983).

[84] *Id.* at 292.

[85] *Id.* In *Solem*, the defendant was sentenced to life imprisonment without the possibility of parole under South Dakota's recidivist statute. *Id.* at 281-82. He was convicted of uttering a "no account" check for $100. *Id.* His previous felony convictions were relatively minor (third-degree burglary, obtaining money under false pretense, grand larceny, and driving while intoxicated), but he received the most severe sentence

ously, the Court in *Rummel v. Estelle*,[86] however, rejected an objective test as unworkable on the basis of the complexity of evaluating the criteria and federalism concerns.[87] Commentators have tried to reconcile

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possible. *Id.* at 270-80, 303. The Court held "that Helm has received the penultimate sentence for relatively minor criminal conduct" and was treated more harshly than other criminals in the same jurisdiction who committed more serious crimes and more harshly than criminals in other jurisdictions who committed the same crime except for one other state. *Id.* at 303. *See also* United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988) (proportionality requirement does not require that a sentence be in harmony with sentences imposed by other courts on other defendants) (citing United States v. Meyer, 802 F.2d 348, 353 (9th Cir. 1986)).

The *Solem* Court said that courts are competent and traditionally make judgments as to the gravity of the offense, the harm to the victim and society, the culpability of the offender, comparisons between different sentences, and line drawing between sentences of imprisonment that are constitutional and those that are not. 463 U.S. at 292-95. *See also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (look at objective indicia, *e.g.* legislative measures, rather than subjective judgment in reviewing contemporary values and attitudes); Comment, *Solem v. Helm: Extension of Eighth Amendment Proportionality Review to Noncapital Punishment*, 69 IOWA L. REV. 775, 794 (1984) ("*Helm* provides constitutional protection when either legislative or judicial standards fail.").

[86] 445 U.S. 263 (1980).

[87] *Solem*, 463 U.S. at 308-10 (Burger, C.J., dissenting). The *Rummel* Court noted the rule expressed in Coker v. Georgia, 433 U.S. 584 (1977), that eighth amendment judgments should not be the subjective views of individual justices. *Rummel*, 445 U.S. at 274. The *Rummel* Court also noted that because of the unique nature of a death sentence, a clearer line can be drawn between capital and non-capital cases than between terms of years. *Id.* at 275 (citing Furman v. Georgia, 408 U.S. 238 (1972)). Thus, the Court can apply the proportionality test to capital and extraordinary cases, but the classification of crimes and the length of sentences is purely a matter of legislative prerogative. *Id.* at 274.

The *Rummel* dissent, on the other hand, maintained that the principle of proportionality is not limited to capital cases, but the focus is whether "the person deserves such punishment." *Id.* at 288. Justice Powell, in his dissenting opinion, noted that when carrying out the eighth amendment command to enforce the constitutional limitation of the Cruel and Unusual Punishments Clause, the Court is competent to consider objective criteria which may include the nature of the offense, the sentence for the same crime in other jurisdictions, and the sentence imposed for other crimes in the same jurisdiction. *Id.* at 295 (Powell, J., dissenting) (citations omitted). Further, the federal courts can "identify and apply objective criteria that reflect constitutional standards of punishment and minimize the risk of judicial subjectivity" so as not to "intervene in state criminal justice systems at will." *Id.* at 304 (Powell, J., dissenting). Justice Powell further noted:

> When we apply the Cruel and Unusual Punishments Clause against the States, we merely enforce an obligation that the Constitution has created. As Mr. Justice Rehnquist has stated, "[c]ourts are exercising no more than the judicial

the Court's holdings in these two cases. One commentator suggested that by limiting *Rummel* to its facts, the *Solem* Court may have, in effect, overruled *Rummel*.[88] Another postulated that since the *Solem* Court did not explicitly overrule *Rummel*, *Rummel* is controlling in cases with similar facts, and the *Solem* proportionality review is limited to life sentences without the possibility of parole.[89]

D. Abuse of Discretion

The matter of sentencing is within the province of the trial court, and an appellate court will not disturb the trial judge's decision in the absence of plain and manifest abuse of discretion.[90] The existence of

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> function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not the particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body."

Id. at 303 (Powell, J., dissenting) (quoting Furman v. Georgia, 408 U.S. 238, 466 (1972)). Thus, the dissent argued that the objective criteria "clearly establish that a mandatory life sentence for defrauding persons of about $230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment." *Id.* at 307 (Powell, J., dissenting).

Two years later, in Hutto v. Davis, 454 U.S. 370 (1982), in a separate concurring opinion, Justice Powell reluctantly concluded that *Rummel* controlled the facts in *Davis* and that although *Rummel* did not rule out the proportionality principle completely, the Court's restricted view of the eighth amendment would result in courts upholding arguably cruel and unusual sentences. *Id.* at 375-77 (Powell, J., concurring). Justice Powell further concluded that "*Rummel* requires reversal." *Id.* at 379 (Powell, J., concurring). In *Davis*, the defendant was sentenced to two consecutive 20-year sentences for the possession of marijuana which Justice Powell called "unjust and disproportionate to the offense." *Id.* at 375 (Powell, J., concurring). Subsequently, Justice Powell would write for the majority in Solem v. Helm, in which the Court adopted the use of an objective criteria test.

In his concurring opinion in *Rummel*, Justice Stewart noted that he was constrained to join the majority of the Court because the procedures in question did not "fall below the minimum level the [Constitution] will tolerate." *Rummel*, 445 U.S. at 285 (Stewart, J., concurring) (quoting Spencer v. Texas, 385 U.S. 554, 569 (1967)). Subsequently, Justice Stewart joined the majority in *Solem v. Helm*. *See generally* Note, *Federal Court Review of Arbitrary State Court Decisions*, 86 MICH. L. REV. 2010 (1988).

[88] Comment, *supra* note 85, at 792.

[89] Note, *Interpretation of the Eighth Amendment - Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 DUKE L.J. 789, 798, 803 (1984).

[90] State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961). The *Sacoco* court held that a five year prison term for the offense of indecent assault on a child under

abuse is judged according to the peculiar circumstances of the case,[91] and "the opinion of the trial judge deserves great weight and careful consideration."[92] "Generally, to constitute an abuse it must appear

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twelve years was not an abuse of discretion. *Id.* at 294, 367 P.2d at 14. The *Sacoco* court explained:

> Whether a defendant should be imprisoned or given a suspended sentence is a matter which lies within the discretionary province of the trial court. It is a universally accepted aphorism in appellate jurisprudence that a discretion vested in a trial court and exercised by it will not be disturbed unless it affirmatively appears that there has been a plain abuse of such discretion.

Id. at 292, 367 P.2d at 13 (citing Harbrecht v. Harrison, 38 Haw. 206 (1948); McMillan v. Peters, 30 Haw. 148 (1927)). *See supra* note 64 for a discussion of *Sacoco* and *infra* notes 91-93 and accompanying text for discussion of abuse of discretion standard. *See, e.g.*, United States v. Rosenberg, 806 F.2d 1169 (3rd Cir. 1986); State v. Murray, 63 Haw. 12, 621 P.2d 334 (1980); State v. Fry, 61 Haw. 226, 602 P.2d 13 (1979); State v. Teves, 4 Haw. App. 566, 670 P.2d 834 (1983); State v. Emmsley, 3 Haw. App. 459, 652 P.2d 1148 (1982) (scope and extent of cross-examination on collateral matters bearing on credibility of witness is within discretion of trial judge); State v. Karwacki, 1 Haw. App. 157, 616 P.2d 226 (1980). *See also* Woolsey v. United States, 478 F.2d 139 (8th Cir. 1973) (not abuse of discretion if reasonable men could differ as to propriety of trial court); State v. Johnson, 68 Haw. 292, 711 P.2d 1295 (1985) (court has exclusive responsibility for imposing sentence); State v. Mayo, 62 Haw. 108, 111, 612 P.2d 107, 109-10 (1980) (not abuse of discretion when trial court declared a mistrial *sua sponte* when the circumstances of the case show that there was manifest necessity to do so); State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975) (abuse of discretion to deny motion for deferred acceptance of a guilty plea based on "blind adherence to predetermined rigid conduct"); State v. Huggett, 55 Haw. 632, 638-39, 525 P.2d 1119, 1123-24 (1974) (imprisonment for bare failure to pay fine which was an express condition of probation is harsh without further determination by trial court of defendant's willful and deliberate subversive conduct); State v. Faulkner, 1 Haw. App. 651, 654, 624 P.2d 940, 944-45 (1981) (not abuse of discretion when trial court refused to allow irrelevant testimony which had no bearing on charges alleged against defendant and refused to grant defendant's motion for new trial since record did not show that juror failed to answer *voir dire* examination questions asked). *See generally* 5 AM. JUR. 2D *Appeal and Error* § 772 (1990).

[91] *Sacoco*, 45 Haw. at 292, 367 P.2d at 13. The *Sacoco* court noted that "[a]dmittedly, the determination of the existence of clear abuse is a matter which is not free from difficulty and each case in which abuse is claimed must be adjudged according to its own peculiar circumstances." *Id. See, e.g., Woolsey*, 478 F.2d 139. *See generally* 5 AM. JUR. 2D, *supra* note 90, at 217.

[92] *Sacoco*, 45 Haw. at 293, 367 P.2d at 14 (citation omitted). *See also Woolsey*, 478 F.2d 139 (trial court must use conscientious judgment not arbitrary action); State v. Kicklighter, 60 Haw. 314, 317, 588 P.2d 927, 931-32 (1979) (not abuse of discretion when sentencing court determines that lesser sentence than imprisonment will depreciate the seriousness of defendant's crime and not take into consideration defendant's

that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant."[93] Factors to consider are "arbitrary or capricious action by the judge and a rigid refusal to consider the defendant's contentions."[94] However, in *State v. Davis*,[95] the court held that abuse is found

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potential for rehabilitation); State v. Kui Ching, 46 Haw. 138, 138-39, 376 P.2d 379, 381 (1962) (absent "clear showing of unusual and exceptional circumstances evincing a palpable abuse . . . the court is importuned to vitiate the effect of the sentence imposed and vicariously . . . exercise for the trial court the discretion of placing defendant on probation."). *See generally* 5 AM. JUR. 2D, *supra* note 90, at 217.

[93] *Sacoco*, 45 Haw. at 292, 367 P.2d at 13. *See, e.g.*, *Woolsey*, 478 F.2d 139; State v. Karwacki, 1 Haw. App. 157, 616 P.2d 226 (1980). *See also* State v. Hoopii, 68 Haw. 246, 249, 710 P.2d 1193, 1195 (1985) (trial judge's denial of motion for expert witness funds did not clearly exceed the bounds of reason because motion was not supported by evidence or justification); State v. Emmsley, 3 Haw. App. 459, 467, 652 P.2d 1148, 1154 (1982) (witness's juvenile adjudications not relevant to credibility issue so not abuse of discretion when court would not allow juvenile record to impeach testimony); State v. Faulkner, 1 Haw. App. 651, 655, 624 P.2d 940, 944 (1975) (properly exercised discretion to exclude irrelevant and repetitious evidence does not violate defendant's right to due process); 5 AM. JUR. 2D, *supra* note 90, at 217.

[94] State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 17 (1979) (citing State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975)). The *Fry* Court held that the trial court did not abuse its discretion when it corrected an illegal sentence. *Id.* at 231-32, 602 P.2d at 17. The defendant was resentenced because the original judge did not have the authority to suspend part of a sentence for first degree robbery. The court held that it was not an abuse of discretion for the subsequent judge to resentence the defendant in the defendant's absence because the defendant was notified of the hearing but waived his right to be present when he deliberately did not attend, that an updated presentence report was not required by law, and that the subsequent judge did follow the original judge's intent by only removing the illegal suspensions and reimposing the prison terms. *Id.* at 231-32, 602 P.2d at 17. *See, e.g.*, State v. Estencion, 63 Haw. 264, 270, 625 P.2d 1040, 1044 (1981) (not abuse of discretion in dismissing the charge with prejudice where no showing of good cause for state's violation of speedy trial rule). *See also* McClesky v. Kemp, 481 U.S. 279, 297, 313 (1987) (in capital offenses, exceptionally clear proof of abuse by decision maker required and statistical study showing racial bias in sentencing not enough); State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975) (arbitrary and capricious conduct is improper and prejudicially denies defendant due process of law); State v. Karwacki, 1 Haw. App. 157, 160, 616 P.2d 226, 228-29 (1980) (sentencing court's denial of deferred acceptance of guilty plea motion not arbitrary or capricious since denial made after review of the circumstances of the offence, probation office report, possible alternatives, and statements of defendant, his attorney, and his psychiatrist). *See generally* 5 AM. JUR. 2D, *supra* note 90, at 217.

[95] 63 Haw. 191, 624 P.2d 376 (1981). In *Davis*, the court held that the trial court did not abuse its discretion when it found no showing of good cause in defendant's failure to comply with the notice requirement of HAW. R. PENAL P. 12.1.

only "where the reviewing court is driven . . . to the conclusion that an objective appraisal of the record would result in a different finding."[96]

Federal appellate courts follow the principle that a reviewing court should not disturb a sentence imposed within statutory limits.[97] This rule is premised on the grounds that the sentencing judge is in the best position to evaluate and observe the defendant and that the judge will exercise discretion in sentencing.[98] However, the court in *Woolsey v. United States*,[99] stated that the United States Supreme Court's support for the principle of unreviewability is pure dicta,[100] and that the general rule of unreviewability "does not insulate from review *every* sentence within statutory limits." [101] After an examination of other federal appellate court cases, the United States Circuit Court of Appeals for the Eighth Circuit in *Woolsey* ruled that it had the power to review the severity of criminal sentences "within narrow limits where the court has manifestly or grossly abused its discretion."[102] The *Woolsey* court

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[96] *Id.* at 198, 624 P.2d at 381 (citing First Hawaiian Bank v. Smith, 52 Haw. 591, 593, 483 P.2d 185, 187 (1971)).

[97] Woolsey v. United States, 478 F.2d 139, 141 (1973). The *Woolsey* court noted that some courts disclaim the authority to review sentences without statutory authority while other courts say they have the authority if it appears that the sentencing judge abused his discretion. *Id.* at 141 n.3. *See, e.g.*, United States v. Rosenberg, 806 F.2d 1169 (3rd Cir. 1986). *See* United States v. Zavala-Serra, 853 F.2d 1512, 1518 (1988) (generally, appellate courts will not overturn sentences within statutory limits on eighth amendment grounds). *See also* United States v. Tucker, 404 U.S. 443, 447-49 (1972) (case properly remanded for sentencing when sentence may have been imposed on misinformation); Gore v. United States, 357 U.S. 386, 395 (1958) (Supreme Court has no power to revise severity of sentences imposed pursuant to statute as severity is legislative policy). *See generally* 5 AM. JUR. 2D, *supra* note 90.

[98] *Woolsey*, 478 F.2d at 144. *See generally* 5 AM. JUR. 2D, *supra* note 90, at 215-17.

[99] 478 F.2d 139 (8th Cir. 1973).

[100] *Id.* at 142.

[101] *Id.* at 143 (original emphasis).

[102] *Id.* at 147. The *Woolsey* court stated that that circuit generally adhered to the principle of non-intervention if the district court exercised discretion in sentencing but that, in fact, the Eighth Circuit had reviewed the severity of sentences, although it found no abuse of discretion on the part of the district court. *Id.* at 142.

In ruling that it had the power to review the severity of sentences, the *Woolsey* court noted that other federal appellate courts examined cases where the sentence imposed was within statutory limits, but the sentence "was greatly excessive under traditional concepts of justice or was manifestly disproportionate to the crime or the criminal." *Id.* at 147. Other cases examined stated that courts have the power to review a

noted that in *Yates v. United States*,[103] that Court not only reviewed the severity of the sentence but set aside and imposed its own sentence when the lower court did not abide by that Court's previous ruling.[104]

IV. ANALYSIS

A. Narrative

In *State v. Kumukau*[105] the Hawaii Supreme Court held that Hawaii Revised Statutes section 706-660.1[106] permits consecutive mandatory

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sentence when there was a gross abuse of discretion. *Id.* The *Woolsey* court ruled:

> If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is possible that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene.

Id. at 147. (quoting United States v. Holder, 412 F.2d 212, 214-15 (2nd Cir. 1969)).

[103] 356 U.S. 363 (1958).

[104] *Woolsey*, 478 F.2d at 142. The *Woolsey* court noted the *Yates* opinion:

> Reversing a judgment for contempt because of errors of substantive law may naturally call for a reduction of the sentence based on an extent of wrongdoing found unsustainable in law. Such reduction of the sentence, however, normally ought not be made by this Court. It should be left, on remand, to the sentencing court. And so, when this Court found that only a single offense was committed by petitioner, and not eleven offenses, it chose not to reduce the sentence but to leave this task, with gentle intimations of the necessity for such action, to the District Court. However, when in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court.
>
> . . . Not unmindful of petitioner's offense, this Court is of the view, exercising the judgment that we are now called upon to exercise, that the time that petitioner has already served in jail is an adequate punishment . . . and is to be deemed in satisfaction of the new sentence herein ordered formally to be imposed. Accordingly, the writ of certiorari is granted, and the judgment of the Court of Appeals is vacated and the cause remanded to the District Court with directions to reduce the sentence to the time petitioner has already been confined in the course of these proceedings.

Id. at 142-43 (quoting Yates v. United States, 356 U.S. 363, 366-67 (1958)).

[105] 71 Haw. 218, 787 P.2d 682 (1990).

[106] HAW. REV. STAT. § 706-660.1(a) (Supp. 1989) (amended 1990) in relevant part provides:

minimum terms of imprisonment.[107] The court also held that section 706-660.1 is constitutional on its face on the grounds that the Hawaii State Legislature did not prescribe punishment that contravened the proscription against cruel and unusual punishment under the United States Constitution and the Hawaii State Constitution.[108] However, finding an abuse of discretion by the trial court in applying section 706-660.1, the court concluded that although there were grounds upon which to impose extended terms and consecutive mandatory minimum terms of imprisonment,[109] "to consecutively impose the maximum terms possible on each and every count for which Kumukau was convicted, . . . is excessive[]"[110] and remanded *Kumukau* for resentencing.[111]

Sentence of imprisonment for use of a firearm in a felony. (a) A person convicted of a felony, where the person had a firearm in his possession or threatened its use or used the firearm while engaged in the commission of the felony, whether the firearm was loaded or not, and whether operable or not, may in addition to the indeterminate term of imprisonment provided for the grade of offenses be sentenced to a mandatory minimum term of imprisonment without possibility of parole or probation the length of which shall be as follows:

(1) For murder the attempted murder in the second degree — up to 15 years;
(2) For a class A felony — up to 10 years; and
(3) For a class B felony — up to 5 years; and
(4) For a class C felony — up to 3 years.

The sentence of imprisonment for a felony involving the use of a firearm as provided in this subsection shall not be subject to the procedure for determining minimum term of imprisonment prescribed under section 706-669, provided further that a person who is imprisoned in a correctional institution as provided in this subsection shall become subject to the parole procedure as prescribed in section 706-670 only upon the expiration of the term of mandatory imprisonment fixed under (a)(1), (2), (3), or (4), herein.

[107] 71 Haw. at 226, 787 P.2d at 687.

[108] *Id.* at 227, 787 P.2d at 687.

[109] *Id.* at 228, 787 P.2d at 688. The sentencing court found that Kumukau was a multiple offender, had a history of criminality, and posed a danger to the public. *Id.* at 222, 787 P.2d at 685. Thus, under HAW. REV. STAT. §§ 706-661 (1976) and 706-662 (Supp. 1989) (amended 1990), Kumukau was subject to a maximum term of imprisonment of eight life terms plus 200 years. *Id.* Because Kumukau committed the felonies with the use of a firearm, under HAW. REV. STAT. § 706-660.1(a) (Supp. 1989) (amended 1990), he was subject to mandatory minimum terms of imprisonment. *Id.*

[110] *Id.* at 228, 787 P.2d at 688.

[111] *Id.*

In bringing his appeal, Kumukau first contended that the imposition of consecutive mandatory minimum terms of imprisonment was not authorized by statute. He argued that the legislature did not intend consecutive mandatory minimum terms of imprisonment because a court could, in effect, impose a life term without parole, a result that is "absurd and unjust."[112] To the first point on appeal, the court held that Hawaii Revised Statutes section 706-660.1(a) authorized the imposition of consecutive mandatory minimum terms of imprisonment.[113] In construing section 706-660.1(a), the court looked to Hawaii Revised Statutes section 706-668.5,[114] which clearly permits the court to impose consecutive terms of imprisonment and to its legislative history which did not preclude Hawaii Revised Statutes section 706-660.1 from its application.[115]

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[112] *Id.* at 223, 787 P.2d at 686. Kumukau argued that the legislature did not intend consecutive mandatory minimum terms of imprisonment, that the legislature delineated those offenses deserving life imprisonment without parole, and that consecutive mandatory minimum terms amounted to life imprisonment without the possibility of parole. *Id.* Further, Kumukau argued that the paroling authority must apply to the governor for a commutation of a life sentence without parole after twenty years have been served and that no such "ameliorating provision exists when a person is sentenced to consecutive mandatory minimum terms which, in effect, become life terms without parole." *Id. See supra* note 24 for discussion of legislative prerogative to prescribe penalties for criminal offenses.

[113] *Id.* at 226, 787 P.2d at 687.

[114] HAW. REV. STAT. § 706-668.5 (Supp. 1989).

[115] *Id.* at 224, 787 P.2d at 686. HAW. REV. STAT. § 706-668.5 (Supp. 1989) reads:

> Multiple sentence of imprisonment. (1) If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an unexpired term of imprisonment, the terms may run concurrently or consecutively. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders of the statute mandates that the terms run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms run concurrently.
>
> (2) The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider the factors set forth in section 706-606.

HAW. REV. STAT. § 706-606 (Supp. 1989) provides:

> Factors to be considered in imposing a sentence. The court, in determining the particular sentence to be imposed, shall consider:
>
> (1) The nature and circumstances of the offense and the history and charac-

In addressing Kumukau's contention that the legislature did not intend consecutive mandatory minimum terms of imprisonment, the court first considered the spheres of power of the legislature and the courts in prescribing and imposing sentences.[116] The court next reviewed the change in the law in 1982 in which the legislature explicitly stated its intention that judges should have the discretion to impose consecutive sentences when appropriate.[117] Finally, the court noted its

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teristics of the defendant;

(2) The need for the sentence imposed:

(a) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(b) To afford adequate deterrence to criminal conduct;

(c) To protect the public from further crimes of the defendant; and

(d) To provide the defendant with needed educational or vocational training

S. CONF. COMM. REP. NO. 5-82, 1982 HAW. LEG. SESS., SENATE J. 874 in relevant part reads:

> The purpose of this bill is to give judges discretion to sentence a person to a term of imprisonment to run concurrently or consecutively.
>
> Presently, the law requires a judge to sentence a person to terms of imprisonment to run concurrently, giving no discretion to judges. This requirement negates the deterrent and punishment aspects of sentencing and in so doing fails to deter similar future behavior on the part of the particular individual involved. The bill provides that judges have discretion to sentence a person to consecutive terms of imprisonment. Your Committee feels that judges will exercise their discretion in invoking consecutive terms of imprisonment when appropriate as in instances where the defendant committed multiple or subsequent offenses.
>
> . . . .

H.R. CONF. COMM. REP. NO. 6-82, 1982 HAW. LEG. SESS., HOUSE J. 817 in relevant part reads:

> The purpose of this bill is to give judges discretion to sentence a person to a term of imprisonment to run concurrently or consecutively.
>
> Presently, the law requires a judge to sentence a person to terms of imprisonment to run concurrently, giving no discretion to judges. This requirement negates the deterrent and punishment aspects of sentencing and in so doing fails to deter similar future behavior on the part of the particular individual involved. The bill provides that judges have discretion to sentence a person to consecutive terms of imprisonment. your Committee feels that judges will exercise their discretion in invoking consecutive terms of imprisonment when appropriate as in instances where the defendant committed multiple or subsequent offenses.
>
> . . . .

[116] *Kumukau*, 71 Haw. at 223-26, 787 P.2d at 686-87 (1990). The court discussed the legislative prerogative in prescribing penalties, the latitude left to the court in imposing sentences, and the court's duty to ascertain and implement the intent of the legislature, to interpret and construe statutes consistent with their purpose, and to exercise discretion in sentencing. *Id. See supra* notes 24-68 and accompanying text.

[117] *Id.* at 225, 787 P.2d at 686. Previous to 1982, terms of imprisonment ran

duty to individualize sentences to fit the crime and the needs of the defendant and the community.[118] The court then ruled that the imposition of consecutive sentences was authorized by Hawaii Revised Statutes section 706-660.1, and its imposition was not "absurd or unjust in light of Kumukau's commission of multiple offenses with a firearm thereby jeopardizing the safety of numerous persons, and in light of the circumstances of the case, and the history and characteristics of Kumukau."[119]

Kumukau then argued that the imposition of consecutive mandatory minimum terms which results in a sentence of life imprisonment without parole constitutes cruel and unusual punishment, and therefore, Hawaii Revised Statutes section 706-660.1 which permits its imposition is constitutionally invalid.[120] To Kumukau's second point on appeal, the court held that Hawaii Revised Statutes section 706-660.1 was not unconstitutional on its face.[121] In reaching its holding, the court noted the cruel and unusual punishment proscription in both the United States and Hawaii State Constitutions[122] and the principle that the possibility of parole is within the prerogative of the legislature.[123] The court held that a legislative decision to impose life imprisonment without the possibility of parole to "a person who commits numerous felonies with the use of a deadly weapon . . . [does not] 'shock the conscience of reasonable persons nor outrage the moral sense of the community.'"[124]

Finally, Kumukau contended that the imposition of consecutive mandatory minimum terms of imprisonment is an abuse of discretion.[125]

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concurrently by law. *See supra* note 115 for relevant parts of S. CONF. COMM. REP. No. 5-82 and H.R. CONF. COMM. REP. No. 6-82.

[118] *Id.* at 225, 787 P.2d at 686-87 (citing State v. Teves, 4 Haw. App. 566, 576, 670 P.2d 834, 838 (1983)).

[119] *Id.* at 226, 787 P.2d at 687.

[120] *Id.* at 226, 787 P.2d at 687. *See supra* notes 70-71 and accompanying text.

[121] *Id.* at 227, 787 P.2d at 687.

[122] *Id.* at 226-27, 787 P.2d at 687. *See supra* notes 80-87 and accompanying text for the standard by which sentences are judged to be cruel and unusual and discussions of cases on the issue.

[123] *Id.* at 227, 787 P.2d at 687. *See supra* note 24 and accompanying text.

[124] *Id.* The court held in part:

> The fact that the legislature may have determined that a person who commits numerous felonies with the use of a deadly weapon should be subject to imprisonment without the possibility of being paroled during his lifetime does not, in our opinion, "shock the conscience of reasonable persons" nor "outrage

To this point on appeal, the court held that the sentencing court abused its discretion and that the abuse was in sentencing Kumukau to the maximum mandatory minimum term on each and every count of conviction.[126] The *Kumukau*[127] court noted that it had the power to review a sentence for abuse of discretion even if the statute authorizing it was constitutionally valid.[128] The court subsequently held without further analysis:

> After careful review of the record, we conclude that the sentencing court abused its discretion in imposing the maximum minimum term of each conviction to be served consecutively amounting to 136 years of imprisonment before being eligible for parole. We agree that the sentencing court had ample grounds on which to premise the imposition of extended terms and consecutive mandatory minimum terms of imprisonment but to consecutively impose the maximum terms possible on each and every count for which Kumukau was convicted, however, is excessive.[129]

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the moral sense of the community." Kumukau has cited no cases which have held otherwise. (original quotes).

Id.

[125] *Id.* at 222, 787 P.2d at 685. Kumukau argued that the trial judge nullified the finding of the jury by sentencing him to the equivalent of a conviction of Attempted Murder in the First Degree for which the jury did not convict him. Opening Brief of Defendant-Appellant, State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367) in part stated:

> 1. The trial court effectively nullified the findings of the jury on the two counts of Attempted Murder in the First Degree (Counts VI and XXIII) by using consecutive mandatory minimum terms of imprisonment to sentence Mr. Kumukau to life imprisonment without the possibility of parole despite the fact that the jury did not convict him as charged on either of those counts. This disregards the principle of law which demands respect for the conclusions of the trier of fact. It also disregards principles of fundamental fairness and due process of law found in the respective Constitutions of the United States and the State of Hawaii.

Id. at 30. Kumukau also contended that his sentence was cruel and unusual in violation of the federal and state constitutions. However, since the case was remanded for sentencing on abuse of discretion grounds, the court was not obliged to pass on this constitutional issue. *Kumukau*, 71 Haw. at 228, 787 P.2d at 688.

[126] *Kumukau*, 71 Haw. at 228, 787 P.2d at 688.

[127] 71 Haw. 218, 787 P.2d 682 (1990).

[128] *Id.* at 227, 787 P.2d at 687-88 (citing State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 17 (1979)). *See supra* notes 69-70 and accompanying text for a discussion on the court's power of review. *See supra* note 93 and accompanying text for discussion of abuse of discretion standard.

[129] *Id.* at 228, 787 P.2d at 688.

B. Commentary

In *State v. Kumukau*,[130] the Hawaii Supreme Court reviewed the separation of power between the legislature and the courts and afforded substantial deference to the legislature's judgment and value decisions in prescribing penalties for criminal offenses.[131] Regarding statutory and eighth amendment constitutional concerns, the court's holding was consistent with prior cases and principles of law. However, the *Kumukau* opinion lacks in-depth analysis and reasoning, and thus, serves no beneficial purpose on remand and in future sentencing decisions. Further, the conclusory nature of the *Kumukau* decision suggests that the appellate court substituted its own discretion for that of the trial court. The court should have addressed the issue of whether Kumukau's sentence itself was cruel and unusual based on a test of objective criteria. But the court left the issue of the constitutionality of a sentence imposed under Hawaii Revised Statutes section 706-660.1[132] for another day.

On the issue of whether consecutive mandatory minimum terms of imprisonment were authorized by statute, the court adhered to well established rules of statutory construction. Noting that its primary duty is to ascertain and implement the intention of the legislature,[133] the court proceeded to construe Hawaii Revised Statutes sections 706-660.1(a) and 706-668.5[134] in relation to each other[135] and in light of legislative intent to empower judges to impose sentences consecutively at their discretion.[136] Absent from the court's reasoning were legislative concerns regarding the "deterrent and punishment aspects of sentencing," which the legislature stated as its purpose in changing the law to allow judges discretion to impose consecutive sentences.[137] At this point, the court rejected Kumukau's argument that the imposition of consecutive sentences was absurd and unjust and thus, not intended

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[130] 71 Haw. 218, 787 P.2d 682 (1990).

[131] *Id.* at 223-27, 787 P.2d at 686-87. *See supra* notes 24-68 and accompanying text.

[132] HAW. REV. STAT. § 706-660.1 (Supp. 1989) (amended 1990).

[133] *Id.* at 223-24, 787 P.2d at 686.

[134] HAW. REV. STAT. § 706-668.5 (Supp. 1989).

[135] *Id.* at 224, 787 P.2d at 686.

[136] *Id.* at 224-26, 787 P.2d at 686-87. *See supra* note 115 and accompanying text.

[137] S. CONF. COMM. REP. No. 5-82, 1982 HAW. LEG. SESS., SENATE J. 874; H.R. CONF. COMM. REP. No. 6-82, 1982 HAW. LEG. SESS., HOUSE J. 817. *See supra* note 115 for text of reports and accompanying text.

by the legislature.[138] The court reasoned that consecutive sentences were not absurd and unjust in light of Kumukau's history and multiple offenses with a firearm.[139]

In holding that the trial court abused its discretion in imposing consecutively the maximum mandatory minimum terms of imprisonment on each and every count for which Kumukau was convicted, the *Kumukau*[140] court offered no reasoning for its finding that the imposition was excessive except that its decision was based on a "careful review of the record[.]"[141] Appellate courts do not follow hard and fast rules when reviewing an abuse of discretion issue.[142] The line between the proper exercise of judicial discretion and an abuse of that discretion is not clearly discernible but depends upon the circumstances of the case.[143] Thus, when an appellate court announces its decision, it is imperative that that court provide some insight as to its reasoning to serve as guidelines upon remand and in future sentencing decisions.

The legislature allows sentencing courts wide latitude in imposing sentences which is normally undisturbed on review unless the court abused its discretion[144] or failed to adhere to statutory and constitutional commands.[145] It is also well settled that "an appellate court will not disturb the trial judge's decision in the absence of plain and manifest abuse of discretion."[146] In *State v. Kumukau*[147], the court did not find

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[138] *Kumukau*, 71 Haw. at 226, 787 P.2d at 687.

[139] *Id.* Since legislative statutes are presumptively constitutional, the *Kumukau* court should have measured Kumukau's sentence, and not the legislature's determination, against the cruel and unusual proscription in the federal and state constitutions. The *Freitas* court noted that "[t]he function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. . . ." State v. Freitas, 61 Haw. 262, 267, 602 P.2d 13, 920 (1979) (quoting Weems v. United States, 271 U.S. 349, 379 (1910)).

[140] 71 Haw. 218, 787 P.2d 682 (1990).

[141] *Id.* at 228, 787 P.2d at 688.

[142] 5 AM. JUR. 2D, *supra* note 90, at 217.

[143] *Id.* at 215, 217.

[144] State v. Johnson, 68 Haw. 292, 296, 711 P.2d 1295, 1298 (1985) (citing State v. Fry, 61 Haw. 226, 231, 602 P.2d 13, 17 (1979); State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975)). *See, e.g.*, State v. Huelsman, 66 Haw. 71, 588 P.2d 394 (1978).

[145] *Johnson*, 68 Haw. at 196, 711 P.2d at 1298 (citing State v. Martin, 56 Haw. 292, 294, 535 P.2d 127, 128 (1975)). *See, e.g.*, State v. Murray, 63 Haw. 12, 25, 621 P.2d 334, 343 (1980).

[146] *Sacoco*, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961) (citations omitted). *See supra* note 90 and accompanying text.

[147] 71 Haw. 218, 787 P.2d 682 (1990).

that the trial judge exhibited arbitrary or capricious behavior in sentencing Kumukau.[148] Nor did the trial judge exceed his authority in sentencing Kumukau since his sentence was within statutory limits. Consequently, it is not clear whether the imposition of consecutive maximum mandatory minimum terms of imprisonment on each and every count of conviction is excessive because the result is outside permissible limits or only that the trial court should have decided otherwise.[149] On its face, the *Kumukau* court broke with a well established tenet by displacing the trial court's discretion, exercised under sanction of law, with that of its own.[150]

The court, therefore, should have addressed the issue of the constitutionality of Kumukau's sentence,[151] and have grounded its holding on objective criteria recognized in *State v. Freitas*.[152] In *Freitas*,[153] the

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[148] *See supra* note 94 and accompanying text.

[149] *See generally* 5 AM. JUR. 2D, *supra* note 90, at 216-17.

[150] *See supra* note 90 and accompanying text.

[151] Kumukau contended that his sentence itself was cruel and unusual punishment. Opening Brief of Defendant-Appellant at 26-27, State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367) in part reads:

> Mr. Kumukau has been sentenced to a mandatory minimum term that is far in excess of his reasonable life expectancy and the total of his consecutive maximum sentences staggers the imagination. Although the conduct which underlies his conviction was egregious, it does not warrant a penalty which amounts to "warehousing" him for the rest of his natural life, regardless of what changes might take place in his personality or character. . . . [F]oreclosure of any opportunity for rehabilitation on the part of Mr. Kumukau shocks the conscience of a reasonable person and violates the Eighth Amendment to [sic] United States Constitution and Article VIII of the Hawaii State Constitution. (original quote).

The court framed the issue as one of legislative power over prescribing punishment:

> Kumukau does not contend that the maximum length of his sentence (eight life terms plus 200 years) is cruel and unusual punishment. His contention is that the imposition of consecutive mandatory minimum terms constitutes cruel and unusual punishment. In essence, Kumukau argues that a statute which, in some circumstances, permits the imposition of life imprisonment without the possibility of parole (when first degree murder or attempted murder has not been committed) is constitutionally invalid.

Kumukau, 71 P.2d at 226, 787 P.2d at 687.

[152] 61 Haw. 262, 602 P.2d 914 (1979).

[153] *Id.* One of the issues raised in *Freitas* was whether Act 181, 1976 Haw. Sess. Laws (codified as HAW. REV. STAT § 706-606.5 (1976) (current amendment 1990)) unconstitutionally violated the prohibition against cruel and unusual punishment. *Id.* at 266, 602 P.2d at 919. In considering the constitutionality of the act, the *Freitas*

Hawaii Supreme Court utilized a three prong comparative test of objective criteria that focused on legislative discretion in defining crime and punishment and the imposition of the appellant's sentence thereunder.[154] Subsequently, the United States Supreme Court adopted the principle that courts can identify and apply objective criteria[155] over a strenuous dissent who supported the Court's previous decision rejecting an objective test.[156] Under the facts and circumstances of *Kumukau*,[157] the court should have reached the issue of the constitutionality of Kumukau's sentence and if found to be unconstitutional, address the constitutionality of Hawaii Revised States section 706-660.1.[158] On the other hand, if the court found that Kumukau's sentence was not unconstitutional, the legislature has a clear remedy to abrogate the statute if it disagreed with the court's holding.

V. Impact

The impact of *State v. Kumukau*[159] lies mainly in the issues of proportionate sentencing involving cruel and unusual punishment and judicial abuse of discretion. Regarding the issue of statutory construction, the court only added to the well established principles of construing statutes upon the same subject matter with reference to each other in light of legislative intent. However, the court's opinion contributes to sentencing disparities and to uncertainty as to how far a sentencing court can go before it clearly exceeds the bounds of reason. Most

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court noted:

> We consider first the constitutionality of Act 181, for if it is found to be invalid with respect to the defendants the sentences imposed thereunder must be set aside.
>
> The defendants . . . do contend . . . that Act 181, as it applies to them, is unconstitutional in that it contravenes the Eighth Amendment's prohibition against cruel and unusual punishment.

Id. at 267, 602 P.2d at 919. The *Kumukau* court should have followed the *Freitas* analysis as Kumukau also contended that his sentence was cruel and unusual. *Kumukau*, 71 Haw. at 222, 787 P.2d at 685.

[154] *Freitas*, 61 Haw. at 267-71, 602 P.2d at 919-22. *See supra* note 73 and accompanying text.

[155] Solem v. Helm, 463 U.S. 277, 294 (1983).

[156] *Id.* at 305. *See supra* note 30.

[157] 71 Haw. 218, 787 P.2d 682 (1990).

[158] Haw. Rev. Stat. § 706-660.1 (Supp. 1989) (amended 1990). The *Kumukau* court noted that "where 'the sentence prescribed by statute is cruel and unusual within the meaning of the Eighth Amendment, the statute itself is unconstitutional and any sentence imposed thereunder must be set aside.'" *Kumukau*, 71 Haw. at 226, 787 P.2d at 687 (citations omitted).

[159] 71 Haw. 218, 787 P.2d 682 (1990).

importantly, the court's sparse offering of reasoning and analysis adds to the tension between trial and appellate courts in discretionary matters. Finally, on its face, the *Kumukau* decision seems contrary to a legislative objective to deter and punish crime through sentencing in instances of multiple felony convictions.

The *Kumukau*[160] court should have reached the issue of whether Kumukau's sentence was cruel and unusual punishment under the federal and state constitutions. By applying the objective criteria test used in *State v. Freitas*,[161] the court could base its decision on objective factors rather than the subjectivity of individual justices.[162] The United States Supreme Court in *Solem v. Helm*,[163] held that "courts should be guided by [recognized] objective factors" when reviewing sentences under the eighth amendment.[164] And although no one factor is dispositive of the question of proportionality,[165] factors to consider are: (1) the gravity of the offense and the harshness of the sentence; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions.[166] Thus, the *Kumukau* court's recognition of the use of a test of objective criteria following *Freitas* would have been a natural evolution of the law in objectifying standards of review in Hawaii,[167] a parallel of what has already happened in the United States Supreme Court.[168]

In finding that the trial court abused its discretion in sentencing, the *Kumukau*[169] court gave no specific reasons for its holding. For example, in *State v. Sacoco*,[170] the court discussed the severity of the crime;[171] in *State v. Teves*,[172] the court considered the undue risk the

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[160] *Id.*

[161] 61 Haw. 262, 602 P.2d 914.

[162] *See supra* note 82 and accompanying text for description of test used in *Freitas*.

[163] 463 U.S. 277 (1983).

[164] *Id.* at 290.

[165] *Id.* at 290-91 n.17.

[166] *Id.* at 292.

[167] *See supra* note 82.

[168] *See supra* notes 83-87 and accompanying text.

[169] 71 Haw. 218, 787 P.2d 682 (1990).

[170] 45 Haw. 288, 367 P.2d 11 (1961).

[171] *Id.* at 294, 367 P.2d at 14. Sacoco was convicted for the offense of indecent assault upon a child under twelve years. The court noted the trial judge's remark that the defendant could have been charged with assault with intent to have sexual relations. *See supra* note 64 for further discussion of the case.

[172] 4 Haw. App. 566, 670 P.2d 834 (1983).

defendant presented to public safety;[173] and in *State v. Murray*,[174] although the court did not reach the question of abuse of discretion, that court thought it beneficial to discuss the issue for purposes of remand and in future application of the statute.[175]

Absent specificity, the *Kumukau*[176] decision adds to the uncertainty in imposing sentences within acceptable limits and results in sentencing disparity and judge-shopping by lawyers who want particular judges to hear their cases. In *Hutto v. Davis*,[177] Justice Powell noted that because "a good deal of disparity is inevitable[,]" primarily due to the size of the United States, individual states must strive to minimize sentencing disparity.[178] Proportionate sentences take into account the offense, other sentences, the interests of society, and the rights of convicted persons.[179] In Hawaii, the concern for disparity in sentencing is addressed in Hawaii Revised Statutes section 706-606(4).[180]

For example, in resentencing Kumukau, the trial court again imposed the maximum mandatory minimum terms of imprisonment on each and every count of conviction but imposed the terms of imprisonment concurrently[181] inasmuch as the Hawaii Supreme Court found ample grounds upon which to impose consecutive sentences.[182] Thus, upon resentencing, Kumukau's mandatory minimum term of imprisonment was reduced from 136 years to 15 years.[183] Without proper guidelines, the sentencing judge may have swung to the other extreme of the

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[173] *Id.* The defendant was arrested and convicted for two petty misdemeanors while awaiting sentencing for theft. *See supra* note 67 for statutory factors to be considered in imposing sentence.

[174] 63 Haw. 12, 621 P.2d 334 (1980).

[175] *Id.* Statutory construction was dispositive of the issue of whether the court's order for restitution from the defendant's earnings while in prison was erroneous. *See supra* notes 46 and 55. However, the court further explained that "a restitution order patently beyond an offender's capacity for compliance serves no purpose, reparative or otherwise." *Id.*

[176] 71 Haw. 218, 787 P.2d 682 (1990).

[177] 454 U.S. 370 (1982).

[178] *Id.* at 380 (Powell, J., concurring).

[179] *Id.* at 380-81.

[180] HAW. REV. STAT. § 706-606(4) (Supp. 1990). *See supra* note 67 for text of statute.

[181] Resentencing Judgment (July 27, 1990), State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367).

[182] *Kumukau*, 71 Haw. at 228, 787 P.2d at 688.

[183] Resentencing Judgment (July 27, 1990), State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367).

spectrum to safely adhere to the *Kumukau*[184] ruling. *Kumukau*, then, is an example of sentencing disparity that adequate sentencing guidelines can minimize.

Further, the court's opinion adds to the tension between trial courts and appellate courts in areas of judicial discretion. The Hawaii Supreme Court stated: "[t]he matter of sentence rests peculiarly within the province of the trial court. This court will not substitute its discretion for that of the trial court exercised under sanction of law."[185] Since the *Kumukau*[186] court did not note any evidence of arbitrary or capricious behavior by the trial judge,[187] arguably, the court simply decided that, in its view, the trial court should have decided otherwise.[188] Thus, the *Kumukau* decision did nothing to ease the tension between sentencing courts and the appellate court and may have exacerbated the situation instead.

Finally, the *Kumukau*[189] decision sends out mixed signals that convictions for the use of firearms in the commission of felonies and committing multiple felonies do not necessarily result in correspondingly greater punishment. The legislative posture toward crime is that of severity and not lenity.[190] House Bill No. 3196-76,[191] precursor to Hawaii Revised Statutes section 706-660.1,[192] sentence of imprisonment for use of a firearm in a felony, was passed in response to the steady increase in the use of firearms in felonies.[193] The Bill also provided

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[184] 71 Haw. 218, 787 P.2d 682 (1990).

[185] State v. Sacoco, 62 Haw. 288, 294, 367 P.2d 11, 14 (1961).

[186] 71 Haw. 218, 787 P.2d 682 (1990).

[187] *See* State v. Fry, 61 Haw. at 231, 602 P.2d at 17. *See supra* note 90-94.

[188] *See generally* 5 AM. JUR. 2D, *supra* note 90, at 216-17.

[189] 71 Haw. 218, 787 P.2d 682 (1990).

[190] State v. Eline, 70 Haw. 597, 602, 778 P.2d 716, 719 (1989). The *Eline* court noted the legislative policy of just punishment and deterrence. Thus, the court held that a sentencing court is obliged to impose a condition that the defendant not commit another offense during the period of suspension and to revoke the suspension if the defendant violates the condition "otherwise, the sentence would neither provide punishment nor afford deterrence." *Id.* at 602-03, 778 P.2d at 719-20.

[191] H.B. 3196, 8th Leg., Reg. Sess. (1976).

[192] HAW. REV. STAT. § 706-660.1 (Supp. 1989) (amended 1990).

[193] Both S. CONF. COMM. REP. No. 34-76, 1976 HAW. LEG. SESS., SENATE J. 883-84 and H.R. CONF. COMM. REP. No. 35, 1976 HAW. LEG. SESS., HOUSE J. 1143-44 on H.B. No. 3196, 8th Leg., Reg. Sess. (1976) read in relevant part:

> The purpose of this bill is to set a schedule of mandatory sentences for a person convicted of a felony, where the person had a firearm in his possession and threatened its use or used the firearm while engaged in the commission of the

that the Board of Paroles and Pardons may fix a longer minimum sentence than that imposed by the court.[194] Senate Bill No. 2379-82,[195] forerunner of Hawaii Revised Statutes section 706-668.5,[196] multiple sentence of imprisonment, granted sentencing judges discretion in imposing consecutive terms of imprisonment on the grounds that mandatory concurrent terms of imprisonment "negates the deterrent and punishment aspects of sentencing . . . [and] fails to deter similar future behavior."[197] In the case of *Kumukau*, a concurrent sentence resulted in a mandatory minimum term of imprisonment of fifteen years,[198] which arguably does not reflect the multiplicity nor seriousness of his offenses[199] and is clearly not in the spirit of legislative intent.

VI. Conclusion

In *State v. Kumukau*,[200] the Hawaii Supreme Court held that consecutive mandatory minimum terms of imprisonment are authorized by

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felony. Your committee intends to require the court, in the cases of felonies where a firearm was used, to impose a mandatory term of imprisonment.

Your Committee is in agreement that the steadily increasing use of firearms in the commission of criminal activities presents a severe degree of risk of injury to victims of criminal actions. At the present time your Committee feels that there is a need to re-examine the methods with which to discourage the use of firearms and institute strong penalties for persons convicted of such criminal activities.

. . . .

Your Committee by this bill and the amendments thereto, intends to require the court in cases of felonies where a firearm was used to impose a mandatory term of imprisonment. Nothing contained in this bill should be construed as precluding (a) the court from imposing an indeterminate sentence or an extended indeterminate sentence, or (b) the Board of Paroles and Pardons from fixing the minimum term of imprisonment at a length greater than the length of the mandatory term of imprisonment provided for in this bill.

. . . .

[194] *See supra* note 193.

[195] S.B. 2379, 11th Leg., Reg. Sess. (1982).

[196] Haw. Rev. Stat. § 706-668.5 (Supp. 1989).

[197] S. Conf. Comm. Rep. No. 5-82, 1982 Haw. Leg. Sess., Senate J. 874; H.R. Conf. Comm. Rep. No. 6-82, 1982 Haw. Leg. Sess., House J. 817.

[198] Resentencing Judgment (July 27, 1990), State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367).

[199] Answering Brief of the State of Hawaii at 22, State v. Kumukau, 71 Haw. 218, 787 P.2d 682 (1990) (Cr. No. 88-0367). *See supra* note 18 for breakdown of Kumukau's convictions and corresponding sentences.

[200] 71 Haw. 218, 787 P.2d 682 (1990).

Hawaii Revised Statutes section 706-660.1[201] and that section 706-660.1 is constitutional on its face.[202] However, the court concluded that the trial court abused its discretion when it sentenced Kumukau to the maximum mandatory minimum term of imprisonment on each and every count for which Kumukau was convicted and remanded the case for resentencing.[203]

The *Kumukau*[204] court did not fully discuss its ruling against the trial court. Thus, the holding in *Kumukau* is only controlling in cases with similar fact situations, although it has defined the ceiling above which the imposition of a sentence is an abuse of discretion. Further, the court did not note the punitive and deterrent aims of the legislature in sentencing but instead seemed to adopt a principle of lenity.[205] Most importantly, the opinion's inadequacy adds to the tension between the trial courts and the appellate court and has a chilling effect on trial courts to impose similar sentences even when warranted.

Finally, although appellate courts need not address a constitutional question if the court can decide on some other ground,[206] *Kumukau*[207] presented a unique situation in which the sentencing court did not exceed its statutory authority by imposing a sentence within statutory limits nor exhibit arbitrary or capricious behavior in its sentencing discretion. Therefore, the court should have reached the issue of the constitutionality of Kumukau's sentence and applied the objective criteria test as set out by the court in *State v. Freitas*[208] and by the United States Supreme Court in *Solem v. Helm*.[209]

Donna H. Yamamoto

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[201] HAW. REV. STAT. § 706-660.1 (Supp. 1989) (amended 1990).

[202] *Id.* at 226-27, 787 P.2d at 687.

[203] *Id.* at 228, 787 P.2d at 688.

[204] 71 Haw. 218, 787 P.2d 682 (1990).

[205] *See generally*, United States v. Rosenberg, 806 F.2d 1169 (3rd Cir. 1986) (judicial duty to interpret ambiguous legislative history and criminal statutes with lenity); Annotation, *Consecutive Sentences*, 55 A.L.R. FED. 633 (1990) (Supreme Court adopted "rule of lenity" when Congressional intent ambiguous and not clear).

[206] *Kumukau*, 71 Haw. at 228, 787 P.2d at 688 (citation omitted).

[207] 71 Haw. 218, 787 P.2d 682 (1990).

[208] 61 Haw. 262, 602 P.2d 914 (1979).

[209] 463 U.S. 277 (1983).

State v. Rothman: Expanding the Individual's Right to Privacy under the Hawaii Constitution

I. Introduction

In *State v. Rothman*,[1] the Hawaii Supreme Court held that without a warrant, the State's seizure of a listing of telephone numbers of outgoing and incoming calls on a private telephone line[2] violated an individual's constitutional right to privacy under the Hawaii Constitution.[3] The court also chose not to adopt the good faith doctrine of *United States v. Leon*, which permits the admission of evidence seized under a warrant ultimately found to be unsupported by probable cause if the officers in question acted in a good faith reliance upon the warrant.[4] By its holding, the Hawaii Supreme Court set forth a more

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[1] 70 Haw. 546, 779 P.2d 1 (1989).

[2] This information is compiled in a mechanical device called a "pen register." *See infra* note 7 for an explanation of this device.

[3] 70 Haw. at 546, 779 P.2d at 1. Haw. Const. art. I, § 6 reads:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

Haw. Const. art. I, § 7 reads:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy 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 or the communications sought to be intercepted.

[4] 70 Haw. at 546, 779 P.2d at 1 (citing U.S. v. Leon, 468 U.S. 897 (1984)). The court also noted that (1) circuit court judges, but not district court judges, had the power to issue a warrant for good cause shown for interception of the phone numbers and (2) the description of items to be seized in two residential search warrants was so broad as to make the warrants prohibited general warrants. *Id.* This casenote does not address these secondary issues but instead focuses on the pen register issue, which is a question of first impression in Hawaii.

stringent standard in the protection of an individual's right to privacy under the Hawaii Constitution[5] than the United States Supreme Court had found previously under the United States Constitution.[6]

Part II of this casenote details the facts of *State v. Rothman*. Part III examines the legal history of privacy rights regarding the use of pen registers,[7] both by the United States Supreme Court and in state courts across the country, and discusses the good faith doctrine. Part IV analyzes the holding and reasoning of *Rothman*. Part V analyzes the potential impact of *Rothman* on the right to privacy in Hawaii.

II. Facts

Edward Martin Rothman was charged with Promoting a Dangerous Drug in the First Degree and Criminal Conspiracy.[8] Before the indictment, a district court judge issued a warrant which authorized the Office of Narcotics Enforcement to install a pen register on Rothman's telephone line and ordered the Hawaiian Telephone Company to identify the numbers at which calls to Rothman's telephone originated and to supply those numbers to the Office of Narcotics Enforcement.[9]

The warrant for the pen register was entitled "In the Circuit Court of the First Circuit State of Hawaii" but was signed by a district court

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[5] Haw. Const. art. I, § 6. *See supra* note 3.

[6] 70 Haw. at 546, 779 P.2d at 1. U.S. Const. amend. IV provides:

> 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.

See also United States v. New York Tel. Co., 434 U.S. 159 (1977) (installation of pen registers not governed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which addresses the interceptions of wire or oral communications, because pen registers do not record contents of conversation); Smith v. Maryland, 442 U.S. 735 (1979) (installation and use of pen register was not a "search" within the meaning of the fourth amendment, and thus no warrant was required). *See infra* notes 18 and 28 and accompanying text.

[7] A pen register is a device that identifies the numbers dialed or otherwise transmitted on the telephone line to which the service is attached. United States v. New York Tel. Co., 434 U.S. 159 (1977). The Electronic Automatic Exchange can be programmed to produce a printout of numbers of all incoming calls to the telephone line. *Rothman*, 70 Haw. at 552, 779 P.2d at 5. For purposes of this casenote, both devices are included in the term "pen register."

[8] State v. Rothman, 70 Haw. 546, 548, 779 P.2d 1, 3 (1989).

[9] *Id.* at 548, 779 P.2d at 3.

judge as "Judge of the Above-Entitled Court" and filed in the District Court of the First Circuit.[10] To overcome this procedural error, the State urged the Hawaii Supreme Court to rule that no warrant was required to obtain the numbers of phone calls to and from Rothman's telephone line, or that the warrant for the pen register as signed by the District Court judge was valid under the good faith doctrine.[11]

In *Rothman*, the Hawaii Supreme Court held that "persons using telephones in the State of Hawaii have a reasonable expectation of privacy, with respect to the telephone numbers they call . . . [and the] numbers of calls made to them on their private lines."[12] The court further found that a warrant, signed by a Circuit Court judge, was required for the installation of a pen register.[13]

III. Legal History

The United States Supreme Court has limited the fourth amendment protections of an individual's right to privacy by refusing to require a warrant to authorize the installation of a pen register.[14] In addition, the Court has adopted the good faith test in *United States v. Leon*,[15] which permits evidence obtained through a good faith reliance on an invalid warrant to be used in court.

Despite the federal government's refusal to extend individuals' privacy protections, "the appellate courts of a majority of the states have interpreted their state constitutions to provide greater protection for individual rights than does the United States Constitution."[16] With the *Rothman* decision, Hawaii joins other states in holding that an individual does have a reasonable expectation of privacy in regard to the numbers he dials on his telephone.[17]

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[10] *Id.*

[11] *Id.* at 554-55, 779 P.2d at 7.

[12] *Id.* at 556, 779 P.2d at 7.

[13] *Id.*

[14] *See* United States v. New York Tel. Co., 434 U.S. 159 (1977); Smith v. Maryland, 442 U.S. 735 (1979); *see also infra* notes 18 and 28 and accompanying text.

[15] 468 U.S. 897 (1984); *see infra* note 64 and accompanying text.

[16] State v. Gunwall, 106 Wash. 2d 54, 59, 720 P.2d 808, 811 (1986) (constitution of the State of Washington provides a more stringent right to privacy than the United States Constitution; thus there must be probable cause shown before the installation of a pen register). *See infra* note 51 and accompanying text.

[17] *Id. See also, e.g.*, State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (disclosure of telephone numbers to the phone company is made for a limited business purpose and

A. The United States Supreme Court's Treatment of Pen Registers

1. United States v. New York Telephone Co.[18]

In *United States v. New York Telephone Co.*, which marked the first time the United States Supreme Court addressed the pen register issue, the Court held that the installation of pen registers was not governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which addresses the interception of wire and oral communications, thus removing pen registers from the realm of fourth amendment protections under that act.[19] Because a pen register does not record the contents of phone conversations, the Court noted that a law enforcement official could not even determine if a communication had actually existed through the use of a pen register.[20]

The Court also pointed out that the legislative history of Title III expressed a congressional intent to exclude pen registers from the

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not for release to other persons for other reasons); Commonwealth v. Melilli, 521 Pa. 405, 555 A.2d 1254 (1989) (current state law requires that probable cause be shown to install a pen register, although issue of good faith doctrine left for resolution in a later case); Commonwealth v. Beauford, 327 Pa. Super. 253, 475 A.2d 783 (1984) (state supreme court may require a showing of probable cause for the installation of pen registers where the state constitution is more restrictive than its federal counterpart); People v. Blair, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979) (under the California constitution, evidence seized in California under a pen register installed without probable cause will be suppressed).

[18] 434 U.S. 159 (1977). *New York Telephone* marked the first time the United States Supreme Court addressed the pen register issue. The Court held that pen registers were not governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *See infra* note 19. The Court did find that the District Court had power to authorize the installation of a pen register under Federal Rules of Criminal Procedure 41. *See infra* note 24 and accompanying text.

[19] 18 U.S.C. § 2510(1) (1982) (hereinafter Title III). Title III stated in relevant part:

> "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid or wire, cable or other like connection between the point of origin and the point of reception. . . .

Id. Title III also states that "intercept" means the aural acquisition of the *contents* of any wire or oral communication through the use of any electronic, mechanical, or other device. 18 U.S.C. § 2510(4) (1982) (emphasis added).

[20] 434 U.S. at 167.

definition of "intercept,"[21] and concluded that Congress "did not view pen registers as posing a threat to privacy of the same dimension as the interception of oral communications . . . ."[22] Thus, the Court did not consider the recording of numbers dialed to or from a telephone to be as stringent a privacy interest as the interception of the contents of communications.

The Court stated, however, that the district court could remain consistent with the fourth amendment by authorizing the installation of pen registers upon a showing of probable cause.[23] The Court found the authority to do so under Federal Rule of Criminal Procedure 41(b), which provides for the issuance of a warrant to:

> search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.[24]

The Court noted that Rule 41(b) is not limited to tangible items but is sufficiently flexible to include electronic intrusions authorized by a finding of probable cause.[25] Reasoning that it would be "anomalous to permit the recording of conversations by means of electronic surveillance while prohibiting the far lesser intrusion accomplished by pen registers,"[26] the Court held that Congress clearly indicated that the pen register is a permissible law enforcement tool which may be authorized by a showing of probable cause.[27] Thus, the Court balanced the interests of law enforcement and individual privacy by allowing the installation of pen registers only where there is probable cause, but without insisting that the stringent requirements of Title III on oral communications be met.

2. Smith v. Maryland[28]

Two years later, the United States Supreme Court again addressed the issue of the installation of pen registers. In *Smith v. Maryland*, the

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[21] *Id.* "[T]he use of a 'pen register,' for example, would be permissible . . . ." S. REP. No. 1097, 90th Cong., 2d Sess. 90 (1968).

[22] 434 U.S. at 168.

[23] *Id.* at 168-70 (quoting FED. R. CRIM. P. 41(b)).

[24] *Id.* at 169.

[25] *Id.* (citing Katz v. United States, 389 U.S. 347 (1967)).

[26] *Id.* at 170.

[27] *Id.* at 178.

[28] 442 U.S. 735 (1979). Smith v. Maryland is the current law regarding the

Court narrowed an individual's rights to privacy by holding that the installation and use of a pen register was not a "search" within the meaning of the fourth amendment of the United States Constitution,[29] thus requiring no warrant.[30] The Court cited the test set forth in *Katz v. United States*[31] to determine whether a governmental surveillance is a search within the meaning of the fourth amendment.[32]

The application of the fourth amendment depends on a two-pronged test based on whether the "person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[33] The first prong of the test is whether the individual has shown an expectation of privacy, and the second is whether the expectation is one which society is prepared to accept as reasonable.[34]

The Court expressed doubt that individuals have any actual expectation of privacy in regard to the numbers they dial on their telephones.[35] The Court assumed that although most people may be unaware of the purpose of pen registers, all phone users know that the telephone company has the ability to monitor the numbers dialed for billing purposes or for the detection of fraud.[36] The dissent in *Smith* pointed out that phone calls are made in the privacy of the individual's home or office, "locations that without question are entitled to Fourth and Fourteenth Amendment protection."[37] The majority, however,

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installation of pen registers under the United States Constitution. *See e.g.*, California v. Ciraolo, 476 U.S. 207 (1985); California v. Greenwood, 486 U.S. 35 (1988). In *Smith*, the Court invoked the "reasonable expectation of privacy" test set forth in Katz v. United States. 442 U.S. at 739. *See infra* note 31 and accompanying text. Using that analysis, the Supreme Court decided that no warrant was necessary for the installation of a pen register.

[29] *See supra* note 6.

[30] 442 U.S. at 746.

[31] 389 U.S. 347 (1967) (petitioner had reasonable expectation of privacy while using a telephone booth and was thus protected under the Fourth Amendment). The test set forth in *Katz* is cited today in cases requiring an analysis of an individual's expectations of privacy. *See, e.g.*, New York v. Burger, 482 U.S. 691 (1987); California v. Greenwood, 486 U.S. 35 (1988); *see supra* note 56 and accompanying text for discussion of Hawaii cases adopting the *Katz* test.

[32] 389 U.S. at 361 (Harlan, J., concurring).

[33] 442 U.S. at 740.

[34] 389 U.S. at 361 (Harlan, J., concurring).

[35] 442 U.S. at 742.

[36] *Id.*

[37] *Id.* at 747 (Stewart, J., dissenting).

noted that while the petitioner may have had a legitimate expectation of privacy as to the *content* of his phone calls, he could not reasonably expect privacy as to the specific numbers he dialed.[38]

In addition, the Court stated that even if a person did entertain some expectation of privacy regarding the numbers he dialed, that expectation is "not 'one that society is prepared to recognize as reasonable.'"[39] Because an individual voluntarily conveys numerical information to the telephone company when he uses the phone, he assumes the risk that the phone company will reveal that numerical information to the police,[40] and a person has "no legitimate expectation of privacy in information he voluntarily turns over to third parties."[41]

Thus, according to the United States Supreme Court, fourth amendment protections do not limit the use of pen registers. Although some states have followed the lead of the United States Supreme Court, other states have enforced more stringent requirements under their own constitutions.

B. State Courts' Treatment of Pen Registers

Several state courts have adopted the reasoning of *Smith v. Maryland* and have held that pen registers do not record the contents of conversations or even prove that a conversation took place, and thus, are not subject to fourth amendment protections.[42] Other states have followed the *Smith* precedent and admitted the evidence obtained through the use of a pen register, but have questioned the reasoning of the *Smith*

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[38] *Id.* at 743.

[39] *Id.* (citing Katz v. U.S., 389 U.S. at 361).

[40] *Id.* at 744.

[41] *Id.* at 743-44.

[42] *Id. See, e.g.*, People v. Guerra, 65 N.Y.2d 60, 478 N.E.2d 1319, 489 N.Y.S.2d 718 (1985) (police did not violate defendant's rights by use of a pen register without a warrant as the defendant had no legitimate expectation of privacy in the records maintained by the phone company); Shaktman v. State, 529 So. 2d 711 (Fla. App. 1988) (use of pen registers comes under privacy rights in the state constitution but use is permitted when the state meets the burden of proof of a compelling state interest); State v. Valenzuela, 130 N.H. 175, 536 A.2d 1252 (1987), *cert. denied*, 485 U.S. 1008 (1988) (information obtained from a pen register installation unsupported by probable cause is admissible under the analogy of agent-informer cases, where information revealed by an informer is admissible without a warrant).

opinion and have suggested a need to readdress the issue under the provisions of their own state constitutions.[43]

States are free to broaden individual rights under their own state constitutions as the state constitution imposes limitations on the "otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law," whereas the United States Constitution authorizes the federal government to exercise constitutionally enumerated powers expressly delegated to it by the states.[44] "[D]ecisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[45] States that have rejected *Smith v. Maryland* have given the citizens of their state increased privacy rights under the particular privacy provisions of their state constitutions.

For example, in *People v. Sporleder*,[46] the Colorado Supreme Court held that a person did indeed have a right to expect privacy as to the numbers dialed on his telephone and thus required that a warrant be issued before a pen register could be installed.[47] The court based this decision on the right to privacy provision found in the Colorado state constitution[48] and noted that although the Colorado privacy provision is substantially similar to its federal fourth amendment counterpart, the Colorado Supreme Court was not bound to follow the United

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[43] State v. Thompson, 113 Idaho 466, 745 P.2d 1087 (1988) (court agreed to follow the precedent of the United States Supreme Court in *Smith* but suggested that the Idaho constitution be interpreted more broadly in the future); State *ex rel.* The Ohio Bell Tel. Co. v. Williams, 63 Ohio St. 2d 51, 407 N.E.2d 2, 17 Ohio Op. 3d 31 (1980) (court followed *New York Telephone* and held that a pen register search is authorized under Criminal Rule 41(B) for the seizure of evidence, which is similar to Federal Rule of Criminal Procedure 41(b)).

[44] State v. Gunwall, 106 Wash. 2d 54 at 54, 720 P.2d 808 at 815 (1986) (footnote omitted).

[45] Brennan, J., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

[46] 666 P.2d 135 (Colo. 1983) ("defendant's privacy expectation in telephone numbers dialed on home telephone qualified for constitutional protection under state constitutional proscription of unreasonable searches and seizures").

[47] *Id.* at 136.

[48] *Id.* at 139. COLO. CONST. art. II, § 7 provides:

> The people shall be secure in their persons, papers, houses and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

States Supreme Court's interpretation of the fourth amendment in deciding the extent of state constitutional protections.[49] In addition, the court stated that "[t]he mere fact that 'our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in adding to those risks.'"[50]

The Washington Supreme Court followed the same reasoning in *State v. Gunwall*, holding that there must be probable cause for a warrant to install a pen register because the Washington Constitution affords individuals a broader right to privacy than the United States Constitution.[51] The court set forth six criteria to be used in determining whether a state constitution should be read as extending broader rights to a citizen of the state than the United States Constitution in a given situation,[52] and compared the privacy provision of the Washington Constitution[53] to the fourth amendment of the United States Constitution. The court then stated that unlike the federal constitution, the Washington Constitution provides express protection for an individual's "private affairs," and noted that the court in previous cases had held that language to be material, thus rendering a more expansive interpretation to the Washington Constitution than that given the United States Constitution.[54]

C. Hawaii's Treatment of the Right to Privacy

The issue of pen registers has not been previously decided in Hawaii, although the "reasonable expectation of privacy" test set forth in *Katz*

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[49] 666 P.2d at 140.

[50] *Id.* at 141, (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406 (1974)).

[51] State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (1986).

[52] The Washington court noted the relevance of six nonexclusive criteria in determining the scope of state constitutional protections as compared to those afforded by the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. 106 Wash. 2d at 61-62, 720 P.2d at 811.

[53] 106 Wash. 2d at 65, 720 P.2d at 814. WASH. CONST. art. I, § 7 reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

[54] 106 Wash. 2d at 65, 720 P.2d at 814.

v. United States[55] has been adopted.[56] The Hawaii Constitution provides its citizens with an express privacy provision above and beyond that of the fourth amendment of the United States Constitution.[57] The Hawaii Supreme Court also recognizes that it has "final, unreviewable authority to interpret and enforce the Hawaii Constitution."[58]

In keeping with the above provisions, the Hawaii Supreme Court has recognized an increased right to privacy in most search and seizure cases. In *State of Hawaii v. Tanaka*,[59] for example, the Supreme Court held that individuals could reasonably believe that law enforcement officials would not be permitted to conduct a warrantless search of the garbage on their property to discover their personal beliefs and activities.[60] The court noted that such an "overbroad governmental intrusion" was meant to be protected under article I, section 7 of the Hawaii Constitution.[61]

In Hawaii cases dealing with the recording of conversations by one party who consents to having the communication recorded, however, the recognized privacy protections have not been so broad. The Hawaii Supreme Court has stated that the expectation that a conversation will not be repeated is not one which society is prepared to recognize as

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[55] 389 U.S. 347 (1967). *See supra* note 31 and accompanying text for a brief description of *Katz*.

[56] *See* State v. Lester, 64 Haw. 659, 667, 649 P.2d 346 (1982) (no reasonable expectation of privacy when one party to a conversation consents to having communication recorded); State v. Okubo, 3 Haw. App. 396, 403, 651 P.2d 494 (1982) (no reasonable expectation of privacy in the recording of a consensual conversation).

[57] *See supra* note 3 for the text of article I, sections 6 and 7 of the Hawaii Constitution.

[58] State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974) (defendant's search at police station incidental to her custodial arrest was reasonable under fourth amendment of United States Constitution but unreasonable under the greater protections of article I, section 5 of the Hawaii Constitution). Justice Brennan cited this case in a commentary on state constitutional rights:

> As the Supreme Court of Hawaii has observed, "while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law. . . ."

Brennan, J., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977).

[59] 67 Haw. 658, 701 P.2d 1274 (1985) (individual has reasonable expectation of privacy in the contents of his garbage). *See also* State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); *supra* note 58.

[60] 67 Haw. at 662, 657 P.2d at 1023.

[61] *Id.*

reasonable under the *Katz* test.[62] The court reasoned that there can be no claim of eavesdropping where one party to a consensual conversation agrees to record the communication. Because an officer is permitted to make notes of conversations for later testimony, a recording was held to enhance credibility, thereby removing the defendant's "right" to rely on flaws in the officer's memory.[63] This analysis can be distinguished from the pen register issue, however, as a pen register device permits government agents to "eavesdrop" on information they couldn't otherwise have heard.

The issue of the need for a search warrant for pen registers was one of first impression in Hawaii, but with Hawaii's express privacy provision in the state constitution, the court is free to enforce a warrant requirement for the installation of pen registers. The *Rothman* decision, therefore, is in keeping with the Hawaii Supreme Court's desire to provide its citizens with greater protections than those granted by the United States Constitution.

D. The Good Faith Doctrine

The United States Supreme Court has articulated the good faith doctrine in *United States v. Leon*.[64] This doctrine modifies the exclusionary rule of the fourth amendment[65] to permit the admission of evidence seized by officers acting in a reasonable, good faith reliance upon a

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[62] *See* State v. Lester, 64 Haw. 659, 649 P.2d 346 (1982); State v. Okubo, 3 Haw. App. 396, 651 P.2d 494 (1982).

[63] 64 Haw. at 664-65, 649 P.2d at 351.

[64] 468 U.S. 897 (1984). In *Leon*, a search warrant was authorized on the basis of an affidavit which the district court found to be insufficient as to the reliability and credibility of the informant. *Id.* at 903 n.1. The Supreme Court upheld the court's denial of the motion to suppress evidence obtained under the warrant.

[65] The Supreme Court explained the exclusionary rule in its *Leon* opinion as follows:

> The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." The wrong . . . is "fully accomplished" by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." The rule thus operates as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

Id. at 906 (citations omitted).

search warrant which is ultimately found to be unsupported by probable cause.[66] The Court in *Leon* looked at the competing goals of "deterring official misconduct and removing inducements to unreasonable invasions of privacy" and "establishing procedures under which defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth,'"[67] and stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.[68]

The dissent pointed out, however, that the fourth amendment's purpose is to define the conditions of a legal search and seizure so that private citizens will not have to depend on the discretion or restraint of government agents for protection of their right to privacy.[69] While the exclusion of evidence cannot act as a deterrent to unconstitutional searches and seizures when officers have no reason to know that their actions are unconstitutional,[70] care and self-restraint exhibited in good faith by officers alone "can never be a sufficient protection for constitutional liberties."[71]

IV. Analysis

A. The Pen Register

In deciding *State v. Rothman*, the Hawaii Supreme Court agreed in part with the holding in *United States v. New York Telephone*[72], but rejected the United States Supreme Court decision in *Smith v. Maryland*[73] which allowed the installation and use of pen registers without a

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[66] *Id.* at 913.

[67] *Id.* at 900-01 (quoting Alderman v. United States, 394 U.S. 165, 175 (1969)).

[68] *Id.* at 919 (quoting United States v. Peltier, 422 U.S. 531, 542 (1975).

[69] *Id.* at 948 (Brennan, J., dissenting).

[70] *Id.* at 975 (Stevens, J., concurring).

[71] *Id.* at 948.

[72] 434 U.S. 159 (1977). For a brief description of *New York Telephone*, *see supra* note 18 and accompanying text.

[73] 442 U.S. 735 (1979). For a brief description of *Smith*, *see supra* note 28 and accompanying text.

warrant. The Hawaii Supreme Court looked at the Hawaii statutes on wire and oral communications[74] and noted in *Rothman* that "[t]he parallel provision in the federal wiretap law, 18 U.S.C.S. § 2510(1), was construed [by the United States Supreme Court] not to include the telephone number information"[75] seized by the usage of a pen register in *New York Telephone*. The Hawaii Supreme Court agreed with the United States Supreme Court that the definitions of "oral communication" and "wire communication" in Hawaii Revised Statutes chapter 803 are not broad enough to address mere telephone number information, as pen registers do not record the contents of wire or oral communications.[76]

The court, however, rejected the United States Supreme Court's view in *New York Telephone* that the Federal Rule of Criminal Procedure 41(b) authorizes the issuance of a warrant for the use of a pen register.[77] The equivalent provision in Hawaii is the Hawaii Rule of Penal Procedure 41(b), which permits the issuance of a warrant to "search for and seize any [property]. . . . The term 'property' includes documents, books, papers and any other tangible objects."[78] The court used a literal reading of the statutes on wire and oral communications and the rule on search and seizure in holding that the telephone number

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[74] HAW. REV. STAT. § 803-41 (1985) defines "wire communication" as follows:

> "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception. . . .

The same statute defines "oral communication" as any "oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception. . . ." The statute also defines "contents" to mean the following:

> "Contents" when used with respect to any wire or wireless communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

The interception of such wire or oral communication is governed by HAW. REV. STAT. § 803-42(b)(4)(1985):

> It shall not be unlawful under this part for any person to intercept a wire, wireless, or oral communication or to disclose or use the contents of an intercepted communication, when such interception is pursuant to a valid court order under this chapter or as otherwise authorized by law. . . .

[75] 70 Haw. at 555, 779 P.2d at 7.

[76] *Id. See also* HAW. REV. STAT. § 803-41, defining "contents," *see supra* note 74 for the text of the statute.

[77] 70 Haw. at 555, 779 P.2d at 7.

[78] *Id.* at 554, 779 P.2d at 6.

information seized under a pen register does not fall under the scope of Hawaii Revised Statutes chapter 803, relating to electronic eavesdropping.[79] However, the Hawaii Supreme Court was still left with the question of the scope of individual privacy protections in the installation of pen registers.

Although the Hawaii Supreme Court denied authorization for the issuance of a warrant for the installation of a pen register under the wire communication statutes,[80] it disagreed with the United States Supreme Court's decision in *Smith v. Maryland* that the installation of pen registers does not require a warrant at all. The court relied on the privacy provisions found in article I, sections 6 and 7 of the Hawaii Constitution[81] and noted that while article I, section 7 of the constitution parallels the fourth amendment to the United States Constitution, the Hawaii Constitution is more protective because it has an added provision for an express right of privacy in section 6. The court failed to mention, however, that the Hawaii Constitution's article I, section 7, which parallels the federal fourth amendment protections, also has an express right to privacy that is missing in its federal counterpart.[82]

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[79] *Id.* Hawaii Revised Statutes § 803-42 was amended in 1989 to require a warrant prior to the installation of a pen register. The committee report for the 1989 amendment read in part:

> Use of [pen registers and trap and trace devices] require prior court approval . . . . [Y]our Committee finds that the measure is appropriate in order for Hawaii to keep abreast of the rapidly developing technology in communications. However, the privacy right of our people must be preserved and a balance struck between that precious right and legitimate law enforcement investigation. Accordingly, your Committee has amended this measure to substitute a probable cause standard in place of a "reason to believe," before electronic data stored by providers of electronic communications may be disclosed.

FIFTEENTH LEGISLATURE OF THE STATE OF HAWAII, STAND. COMM. REP. No. 721, at 1093 (1989).

[80] 70 Haw. at 554, 779 P.2d at 6.

[81] *Id.* at 551-52, 779 P.2d at 5. HAW. CONST. art. I, §§ 6, 7; *see supra* note 3 for the text of these sections.

[82] While the fourth amendment protects against "unreasonable searches and seizures", the Hawaii Constitution protects against "unreasonable searches, seizures and invasions of privacy. . . ." *See* Note, *State v. Kam: The Constitutional Status of Obscenity in Hawaii*, 11 U. HAW. L. REV. 253, 264 (1989). The purpose of the added privacy provision in the Hawaii Constitution was to "protect the individual's wishes for privacy as a legitimate social interest" and was "intended to include . . . undue government inquiry into and regulation of those areas of a person's life which is defined as

Using the express privacy provision found in section 6 of the Hawaii Constitution, the court analyzed the expectation of privacy under the two-pronged test set forth in *Katz v. United States*,[83] and held that people have a reasonable expectation of privacy with respect to the telephone numbers they call and the telephone numbers of incoming calls on their private lines, so that seizure of those numbers by the government without a warrant would violate the right of privacy guaranteed by article II, section 6 of the Hawaii Constitution.[84]

Although the court decided that individuals have a right to expect that the phone company will not reveal telephone number information to governmental authorities,[85] the court disagreed with Rothman's argument that the information is not obtainable by warrant or otherwise. The court stated:

> Since the legislature has authorized the electronic interception of telephone conversations by statute, it would be anomalous to hold that, because the lesser privacy invasion of intercepting telephone numbers was not within the literal definition of a 'wire communication', no warrant at all could issue authorizing the installation of a pen register, upon a showing of sufficient probable cause.[86]

The court held that the circuit court has power to authorize the installation of pen registers under the broad provisions of Hawaii Revised Statutes Section 603-21.5 and Section 603-21.9.[87] Since the

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necessary to insure man's individuality and human dignity." STAND. COMM. REP. No. 55, 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. of 1968, at 233-34 (1973). Although the court did not address this distinction, it gives added weight to the broadening of individual privacy protections under the Hawaii Constitution.

[83] The Hawaii Supreme Court has adopted the *Katz* test in several similar Hawaii cases. *See, e.g.*, State v. Lester, 64 Haw. 659, 667, 649 P.2d 346, 353 (1982) (no reasonable expectation of privacy when one party to a conversation consents to having communication recorded); State v. Okubo, 3 Haw. App. 396, 403, 651 P.2d 494, 500 (1982) (recording of conversation by police officer without other party's consent does not violate article I, sections 6 and 7 of the Hawaii Constitution). A discussion of the adoption of the *Katz* test is beyond the scope of this casenote.

[84] *Rothman*, 70 Haw. 546, 779 P.2d 1 (1989).

[85] *Id.* at 556, 779 P.2d at 7-8.

[86] *Id.* at 556-77, 779 P.2d at 8.

[87] *Id.* at 557, 779 P.2d at 8. HAW. REV. STAT. § 603-21.5 (1985) provides the circuit courts with jurisdiction over criminal offenses under the laws of the State. HAW. REV. STAT. § 603-21.9 (1985) states in part:

> The several circuit courts shall have power: [6] To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them.

pen register warrant in this case was signed by a district court judge, it was held to be invalid.[88]

In refusing to follow *Smith v. Maryland* and holding that the installation of a pen register requires a warrant, the Hawaii Supreme Court upheld the legislators' intent to protect individual privacy rights in light of increasing communications technology.[89] While a pen register only records the numbers of incoming or outgoing telephone calls, and not the actual contents of telephone communication, a list of numbers called by an individual "could reveal the identities of the persons and places called, and thus reveal the most intimate details of a person's life."[90] The disclosure of those details is a threat to "man's individuality and human dignity"[91] and is thus protected under the Hawaii State Constitution.[92]

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[88] *Id.* at 557, 779 P.2d at 8. The court pointed out that only circuit court judges were authorized to issue warrants for the installation of pen registers. The opinion stated:

> Language similar to HRS § 603-21.9(6) appears in the chapter on district courts at HRS § 604-7(e). However, the powers of the district judges are to be exercised to carry into effect their powers given by law, and their jurisdiction on criminal cases is severely limited by HRS § 604-8 and § 604-9. The pen register warrant here was issued in an alleged felony case, and consequently could be issued only by a circuit judge.

Id.

[89] The committee report for the 1968 amendment to article I, section 7, reads in part:

> Several proposals sought to secure all persons against unreasonable interceptions of their communications or other invasions of their privacy. Your Committee recognizes the need for certain protections of the individual's right to privacy in the context of today's society. The tremendous growth of the electronic communications technology along with a corresponding growth of electronic surveillance techniques make possible the ready encroachment upon a person's private conduct and communication. . . .
>
> Your Committee is of the opinion that inclusion of the term 'invasions of privacy' will effectively protect the individual's wishes for privacy as a legitimate social interest. The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of those areas of a person's life which are defined as necessary to insure 'man's individuality and human dignity.'"

I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1968, at 233-34. *See also* State v. Lester, 64 Haw. 659, 649 P.2d 346 (1982) and State v. Okubo, 3 Haw. App. 396, 651 P.2d 494 (1982).

[90] Smith v. Maryland, 442 U.S. 735, 748 (Stewart, J., dissenting).

[91] I PROCEEDINGS OF THE CONST. CONVENTION OF HAW. 1968, at 234; State v. Lester, 64 Haw. at 684, 649 P.2d at 352.

[92] State v. Lester, 64 Haw. at 684, 649 P.2d at 352 (Nakamura, J., dissenting).

Other Hawaii cases involving electronic surveillance have held that where one party consents to the eavesdropping, there is no violation of a right to privacy.[93] Likewise, in *Smith v. Maryland*, the United States Supreme Court majority held that there is implied consent to the use of telephone numbers dialed through an individual's disclosure of those numbers to the telephone company.[94] However, in a dissenting opinion, Justice Marshall stated:

> Implicit in the concept of assumption of risk is some notion of choice. . . . By contrast here, unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative.[95]

Thus, while an individual may have some choice in the persons he converses with, therefore assuming the risk that those persons will reveal the contents of his conversation, he *must* indirectly disclose the telephone numbers he dials to the telephone company if he wishes to communicate by phone. That requirement does not mean that the individual would voluntarily disclose the same information to the government.

A literal reading of chapter 803 of the Hawaii Revised Statutes regarding electronic eavesdropping forced the Hawaii Supreme Court to follow *New York Telephone*[96] and reject the inclusion of pen register information in the definition of "contents of wire communication", as the statutes on electronic eavesdropping were not broad enough to encompass such information. By rejecting the decision of the United States Supreme Court in *Smith v. Maryland*,[97] however, the Hawaii Supreme Court retained an individual's right to privacy found in article I, sections 6 and 7, of the Hawaii Constitution. By requiring the issuance of a warrant before the installation of a pen register, the court protected individual rights to privacy while allowing law enforcement personnel to retain a constitutional method of obtaining evidence.

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[93] *See, e.g.*, State v. Lester, 64 Haw. 659, 649 P.2d 346 (1982); State v. Okubo, 3 Haw. App. 396, 651 P.2d 494 (1982).

[94] 442 U.S. at 742-43.

[95] *Id.* at 749-50 (Marshall, J. dissenting) (citation omitted).

[96] 434 U.S. 159; *see supra* note 18 and accompanying text.

[97] 442 U.S. 735; *see supra* note 28 and accompanying text.

B. The Good Faith Doctrine

The Hawaii Supreme Court also rejected the prosecution's argument that the court should follow the good faith doctrine of *United States v. Leon*[98], and pointed out that under Hawaii constitutional law, the good faith test has not yet been adopted.[99] However, because the court did not address its reasons for refusing to adopt the doctrine, whether the court would adopt it in another case is difficult to ascertain from the decision in *Rothman*.[100]

Because the good faith doctrine allows the admission of evidence seized under a constitutionally invalid warrant if the officer seized the evidence in a good faith reliance upon the warrant, adoption of the doctrine may substantially change the right to privacy found in the Hawaii Constitution. The court was freed from having to address the issue in this case, however, as the district court judge found the officer had not acted in good faith. Without an analysis of the doctrine by the Hawaii Supreme Court, the question whether Hawaii citizens will continue to enjoy greater privacy protections under the Hawaii Constitution than those granted under the fourth amendment of the United States Constitution remains unclear.

V. Impact

The decision of the Hawaii Supreme Court in *Rothman* is important for the protection of individual privacy interests from unreasonable government intrusion. While the ability of law enforcement to control crime effectively must always be considered, an individual's right to privacy is threatened by the United States Supreme Court's holding in *Smith v. Maryland*.[101] Unrestrained seizure of telephone numbers called and the originating numbers of incoming calls threatens the privacy interests of individuals whose telephone lines are monitored by

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[98] 468 U.S. 897; *see supra* note 64 and accompanying text.

[99] 70 Haw. at 557, 779 P.2d at 8.

[100] The court in *Rothman* did state, however, that even if the good faith doctrine were to be adopted in this case, it would not change the result as the trial judge had rejected the claim that the officer took the warrant to a district court judge instead of a circuit court judge in good faith. 70 Haw. at 557, 779 P.2d at 8. The court cited as its reasons the officer's eleven years of experience in the narcotics field and the title on the warrants reading "In the Circuit Court of the First Circuit." *Id.* at 558.

[101] 442 U.S. 735; *supra* note 28 and accompanying text.

pen registers as well as the privacy interests of any citizen who communicates with them.

The erosion of an individual's fourth amendment right may lead to a denial of other fundamental rights, such as those guaranteed under the first amendment.[102] In his dissenting opinion in *Smith v. Maryland*, Justice Marshall suggested that law enforcement officials be required to obtain a search warrant before installing pen registers in order to protect those first amendment rights:

> Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity, I am unwilling to insulate use of pen registers from independent judicial review.[103]

Without such judicial review, individuals will be at the mercy of the discretion of law enforcement officials.

In addition, the use of a pen register and the information it compiles may be considered a "general" search, which is prohibited with or without a warrant.[104] A pen register picks up all numbers dialed to or from a telephone line, without differentiating between suspects and innocent citizens. It provides information about all persons who have contact, both criminal as well as innocent, with the suspect, rather than being limited to information about the suspect himself. While such information is disclosed in computerized bits and pieces to the telephone company, the pen register provides a comprehensive picture of an individual's life and associations.[105]

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[102] The first amendment of the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend I.

[103] 442 U.S. at 751 (Marshall, J., joined by Brennan, J., dissenting) (footnote omitted).

[104] HAW. CONST. art. I, § 7; *State v. Rothman*, 70 Haw. at 559, 779 P.2d at 9; Note, *Pen Registers After Smith v. Maryland*, 15 HARV. C.R.-C.L. L. REV. 753, 760 (1980) ("*every* search must be for particular things in particular places").

[105] Note, *Pen Registers After Smith v. Maryland*, 15 HARV. C.R.-C.L. L. REV. 753, 758-59 (1980).

Fortunately, states have the option to treat the United States Constitution as a minimum requirement for protection of individual rights and may impose more stringent protections under their state constitutions. As Justice Brennan noted, "[S]tate courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased."[106]

Hawaii has broadened the scope of individual protections by looking to the privacy rights addressed in the Hawaii State Constitution.[107] By requiring the issuance of a warrant upon showing of probable cause to authorize installation of a pen register, the Hawaii Supreme Court protects the necessary disclosure of information by an individual to the telephone company, a protection which is necessary for effective communication in today's society. "Individuals possess the expectancy that those actions which are indispensable to maintaining a normal existence will be protected. . . . No assumption of risk theory should be implied where little or no choice of action is available."[108]

The question remains whether the Hawaii Supreme Court will reject the good faith doctrine of *United States v. Leon*[109] when it is faced with a situation where it finds a showing of such "good faith." An adoption of that doctrine could lead to unbridled search and seizure in cases where a police officer could "reasonably" believe he held a sufficient warrant. To treat law enforcement efforts to punish the guilty as an important enough consideration to warrant sacrificing the fundamental principles of the law of this nation would abrogate the protections of an individual's fundamental fourth amendment right: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[110] In light of the Hawaii Supreme Court's protection of individual rights to privacy in *Rothman* and the specific privacy man-

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[106] Brennan, J., *supra* note 45, at 500 (citing State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974)).

[107] State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); *supra* note 58 and accompanying text.

[108] Note, *United States v. Knotts—"A Traveller's Advisory for 1984"*, 45 U. PITT. L. REV. 741, 755 (1984) (citing State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982)).

[109] 468 U.S. 897 (1984); *see supra* note 64 and accompanying text.

[110] *Id.* at 937 (Brennan, J., dissenting) (citation omitted).

dates of the Hawaii Constitution, it may be a valid assumption that the court will continue the trend of greater protection in Hawaii than is available under the United States Constitution and United States Supreme Court decisions should the issue of Hawaii's adoption of the good faith doctrine arise again.

VI. Conclusion

The decision of the Hawaii Supreme Court in *State v. Rothman* resolves the issue of the protections available in the installation of pen registers in Hawaii in favor of individual privacy rights. Using the test set forth in *Katz v. United States*,[111] the court found that an individual has a reasonable expectation of privacy in regard to the telephone numbers he calls and the numbers of the persons who call him. In doing so, the court placed a more restrictive requirement on law enforcement officers than the United States Supreme Court has done under the United States Constitution. As there is a trend in the recent decisions of the United States Supreme Court to narrow the protections accorded Americans by the Bill of Rights in general and the fourth amendment in particular,[112] states must place increasing reliance on their own state constitutions,[113] and the court's holding in *Rothman* does just that.

Although the court declined to adopt the good faith doctrine of *United States v. Leon*, it did not specifically reject the doctrine. In keeping with the privacy provisions found in article I, sections 6 and 7 of the Hawaii Constitution, the court may continue to provide the individual with strong protections from unconstitutional searches and seizures. Indeed, in the ongoing balancing test between individual rights and law enforcement, "[t]he judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected."[114] The admission of evidence obtained through an insufficient warrant by an exploration of the officer's good faith in hindsight will slowly erode the protections of the fourth amendment and individual right-to-privacy provisions, protections which are as fundamental as the Constitution this country is founded upon:

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[111] 389 U.S. 347 (1967); *see supra* note 31 and accompanying text.

[112] State v. Thompson, 113 Idaho 466, 473, 745 P.2d 1087, 1094 (1987); *see also* Brennan, J., *supra* note 45.

[113] Brennan, J., *supra* note 45.

[114] U.S. v. Leon, 468 U.S. 897, 932 (1984) (Brennan, J., dissenting).

> These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. . . . And one need only briefly to have dwelt and worked among a people . . . deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[115]

Karen L. Stanitz

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[115] *Id.* at 972-73 (Stevens, J., concurring in part and dissenting in part) (citing Justice Jackson's reference to his experience at Nuremberg (citation omitted)).

State v. Mata: Disqualification of a Trial Judge

I. Introduction

In *State v. Mata* and *State v. Ancheta*,[1] the Hawaii Supreme Court reversed convictions of driving under the influence of intoxicating liquor (DUI) and remanded the cases for retrial[2] on the grounds that the trial judge improperly gave detailed and erroneous instructions to the jury prior to commencement of the trial and at the close of the trial.[3] The court also addressed on appeal the trial judge's refusal to disqualify himself.

The defendants' appeal contended that circuit court Judge James H. Dannenberg was biased against the defendants and their attorneys, and that he violated their constitutional rights by implying that a request for a jury trial would be considered in determining sentencing if the defendants were found guilty.[4] While the defendants' right to a trial presided over by a non-prejudicial judge is vital to the judicial system, a motion for judicial disqualification requires a multi-factored analysis by the judge. If trial judges freely disqualified themselves from cases in which motions for disqualification were made, the court system would be backlogged and damage to the whole system would result. Further damage would result if judges disqualified themselves to escape cases they simply wished to avoid. Thus, while trial judges should disqualify themselves freely from cases where personal bias or prejudice exist, the judges must balance the needs of the system and the interest of the individual parties. Judges should strive to prevent excessive use of

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[1] 71 Haw. 319, 789 P.2d 1122 (1990). These two cases were consolidated for appeal.

[2] *Id.* at 331. 789 P.2d at 1129.

[3] *Id.* The same instructions were given on both occasions.

[4] Both parties submitted affidavits stating these claims. These affidavits were filed with the motion to disqualify. *Id.* at 323, 789 P.2d at 1124-25.

motions for disqualification. Specifically, judicial disqualification should not be used to a party's advantage for judge shopping or for other tactical purposes. Neither should it be used to the judge's advantage to avoid unattractive cases.[5]

This note discusses the rationale and history of judicial disqualification due to personal bias or prejudice,[6] as well as its application in *Mata* and *Ancheta* and the impact of this doctrine in future Hawaii cases. The facts of the cases are presented in Section II. Section III outlines previous rulings and the development of judicial disqualification and the applicable statute. Section IV looks at the Hawaii Supreme Court's analysis of judicial disqualification in *Mata* and *Ancheta*. Finally, Section V discusses and considers the implication of this decision and presents an analysis of the future of motions for disqualification of trial judges in Hawaii.

II. Facts

Defendant-Appellant Ronald Mata (Mata) and Defendant-Appellant Santos Ancheta (Ancheta) were charged with driving under the influence of intoxicating liquor in violation of Hawaii Revised Statutes section 291-4(a).[7] The same law firm represented both parties and both trials were presided over by Judge Dannenberg.[8]

In a previous case, *State v. Hee*,[9] Judge Dannenberg made statements which could have been construed as implying that he might consider a

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[5] Alternative procedural suggestions include a process whereby a third party would rule on the motion to disqualify thus insuring impartiality; or a peremptory challenge system such that a party may demand a disqualification. Both are criticized for their need for extra judicial manpower and time. Note, *Judicial Disqualification - First Circuit Holds Judge's Bias Against Counsel Not Grounds for Disqualification Where No Prejudice Exists Against Party - In Re Cooper, 821 F.2d 833 (1st Cir. 1987)*, 22 Suffolk U.L. Rev. 243 (1988). *In re* Cooper held that the trial judge's statement against the parties and did not require the judge to recuse himself. 821 F.2d 833 (1st Cir. 1987).

[6] There are four basic categories for judicial disqualification: 1) personal knowledge; 2) prior relationship; 3) financial interest; and 4) personal bias or prejudice. Subheadings under personal bias or prejudice include biases with respect to a party, to a class of which the party is a member, to the attorney of a party, and to the subject matter. *See* Note, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 Calif. L. Rev., 1445, 1446-62 (1981).

[7] *Mata*, 71 Haw. at 322, 789 P.2d at 1124.

[8] *Id.* The trials were held on consecutive days.

[9] In State v. Hee, Judge Dannenberg presided over a DUI case similar to the cases against the two appellants. A similar motion for disqualification was filed and Judge Dannenberg made a lengthy response in denying the motion. In his response, the judge

defendant's demand for a jury trial as a factor in determining sentencing.[10] Judge Dannenberg's statement implied that a harsher penalty may be given if the defendant demanded a jury trial. During a pretrial conference for the *Mata* case, Judge Dannenberg apparently made another statement referring to sentencing and a demand for a jury trial.[11] Further, Judge Dannenberg allegedly stated, in the presence of Mata's attorney's secretary, that it would be the decision of the defense attorney as to whether or not the case went to a jury trial.[12] These statements, along with previous memoranda by Judge Dannenberg, caused the defense attorney to move for his disqualification.[13] The defendants claimed that Judge Dannenberg was personally biased against them, arguing that the various memoranda and utterances by Judge Dannenberg indicated that he would likely sentence the appellants more harshly if they demanded a jury trial and were found guilty.[14] The motion also alleged prejudice against Mata's attorney, Mr. Cunney, by referring to complaints by Judge Dannenberg to the Office of Disciplinary Counsel with respect to the conduct of Cunney.[15]

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made statements which left the implication that it was possible that he would sentence the party more severely because the party had demanded a jury trial. The *Hee* case was not appealed. In *Mata*, the Hawaii Supreme Court noted that Judge Dannenberg never explicitly stated that a demand for a jury trial would be considered in sentencing, but also that there were no words that clearly stated this consideration would not effect the sentence if the party was found guilty. *Id.* at 327, 789 P.2d at 1127.

[10] *Id.* at 323, 789 P.2d at 1125.

[11] *Id.* at 326, 789 P.2d at 1126. The affidavits of Mata and Ancheta stated in part:

> 7. On information, Affiant believes that at a pre-trial conference . . . Judge Dannenberg couched the aforementioned remarks, paraphrased as follows: [If a judge should show consideration for a person who enters a change of plea of guilty by leniency, shouldn't there be a standard of punishment that is not as lenient for those who do not change their plea to guilty (persons who exercise their right to jury trial). I am rethinking my position on sentencing first-time offenders.]

Id. The court noted that the brackets and parentheses indicated that the statements were "equivocal at best, and in 1989 were stale." *Id.*

[12] *Id.* at 326, 789 P.2d at 1125. The affidavits of Mata and Ancheta stated in part:

> 6. On information, Affiant states that on said date and time, in the presence of Michele Beavers, secretary to attorney Paul Cunney, counsel for Affiant, and Amy Kato, clerk assigned to courtroom 5c, and Deputy Prosecuting attorney Franklin Pacarro, Judge Dannenberg put a smirk across his face and stated that it would be up to the defense attorneys whether they go to jury trial or not.

Id. at 326, 789 P.2d at 1126.

[13] *Id.* at 326, 789 P.2d at 1125.

[14] *Id.*

[15] *Id.*

Ancheta made a similar motion to disqualify the judge on the grounds of personal bias, as shown by his statements regarding sentencing and his consideration of a demand for jury trial.[16] Furthermore, Ancheta appealed the trial judge's reading of elaborate and detailed instructions of the law to the jury.[17] The same instructions were given prior to the commencement of trial and at the close of trial.[18] Ancheta contended that the instructions at the beginning of the trial were improper and that the instructions, in general, were erroneous.[19]

Since similar motions, instructions, and appeals existed for both cases, the two appeals were consolidated. The Hawaii Supreme Court held that the instructions at the commencement of the trials were improper, violated Hawaii Rules of Penal Procedure 30(b), and went far beyond the mandates of the statutes.[20] Further, while the appeal on the denial of the motions to disqualify Judge Dannenberg did not appear to have a great impact on the reversal of the convictions, the court considered the appeals on this point to be an important part of the opinion.[21]

III. History

A. Right To an Impartial Judge

The issue of judicial impartiality is not new in Hawaii. For example, in *Peters v. Jamieson*[22], the Hawaii Supreme Court stated that in every

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[16] *Id.* at 322, 789 P.2d at 1124.

[17] *Id.*

[18] Similar instructions were given at the commencement and closing of the *Mata* trial. *Id.*

[19] *Mata*, 71 Haw. at 328, 789 P.2d at 1127.

[20] *Id.* at 330, 789 P.2d at 1128. The court stated that the procedure for settlement of instructions for criminal cases are set forth in Haw. R. Penal P. 30(b) and were developed through many years of experience. The procedure allows appellate courts to understand the position of the parties regarding the instructions. In both *Mata* and *Ancheta*, the lack of opportunity to request or reject instructions violated Haw. R. Penal P. 30(b). The court noted that, in order to assist the jurors in understanding the case, a court may make an "appropriate and accurate general statement" prior to the commencement of the case, however, the instructions given in *Mata* and *Ancheta* went beyond what was allowable. Furthermore, the court held that Judge Dannenberg misinterpreted the statutory term "under the influence of intoxicating liquor" allowing the mere perception of impairment to be sufficient for a conviction for driving under the influence.

[21] While the court considered both the instruction errors and the disqualification, this casenote will only discuss the judicial disqualification issue.

[22] 48 Haw. 247, 397 P.2d 575 (1964).

case, parties are entitled to the neutrality of an impartial judge. Hawaii Revised Statute section 601-7 provides a means to achieve that goal.[23] Sub-section (a) of section 601-7 discusses the situations in which a judge shall not preside over a case,[24] while sub-section (b) of section 601-7 addresses situations in which a judge should be disqualified due to personal bias or prejudice.[25] This statute follows the federal disqualification statute.[26]

Judicial interpretation of section 601-7 is marked by a series of holdings which set out the factors to be applied to determine the appropriateness of the disqualification of a trial judge. Many cases have set guidelines for the affidavit requirements for the motion to disqualify, and for the reading and interpretation of the facts and conclusions drawn from the affidavit. Generally, the statute has been considered remedial in nature, but requiring strict application in order to prevent abuse.[27]

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[23] HAW. REV. STAT. § 601-7 (1984) is entitled, "Disqualification of judge; relationship, pecuniary interest, previous judgment, bias or prejudice," and sets out the parameters of actual and potential bias and enumerates the situations in which a judge must be disqualified. *See infra* notes 24-25 for the text of subsections (a) and (b), respectively.

[24] This section was derived from section 84 of the Hawaiian Organic Act. HAW. REV. STAT. § 601-7(a) (1984), in full, states:

> No person shall sit as a judge in any case in which the judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which the judge has been counsel or on an appeal from any decision or judgment rendered by the judge.

[25] HAW. REV. STAT. § 601-7(b) (1984), in full, reads:

> Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge of certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action.

[26] *See* 28 U.S.C. § 144 (1948).

[27] State v. Iaea, State v. Luna, State v. Kam, 55 Haw. 80, 84, 515 P.2d 1250, 1253 (1973); Whittemore v. Farrington, 41 Haw. 52 (1955). United States v. Fujimoto, 101 F. Supp. 293, 295 (1952) states a similar interpretation of 28 U.S.C. § 144 (1948).

Judicial disqualification is not a recent occurrence in Hawaii. Two cases in 1906, *ex parte Higashi* and *Notley v. Brown*, held that a biased judge may not be disqualified unless a statutory provision to the contrary exists.[28] In 1931, in *Territory v. Fritz Eckart*,[29] the Hawaii Supreme Court held that a party's affidavit was insufficient to disqualify the judge because the judge did not have "personal actual enmity or hostility toward the defendant in these cases."[30] These cases severely limited the possibility of a judge recusing himself and left the parties with having to face the danger of having a biased judge. With the need for greater balancing between a party's interest in a fair trial and the abuse of the disqualification motion, the present statutes and rules developed. Today, a combination of Hawaii Revised Statutes section 601-7, case rulings, and Canon 3 of the Judicial Code of Conduct[31] provide ample vehicles for disqualification while preventing abusive use of the doctrine.

One of the most important cases dealing with judicial disqualification in Hawaii is *Whittemore v. Farrington*.[32] This case set forth the rules governing the required affidavit for a motion for disqualification of the trial judge.[33] In *Whittemore*, the Hawaii Supreme Court concluded that the disqualification statute section 9573,[34] must be construed strictly, and that because of the statute's similarity to the federal statute, Hawaii should follow the federal standard set forth in *Berger v. United States*.[35] The *Berger* court held that the affidavit must 1) state the reasons and facts for the belief that the judge should be disqualified due to bias, and 2) give support to the charge of bias which would impede the impartiality of the judge.[36] While the judge must accept the factual allegation of the

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[28] *See ex parte* Higashi, 17 Haw. 428 (1906); Notley v. Brown, 17 Haw. 393 (1906).

[29] 31 Haw. 920 (1931). In this case, the judge, prior to the trial, had independently investigated the illegal sale of liquor by the defendant.

[30] *Id.* at 929.

[31] Canon 3 deals with the situations in which a judge should disqualify himself. *See infra*, note 46 for relevant sections of Canon 3.

[32] 41 Haw. 52 (1955).

[33] Since the Hawaii statute closely followed its federal counterpart, the *Whittemore* case cited many of the key federal court cases regarding judicial disqualification.

[34] This section later became HAW. REV. STAT. § 601-7 (1984).

[35] 255 U.S. 22 (1921). In this case, two defendants were indicted for espionage. The appellate court remanded the case, and upon returning to the district court, the defendants moved for the disqualification of the trial judge due to racial biases. The defendants were German-Americans who claimed through affidavits that the judge made racial remarks in open court. The United States Supreme Court held that the affidavits were sufficient to require the disqualification of the judge and reversed the conviction.

[36] *Whittemore*, 41 Haw. at 59.

affidavit as true, it is his duty to determine if those facts are sufficient to force his disqualification.[37]

The disqualification statute may be remedial, but the opportunity and potential for abuse require a strict compliance with its provisions.[38] Citing *Inland Freight Lines v. United States*,[39] the *Whittemore* court held that the affidavit must "show that there exists a personal bias and prejudice on the part of the trial judge."[40] In justifying the need for strict adherence, the Hawaii Supreme Court also cited *Sanders v. Allen*,[41] stating that if the affidavit is not legally sufficient, the judge should not disqualify himself.[42] Neither should the judge disqualify himself merely because the party prefers another judge, and he should not abandon his position as judge "unless required to do so by the law."[43] Finally, the judge should not allow a party to use such a motion to delay or impede the administration of justice.[44]

While the *Whittemore* analysis dealt sufficiently with avoiding abuse, the requirement for strict compliance with the disqualification section[45] may have been overly narrow, preventing additional factors from being considered regarding the fairness to the parties.[46] The dissent in *Whitte-*

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[37] *Id.*

[38] *Id.* at 60.

[39] 202 F.2d 169 (10th Cir. 1953).

[40] *Whittemore*, 41 Haw. at 60.

[41] 58 F. Supp. 417 (S.D.Cal. 1944).

[42] *Whittemore*, 41 Haw. at 62.

[43] *Id.*

[44] *Id.*

[45] Revised Laws of Hawaii § 9673 (1945). This section is substantially the same as the Federal Judicial Code, Section 21, Act March 3, 1911, ch. 231, 36 Stat. 1090 (28 U.S.C.A. § 144 (1948)). This similarity caused the court to consider cases which applied the federal statute.

[46] Considerations such as those enumerated in Canon 3 of the Judicial Code of Conduct may not be accounted for when one strictly complies with Hawaii's statute. The Code of Judicial Conduct, Canon 3C(1) lists five situations in which a judge should disqualify himself. The Canon states:

> (1) A judge should disqualify himself in proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he has served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness

more pointed out that the statute itself contains safeguards to prevent abuse.[47] For example, the reasons and facts for disqualification must be put in writing. In addition, the affiant is subject to perjury, the affidavit must be accompanied by certificate of good faith on the part of the attorney of record, and the party may only file one affidavit.[48] The dissent further argued that these requirements provided sufficient safeguards against abuse, and thus reasoned that greater flexibility and ability to disqualify judges should be allowed:

> I should like to point out, however, that in a choice between two evils, it would appear to be far worse to force a litigant into trial before a judge whom he believes to be personally biased or prejudiced than it would be to disqualify a trial judge for reasons and facts that give fair support to the belief [that he is biased].[49]

In re Sawyer[50] set out further guidelines for judicial disqualification. The Hawaii Supreme Court held that bias and prejudice must be "personal," meaning that it must be antagonistic to the party or show favoritism to his opponent.[51] The court held that it was insufficient to claim impersonal prejudice stemming from the judge's background, association, or experience.[52] The judge must have personal enmity toward the party or in favor of the adverse party.[53] *In re Sawyer* thus further

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concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Code of Judicial Conduct Canon 3 (1984).

[47] *Whittemore*, 41 Haw. at 67. (McKinley, J., dissenting).

[48] *Id.*

[49] *Id.* at 68.

[50] 41 Haw. 270 (1956).

[51] *Id.* at 276, 279.

[52] *Id.* at 276 (citing Eisler v. United States, 170 F.2d 273, 278 (D.C. Cir. 1948); Price v. Johnson, 125 F.2d 806 (9th Cir. 1942)).

[53] *Id.* at 277.

limited a party's ability to disqualify a judge by allowing for disqualification only in cases of clear personal bias or prejudice.

The Hawaii Supreme Court again addressed the issue of judicial bias in *Peters v. Jamieson*.[54] This case, however, appeared to represent a movement towards a more lenient test for disqualification. The court pointed out that every party is entitled to an impartial, neutral judge, but recognized the difficulty of showing actual and true bias or prejudice in every case.[55] The court held that various acts in combination, which alone would probably be insufficient to grant a motion to disqualify a judge, may be sufficient to prove bias against the party and allow for disqualification of the trial judge.[56] The court placed limitations on its holding, however, by stating that a judge's erroneous rulings, by themselves, were insufficient for disqualification.[57]

Not only must a judge disqualify himself where he has personal bias or prejudice, but he is also required not to disqualify himself where he has no such bias or prejudice. The Hawaii Supreme Court, in *Honolulu Roofing Co. v. Felix*,[58] stated that a judge has a duty not to withdraw from a case where he is not legally disqualified. Similarly, the *Sawyer* court held that:

> A judge owes a duty not to withdraw from a case—however much his personal feelings may incline him to do so—where he is not legally disqualified, yet there may be circumstances that cast suspicion on the fairness of the judge proceeding in the case so that it may be advisable for a judge not technically disqualified to withdraw sua sponte.[59]

In *Hawaii-Pacific Venture Capital Corp. v. Rothbard*,[60] the Unites States District Court for the District of Hawaii held that the test for disqualification should not be used by judges to avoid sitting on difficult or

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[54] 48 Haw. 247, 397 P.2d 575 (1964).

[55] *Id.* at 262, 397 P.2d at 585.

[56] *Id.* at 264, 397 P.2d at 586. The factors which existed in this case were the judge's rejection of prosecution's apparently reasonable request for continuance, handwritten memos from the judge to defense attorneys regarding joinder of the defendants, the judge's comments on the status of a defendant's statement in the presence of all defendants, and the judge's ordering of severance without motion or due hearing. *Id.*

[57] *Id.*

[58] 49 Haw. 578, 426 P.2d 298 (1967).

[59] *In re* Sawyer, 41 Haw. 270, 283 (1956).

[60] 437 F. Supp. 230 (D. Haw. 1977).

controversial cases. More recently, in *State v. Brown*,[61] the Hawaii Supreme Court held that a judge should disqualify himself where his impartiality may be reasonably questioned, but owes a duty not to disqualify himself if no such question would arise.[62]

The recent movement has clearly been towards a broader, more flexible determination of disqualification, although the requirements to show need for disqualification have not become easier. Having started with statements that prejudiced judges may remain on a case unless the statutes specifically prevent it, there was a movement toward stricter statutory interpretation, allowing for little discretion in deciding whether or not disqualification was mandated. Now, a judge apparently has the ability to disqualify himself if, as stated in Canon 3C, his impartiality might be reasonably questioned. The Hawaii Supreme Court, however, continues to protect the system from mass disqualification by the clear statement that a judge has a duty not to disqualify himself if there is no reasonable question of his impartiality.

IV. Analysis

The defendants' appeals in *Mata* and *Ancheta* contended that Judge Dannenberg was biased against them, that he violated their constitutional rights by implying that a request for a jury trial would be considered in determining sentencing if the defendants were found guilty, and that he was biased against Mata's attorney.[63]

A. Personal Bias Against the Defendants-Appellants

The affidavit required for a motion to disqualify is the first consideration which the trial judge must take into account. Hawaii Revised

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[61] 70 Haw. 459, 776 P.2d 1182 (1989). In this case, the defendant was charged with contempt for failing to appear before Judge Richard Lum. Criminal contempt proceedings began before Judge Marcia Waldorf. Judge Waldorf continued the case, at the request of the prosecutor, for trial before Judge Lum. Defendant moved for disqualification of Judge Lum, stating that he was biased and might be a witness in the case. The motion was denied. The Hawaii Supreme Court reversed the conviction, stating that a judge responsible for the contempt charge should not sit in judgement of the accused. *Id.* at 469, 776 P.2d at 1187.

[62] *Id.* at 470, 776 P.2d 1188. The court recognized the situations stated in the Code of Judicial Conduct, Canons 2 and 3, but noted that the judge owes a duty not to disqualify himself "where the circumstances do not *fairly* give rise to an appearance of impropriety and do not *reasonably* case suspicion of his impartiality." *Id.* n.3 (emphasis in original).

[63] *Mata*, 71 Haw. at 322-23, 789 P.2d at 1124-25.

Statutes section 601-7(b) requires that the affidavit state the facts and reasons for the belief that the trial judge is biased.[64] Further, only one affidavit may be filed, and it must be accompanied by a certificate of counsel of record that it is made in good faith.[65] The trial judge must take the facts alleged in the affidavit as true.[66] The judge, however, may use his discretion in determining whether the facts alleged are legally sufficient to require disqualification.[67]

The affidavits filed by Mata and Ancheta stated that Judge Dannenberg's previous statements regarding the demand for a jury trial and its effect on sentencing constituted a personal bias against the defendants.[68] Judge Dannenberg ruled and the Hawaii Supreme Court affirmed, that these alleged facts, taken as true, were insufficient to establish a "personal" bias towards either party.[69]

The Hawaii Supreme Court then turned its attention to the potential bias against the defendants as shown in the statements made by Judge Dannenberg in *State v. Hee* and the similar nature of the defendants' cases.[70] The court found that while the alleged facts did not constitute a personal bias or prejudice against the specific defendants, the implications suggested by the trial judge in a similar driving under the influence of intoxicating liquor case could potentially constitute a bias and prejudice in a general sense which would be sufficient to require the disqualification of the judge.[71] In the *Hee* case, Judge Dannenberg stated:

> I am not saying that I will automatically sentence people to stricter terms if they're convicted by going to trial, either jury or a bench trial. I am saying, and I think it's perfectly proper, that I do consider acknowledging what one has done, if that is appropriate under the circumstances, as an important factor in sentencing. I don't think there's any appellate court that has ever said to the contrary. However, I can only say that I will judge every case on its merits, I have made no judgment in this case, I

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[64] *See supra* note 25 for text of HAW. REV. STAT. § 601-7(b) (1984).

[65] HAW. REV. STAT. § 601-7(b) (1984).

[66] Peters v. Jamieson, 48 Haw. at 254, 397 P.2d at 581; Whittemore v. Farrington, 41 Haw. at 60.

[67] *Whittemore*, 41 Haw. at 60.

[68] *Mata*, 71 Haw. at 323-24, 789 P.2d at 1125. *See supra* notes 11-12 regarding the affidavits.

[69] Here, personal bias refers to a judge's bias towards that individual party, as opposed to any other person or general bias. *Id.*

[70] *Id.* at 326-27, 789 P.2d at 1126-27.

[71] *Id.* at 327, 789 P.2d at 1127.

> have suggested no sentence in this case, and your affidavit suggests nothing of the kind, and it would be absurd to think I had.[72]

Given these statements in a similar driving under the influence of intoxicating liquor case, the Hawaii Supreme Court reasoned that the defendants could possibly imply that a demand for a jury trial would be taken into consideration in sentencing if they were found guilty.[73] An implied or expressed threat that more severe sentencing would occur if there was a demand for a jury trial would be coercive and violate a defendant's constitutional rights.[74] The court stated that if this implication were in fact true, the judge would be considered biased and prejudiced and should be disqualified from the case.[75] Judge Dannenberg made an analogy to the guilty plea which, at the time of sentencing, may be taken into consideration and provide for leniency.[76] However, a judge may not induce a guilty plea by implying that such a plea may reduce one's sentence.[77] In the same sense, a judge may not imply that a demand for a jury trial may be considered in sentencing, resulting in a harsher sentence.[78]

The court continued, however, stating that it was doubtful that Judge Dannenberg intended such an implication, and that although he decided to include a lengthy explanation in the *Hee* case, there were several ways to avoid such problems.[79] The court suggested that explicitly stating that a demand for a jury trial would not be a sentencing consideration and that a stricter adherence to Canon 3A(6)[80] would have allowed the whole

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[72] *Id.* at 327, 789 P.2d at 1126-27.

[73] *Id.* at 327, 789 P.2d at 1127.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] The opinion does not make any reference to a distinction between a judge inducing a waiver of a jury trial and taking a demand for jury trial into consideration during sentencing. Unlike a guilty plea, a demand for a jury trial is a constitutional right which should not effect sentencing in any way. *Id.*

[79] *Mata*, 71 Haw. at 327-28, 789 P.2d at 1127.

[80] Canon 3A(6) of the Code of Judicial Conduct states:

> A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

CODE OF JUDICIAL CONDUCT Canon 3 (1984).

problem to be avoided.[81] In the absence of any action to alleviate the defendants' concern, the court found that the trial judge should probably have recused himself from the case.[82]

The bottom line of this opinion is that if the implications from Judge Dannenberg's statements were true, a personal bias and prejudice would have existed and Judge Dannenberg should have been disqualified.[83] In any case where such bias or prejudice exists, the trial judge should recuse himself. However, given the facts stated in the affidavits of the movants, the decision lies within the discretion of the trial judge. The Hawaii Supreme Court, on one hand, appeared to grant trial judges discretion to prevent widespread disqualification, while on the other hand, warned judges that they must adhere to the commands of the Code of Judicial Conduct and relevant statutes and act on motions for judicial disqualification appropriately.

B. Bias Against a Party's Attorney

A second contention made by Mata was that the judge was biased against his attorney.[84] Mata's affidavit alleged that Judge Dannenberg's referral of his attorney, Cunney, to the Disciplinary Counsel for alleged misconduct in violation of the Code of Professional Responsibility showed bias against Cunney.[85] The Hawaii Supreme Court held, however, that this fact, by itself, did not constitute bias towards the appellant or his attorney.[86]

Hawaii Revised Statutes section 601-7 does not mention bias towards a party's attorney. However, Canon 3C of the Code of Judicial Conduct states that a judge should disqualify himself in any proceeding where his impartiality may be questioned.[87] Thus, the court reasoned, if the trial judge has a personal bias or prejudice against a party's attorney, the judge should disqualify himself even though he is not specifically required to by statute.[88]

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[81] *Mata*, 71 Haw. 327-28, 789 P.2d at 1127.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 324, 789 P.2d at 1125.

[85] *Id.*

[86] *Id.* at 325, 789 P.2d at 1125-26. *See infra*, notes 91-95 and accompanying text.

[87] Canon 3C(1) lists specific instances where a judge should disqualify himself, but notes that the list is not complete. *See supra*, note 46.

[88] *Mata*, 71 Haw. at 324, 789 P.2d at 1125.

In determining whether the trial judge was actually biased against Mata's attorney, the court considered the fact, stated in Mata's affidavit, that Judge Dannenberg referred Cunney to the Disciplinary Counsel.[89] Canon 3B(3) of the Code of Judicial Conduct requires a judge to act against misconduct by an attorney or judge.[90] Therefore, the judge had a duty to refer Cunney to the Disciplinary Counsel for conduct which he perceived to violate the Code of Professional Responsibility and to further respond to inquires from the Counsel.[91] The Hawaii Supreme Court stated that such action did not constitute bias against the attorney.[92] The court continued by stating that conflicts between a judge and an attorney may be unavoidable, and that a judge may or may not be aware of an attorney's track record.[93] However, any conflict or knowledge of an attorney's past conduct should not affect the judge's ability to conduct a fair trial, and such a situation alone, is not grounds for disqualification.[94]

In sum, the Hawaii Supreme Court held that a judge's bias against a party's attorney is sufficient to disqualify the judge for personal bias, even though neither the Code of Judicial Conduct nor the Hawaii Revised Statutes requires such action. A judge's knowledge of an attorney's track record or referral of an attorney to the Disciplinary Counsel, however, are normal and proper situations, and are insufficient to require disqualification of the trial judge due to a claim of bias against an attorney.[95]

V. Impact

The impact of these two cases rests in the balance that must be struck in determining when a judge should or should not be disqualified from a case. In making such a determination, an effort should be made to avoid complicating and delaying the judicial process by disqualifying a judge and requiring reassignment. This would require a second judge

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[89] *Id.*

[90] Canon 3B(3) states: "A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

[91] *Mata*, 71 Haw. at 324, 789 P.2d at 1125.

[92] *Id.* at 325, 789 P.2d at 1125.

[93] *Id.* at 324, 789 P.2d at 1125.

[94] The court stated that whether Cunney's alleged conduct was unprofessional or not was irrelevant to the issue at hand. *Id.* at 325, 789 P.2d at 1125.

[95] *Id.*

to familiarize himself with the case and delay the adjudication of the matter. A competing interest is the parties' interests in obtaining a fair trial, presided over by an unbiased, non-prejudiced judge. These two general, but major factors must be considered when dealing with a disqualification motion.

The Hawaii Supreme Court, while not setting any strict, mechanical rules, laid down some specific guidelines which should be included in future disqualification decisions.[96] While motions for disqualification must be considered on a case-by-case basis, the court has narrowed the issues for similar cases.[97] The court held that strict statutory interpretation will not be the rule in Hawaii, and that many factors should be considered in ruling on a motion for disqualification. The court allowed the trial judge flexibility, and did not require disqualification for statements which possibly implied a showing of bias. At the same time, the court prevented judicial disqualification from becoming an impossibility and stated that the judge, in this case, probably should have disqualified himself or acted to eliminate the alleged prejudice. This statement should serve as a red flag to judges in similar situations in the future.

In considering the impact of this decision, it is important to note that the court stated that given the situation, Judge Dannenberg probably should have recused himself. The court did not impose a duty to disqualify himself, nor a duty to remain on the case. This is a recognition that judicial discretion does exist and situations may arise where the judge has the option of removing himself from the case or not. Thus, while various prior Hawaii cases contain language pertaining to both the duty to disqualify and the duty to remain on the case, this case recognizes the need for flexibility and discretion.

The court also provided guidelines for future cases involving a judge's alleged bias against a party's attorney. While disqualification is not required by statute or common law, the court stated that if a judge has a bias or prejudice against an attorney, he should disqualify himself to

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[96] While it is not ideal to lack specific guidelines, the federal statutes and interpretations do not appear to provide concrete rules. Instead, there is an "erect set of cloudy distinctions" that provide guidance. Further, the federal rules provide many apparent inconsistencies. *See* Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U.L. REV. 237, 238 (1987).

[97] Congress and federal courts have limited the discretion for disqualification of federal judges much like the Hawaii Supreme Court has in this opinion. However, gaps still exist which require judges to struggle with the issue of disqualification in many cases. *Id.* at 243-44.

insure a fair trial for the attorney's client.[98] Thus, when an actual, personal bias exists against an attorney instead of a party, the argument against disqualification on the basis that the bias is not against the party no longer exists.[99] Furthermore, the court prevented abuse of this holding and the resulting burden on the system caused by masses of disqualification motions on this ground by stating that a simple conflict between the attorney and judge or the fact that the judge had referred the attorney to the Disciplinary Board was insufficient to constitute bias or prejudice.[100]

The Hawaii Supreme Court appears to have taken an appropriate middle ground. It has allowed for clear situations of bias, stating that disqualification is proper for bias against either the party or attorney, thus addressing a party's interest in a fair trial. Yet, at the same time, the court set certain limits, stating that disqualification should not occur unless bias is clearly evident. Further, in cases such as *Mata* and *Ancheta*, the situation requires judicial discretion. This controlled holding allows for fair trials, while preventing the filing of frivolous motions for disqualification, thereby preventing the use of such motions to the detriment of the system as a whole.

One possible abuse of the motion to disqualify is judge shopping.[101] Rules and laws prevent forum shopping, and the structure of the judicial system prevents judge shopping from being a "sure thing." The shopping practice still exists, however, in deciding whether to bring suit in federal or state court, and in the timing of the filing of complaints and motions to at least have a better chance at getting assigned to a certain judge. The ability to obtain easy disqualifications of judges would further facilitate such judge shopping practices. Hawaii Revised Statutes section

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[98] *Mata*, 71 Haw. at 324, 789 P.2d at 1125.

[99] This is contradictory to other jurisdictions which hold that a bias against a party's attorney is insufficient to require disqualification. *See* Note, *Judicial Disqualification - First Circuit Holds Judge's Bias Against Counsel Not Grounds for Disqualification Where No Prejudice Exists Against Party - In Re Cooper, 821 F.2d 833 (1st Cir. 1987)*, 22 SUFFOLK U.L. REV. 243 (1988). *See supra* note 5.

[100] *Mata*, at 325, 789 P.2d at 1125.

[101] The negative aspects of judicial shopping and easy judicial disqualification include judicial waste (by requiring a new judge to become familiar with the case), abusive tactics (such as delay and pressure on opposing parties), and a harmful image of the judicial system (due to a appearance of biased, non-neutral judges). *See* Note, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1446-62 (1981). *See* Comment, *supra* note 6, at 1471-80.

601-7 could potentially become a tool for abuse instead of a vehicle for the furtherance of justice through a fair trial.

The Hawaii Supreme Court found that judicial disqualification may be necessary at times. Disqualification is a vital part of the judicial system. Abuse, however, is a potential problem. Although use of the disqualification motion will be allowed, it will be limited to cases in which actual bias exists. This mandate seeks to address disqualification motions' potential of becoming a tool for abuse, harassment, or delay. While *Mata* and *Ancheta* do not appear to have the potential to create a great change in the use of judicial disqualification in Hawaii, the decision strongly backs and concisely states the policies set forth for its use.

The present case has made the seeking of a judicial disqualification more difficult. Allowing for the trial judge's discretionary decision, the Hawaii Supreme Court has not set out any test or specific guidelines for determining whether or not disqualification is proper. Basically, a case-by-case analysis is all that is possible. The discretion of the judge, given the facts that a party may present in its affidavit, will determine the outcome of the motion. While past federal and Hawaii cases provide some guidelines and examples of what are and are not sufficient grounds for disqualification, this decision does not provide further concrete standards. A party's attorney is left with the burden of proving bias or prejudice without a clear indication as to what exactly is necessary to prove. Further, in attempting to show a judge's bias, a party must rely on the judge's acts and statements which, by themselves, are inefficient to show bias or prejudice since judges rarely make such controversial statements.[102]

VI. Conclusion

Mata and *Ancheta* are not landmark cases, but signal Hawaii's stand on judicial disqualification. They will not change the practice of law in Hawaii, nor cause a great disruption in any way. However, the opinion supports the continued proper use of judicial disqualification. Disqualification is proper where a judge is biased or prejudiced against a party's attorney or implies use of a procedure which would violate a party's rights. The bias, however, must be shown to be significant and beyond the normal activity of the judge. A balancing test occurs when a motion for disqualification is filed. The judge must weight the interests of the

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[102] Leubsdorf, *supra* note 96, at 241-43.

judicial system, the practical abilities and limitations on the judge himself, and the party's interest in a fair trial.[103] The ability of a party to have a judge recuse himself has not become easier, although this case adds to the list of Hawaii and federal cases which determine the scope of the disqualification issue. Together, these cases begin to create a "rule book" for judicial disqualification. In *Mata*, the Hawaii Supreme Court has struck a balance by allowing for the interests of parties to be considered while protecting parties and the system from abuse.

Todd K. Apo

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[103] *See* Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CALIF. L. REV. 1445, 1485 (1981).

Punitive Damages In Hawaii: Curbing Unwarranted Expansion

I. Introduction

A jury in a Hawaii state court recently awarded $11.25 million dollars in punitive damages in a products liability action involving an allegedly defective automobile.[1] Although the case was remanded for a new trial,[2] the sheer size of the punitive award has renewed interest in the issue of punitive damages.

The Hawaii Supreme Court defined punitive or exemplary damages as "those damages assessed in addition to compensatory damages for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future."[3] Punitive awards serve the salutary purpose of expressing society's disapproval of egregious conduct and deterring such conduct where no other remedy would suffice.[4]

While some commentators question the propriety of the doctrine,[5] the majority agree that punitive damages are a conceptually valid

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[1] Masaki v. General Motors Corp., 71 Haw. 1, 5, 780 P.2d 566, 569 (1989).

[2] The case was remanded because the Hawaii Supreme Court adopted a higher standard of proof for punitive damages liability. *Id.* at 16, 780 P.2d at 575.

[3] *Id.* at 6, 780 P.2d at 570 (citing D. Dobbs, Handbook on the Law of Remedies § 3.9, at 204 (1973); Restatement (Second) of Torts § 908 (1979)).

Several other justifications for punitive damages exist, although they are typically not as compelling. They include: (1) preserving the peace; (2) inducing private law enforcement; (3) compensating victims for otherwise uncompensable losses; and (4) paying the plaintiff's attorneys' fees. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 3 (1982).

[4] Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 641 (1980).

[5] Many commentators argue that punitive damages have no policy justification. *See, e.g.*, Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand.

means to effectuate the goals of punishment and deterrence.[6] However, there is growing nationwide concern that courts are awarding punitive damages in an expanding variety of cases, and in increasingly large sums. Some commentators predict such trends will cause severe adverse economic consequences.[7] Therefore, reforms may be needed[8] in the application of punitive damages—to control its encroachment into areas of law where punitive damages are inappropriate, and to control excessive awards.

Part II of this paper addresses general aspects of punitive damages in Hawaii. It first reviews Hawaii's standards for awarding punitive damages—including the conduct required, evidentiary burdens, and measure of awards. Second, constitutional challenges to the doctrine and vicarious punitive liability are discussed. Third, punitive damages are considered in the context of various substantive areas of law.

Part III analyzes various reforms of punitive damages in other jurisdictions, and discusses whether Hawaii should follow their lead.

L. REV. 1117 (1984). Critics argue that: (1) punitive damages constitute a windfall to the plaintiff, who deserves no more than compensatory damages; (2) because punitive damages are penal in nature, they do not belong in civil law; (3) the lack of standards to guide the jury results in irrational and excessive awards; (4) punitive damages have not been shown to actually deter misconduct; and (5) it is unfair to assess multiple punitive awards upon one defendant stemming from "mass disaster" litigation. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, 219-20 (1973). The mere threat of punitive damages may also skew the settlement value of a case and the scope of discovery. *See, e.g.*, Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Haw. 1975) (as long as the plaintiff's claim for punitive damages is not spurious, discovery of the defendant's wealth is permitted).

[6] For recent commentary on the philosophical foundations of punitive damages, *see* Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989); Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741 (1989); Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831 (1989); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

[7] For example, the Johns-Manville Corporation declared bankruptcy because of litigation expenses, compensatory awards and punitive damage awards related to asbestos cases. Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573 (1983). Professor Owen believes that large and frequent punitive awards may jeopardize the future stability of American industry. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1981). *See also* Ellis, *supra* note 3, at 33-63.

[8] While empirical data from other states is examined in this paper, no empirical studies of punitive awards in Hawaii exist. This paper generally assumes, for the sake of discussion, that there is a need for reform in the doctrine of punitive damages.

II. PUNITIVE DAMAGES IN HAWAII

A. Basic Standards for Awarding Punitive Damages

The Hawaii Supreme Court first defined the conduct necessary to impose punitive damages in *Bright v. Quinn*,[9] a negligence action involving a hit-and-run automobile collision. The court held that punitive damages

> may be awarded in cases where the defendant "has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"; or where there has been some "willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences." In such cases a reckless indifference to the rights of others is equivalent to an intentional violation of them.[10]

The decisions since *Bright* have reaffirmed this standard.[11] This standard can be interpreted to indicate two situations: where the defendant desires to cause the harm sustained by the plaintiff, or where the defendant knows, or had reason to know, that his conduct created an unreasonable risk of harm to the plaintiff. Thus, ordinary negligence is not enough.[12]

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[9] 20 Haw. 504 (1911).

[10] *Id.* at 512 (citations omitted) (quoting Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1892) and Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 495 (1875)).

[11] *See, e.g.*, Masaki v. General Motors Corp., 71 Haw. 1, 10-11, 780 P.2d 566, 572 (1989); Quedding v. Arisumi Bros., Inc., 66 Haw. 335, 340, 661 P.2d 706, 710 (1983); Goo v. Continental Casualty Co., 52 Haw. 235, 239, 473 P.2d 563, 566 (1970); Howell v. Associated Hotels, Ltd., 40 Haw. 492, 496 (1954); Chin Kee v. Kaeleku Sugar Co., 29 Haw. 524, 532 (1926).

[12] The *Bright* standard is generally in accord with W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2 at 9, 10 (5th ed. 1984):

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough . . .

Id. (footnotes omitted).

In determining punitive awards, the court focuses primarily on the defendant's mental state,[13] and to a lesser degree on the nature of one's conduct.[14] The *Bright* standard is employed in most actions where punitive awards are sought, although a variation of that standard is used for certain actions.[15]

In *Masaki v. General Motors Corp.*,[16] the Hawaii Supreme Court adopted the "clear and convincing" standard of proof[17] for the awarding of punitive damages. The "clear and convincing" standard is more exacting than the civil "preponderance of the evidence"[18] standard, but less stringent than the criminal standard of proof "beyond a reasonable doubt".[19] The clear and convincing standard is typically employed in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.[20] Punitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction.[21] Thus, the clear and convincing

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[13] The emphasis on intent is illustrated by the fact that many punitive awards are made in cases involving intentional torts. A 1987 empirical study by the RAND Corporation found that punitive damages were most frequent in intentional tort cases. The data covered all civil jury trials in Cook County, Illinois, and San Francisco County, California, from 1960 to 1984 and all civil jury trials throughout the State of California from 1980 to 1984. M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987).

[14] *Masaki*, 71 Haw. at 7, 780 P.2d at 570.

[15] For example, in libel suits, "actual malice," in the constitutional sense, must be proved in order to recover punitive damages. Baldwin v. Hilo Tribune-Herald Ltd., 32 Haw. 87, 107 (1931). *See also*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (actual malice defined as acting with knowledge that statement was false or with reckless disregard of whether or not it was false).

[16] 71 Haw. 1, 780 P.2d 566 (1989).

[17] The standard of proof instructs the factfinder as to the degree of confidence our society thinks he should have in the correctness of factual conclusions for a given type of adjudication. *Id.* at 13, 780 P.2d at 574 (citing In Re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

[18] In most civil actions, the "preponderance of the evidence" standard is employed, which means that both parties almost equally share the risk of an erroneous verdict. *Id.* at 14, 780 P.2d at 574.

[19] *Id.* In criminal proceedings, the government is required to prove its case "beyond a reasonable doubt," because society has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free. *Id.*

[20] *Id.* at 15, 780 P.2d at 575 (citing Addington v. Texas, 441 U.S. 418, 424 (1979)).

[21] *Id.* at 16, 780 P.2d at 575.

standard is appropriate for proving punitive damages.[22] Many jurisdictions have already adopted this standard.[23]

Whether there will be practical difficulties in applying this standard of proof has yet to be determined. For example, a juror in a typical tort case may have difficulty in applying two different standards in the same case: a preponderance of the evidence standard for the general tort liability, and a clear and convincing standard for the punitive damage liability.[24]

In Hawaii, no mathematical formula exists for computing the amount of punitive damages, but the Hawaii Supreme Court did hold that the proper measurement should be the "degree of malice, oppression, or gross negligence which forms the basis for the award and the amount of money required to punish the defendant, considering his financial condition."[25] Furthermore, recovering compensatory damages is not a prerequisite for collecting punitive awards.[26]

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[22] *Id.* (citing Orkin Exterminating Co. v. Traina, 486 N.E.2d 1019, 1022 (Ind. 1986)).

[23] At least 15 States—Alabama, Alaska, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Minnesota, Montana, Nevada, Ohio, Oregon, South Carolina, and Utah—have adopted statutes requiring the clear and convincing standard of proof for punitive damages. *See* GA. CODE ANN. § 51-12-5.1(b) (1989); IOWA CODE § 668A.1(1)(a) (1989); MINN. STAT. § 549.20(1) (1989); NEV. REV. STAT. ANN. § 42.005(1) (1989); OHIO REV. CODE ANN. § 2315.12(C)(3) (Baldwin 1990); UTAH CODE ANN. § 78-18-1(1)(a) (1990); J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW AND PRACTICE § 21.13 (1985); Annotation, *Standard of Proof as to Conduct Underlying Punitive Damage Awards—Modern Status*, 58 A.L.R. 4th 878 (1989).

Arizona, Maine, and Wisconsin have judicially adopted the clear and convincing standard. *See* Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986); Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W. 2d 437 (1980).

[24] Of course, if a judge believes the jury would be so confused by the different standards of proof as to create prejudice, he could order separate trials. HAW. R. CIV. P. 42(b). In deciding whether to separate the trial, judges will need to balance judicial economy against the risk of jury confusion.

[25] Howell v. Associated Hotels, Ltd., 40 Haw. 492, 501 (1954); Kang v. Harrington, 59 Haw. 652, 663, 587 P.2d 285, 293 (1978).

[26] *Howell*, 40 Haw. at 501. However, proving actual damages is required if it is an element of the particular cause of action. *Id.* at 498-99. In *Howell*, the Hawaii Supreme Court upheld a punitive award of $1,850 without any special damages. *Id.* at 496-500. Some jurisdictions require proof of actual damages before punitive damages may be awarded. *See* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 5.37 (1985) [hereinafter LAW AND PRACTICE].

The defendant's financial condition is considered in determining the punitive amount in order to financially punish the defendant.[27] A majority of states allow the defendant's wealth to be considered.[28]

The problem with this rule is that it is too vague. Requiring that the amount of punitive damages be determined by the "degree of malice" basically means that the punishment must fit the crime. With so little guidance, the jury is left with very wide discretion to determine the punitive amount.

B. The Constitutionality of Punitive Damages

Punitive damages have been generally upheld as constitutional. Unsuccessful challenges were made on the grounds of the Excessive Fines Clause of the eighth amendment,[29] and the Due Process and Equal Protection clauses of the fourteenth amendment.[30] The United States Supreme Court has consistently held that the United States Constitution presents no general bar to the assessment of punitive damages in civil cases.[31] The Court recently held in *Browning Ferris Industries, Inc. v.*

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[27] If the goal were only deterrence, the defendant's wealth would arguably be irrelevant. Deterrence alone can be achieved without knowledge of the defendant's wealth since increasing the cost of the conduct to take into account the harmful effects should be enough to deter conduct that is not cost effective. On the other hand, to punish the defendant, knowledge of the defendant's wealth is necessary in order to hurt the defendant financially.

[28] Thirty-eight states allow consideration of the defendant's financial status in fixing a punitive award, while only three states (Alabama, Kentucky, and Texas) disallow it. LAW AND PRACTICE, *supra* note 26, Ch. 5 (1985).

Hawaii is in accord with the RESTATEMENT (SECOND) OF TORTS § 908 (1979) (Trier of fact may consider defendant's wealth in assessing punitive awards). *See* Vollert v. Summa Corp., 389 F. Supp. 1348, 1351 (D. Haw. 1975) (as long as the plaintiff's claim for punitive damages is not spurious, discovery of the defendant's wealth is permitted).

[29] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. For the Hawaii counterpart, *see* HAW. CONST. art. I, § 12.

[30] "[N]or shall any State 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." U.S. CONST. amend. XIV, § 1. For the Hawaii counterpart, *see* HAW. CONST. art. I, § 5.

[31] Curtis Pub. Co. v. Butts, 388 U.S. 130, 159 (1967). *See also*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (the Court found no constitutional limit on the amount of punitive awards, upholding a $10 million punitive verdict).

Kelco Disposal Inc.,[32] that the Excessive Fines Clause did not apply to civil cases, and thus could not be used to invalidate punitive awards. In *Pacific Mutual Life Insurance Co. v. Haslip*,[33] the Court held that Alabama's method of awarding punitive damages neither violated substantive nor procedural due process.[34] The *Pacific Mutual* court found that the trial court's instructions placed reasonable restraints on the jury by: describing punitive damages' purposes of retribution and deterrence; requiring the jury to consider the character and degree of the wrong; and by explaining that punitive awards were not compulsory.[35] In addition, the Court found that Alabama's post-verdict hearings ensured that punitive awards would be reasonable.[36]

Hawaii federal court decisions have upheld the constitutionality of punitive damages under Hawaii's laws.[37] In *Man v. Raymark Industries*,[38] the defendants argued that due process was violated because juries were free to impose punitive damages without meaningful standards.[39] The *Man* court disagreed, finding that Hawaii had meaningful standards for imposing punitive damages,[40] and the ability of the court to examine awards made by the jury further insured constitutional due process.[41] Thus, under current common law, punitive damages have been consistently upheld as constitutional.

C. Vicarious Punitive Damage Liability

Under the doctrine of respondeat superior, a principal may be liable for compensatory damages due to the wrongful acts of his agent.

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[32] 492 U.S. 257 (1989).

[33] No. 89-1279 (U.S. 1991) (1991 U.S. LEXIS 1306) (plaintiff, who was left uninsured because agent of defendant insurance company embezzled plaintiff's premiums, recovered over one million dollars in compensatory and punitive damages from the insurance company).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *E.g.*, Vollert v. Summa Corp., 389 F. Supp. 1348 (D. Haw. 1975) (punitive damages against defendant corporation in a products liability action upheld; no due process nor equal protection violation because court can examine any punitive verdict made by the jury).

[38] 728 F. Supp. 1461 (D. Haw. 1989) (court also held that punitive damages were permissible in the mass tort context).

[39] *Id.* at 1463.

[40] *Id.* at 1464-65. *See supra* notes 9-23 and accompanying text for a discussion of these standards.

[41] *Id.* at 1465 (citing Vollert v. Summa Corp., 389 F. Supp. 1348, 1350 (D. Haw. 1975)).

However, Hawaii doesn't allow punitive damages under respondeat superior because the "deterrent or retributive effect of punitive damages must be placed squarely on the shoulders of the wrongdoer."[42]

In *Kealoha v. Halawa Plantation Ltd.*,[43] the Hawaii Supreme Court adopted the United States Supreme Court's ruling in *Lake Shore & Michigan Southern Railway Co. v. Prentice*,[44] that punitive damages are allowed against the principal only if he "participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it either before or after it was committed."[45] Subsequent decisions have followed *Kealoha*.[46]

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[42] Lauer v. YMCA of Honolulu, 57 Haw. 390, 402, 557 P.2d 1334, 1342 (1976) (defendant city not liable for punitive damages for acts of its police officer).

[43] 24 Haw. 579 (1918). The Hawaii Supreme Court overturned the trial court's award of punitive damages against the Halawa Plantation for damages caused by an employee who trespassed on the plaintiff's land and razed his home. The court held that there was no evidence that the corporation or any of its executives expressly or impliedly approved of the wrongful acts. *Id.* at 588-89.

[44] 147 U.S. 101 (1893).

[45] *Kealoha*, 24 Haw. at 589 (citing *Lake Shore*).

Hawaii law is in accord with subsection (a) of the Restatement (Second) of Torts § 909:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:
>
> (a) *the principal authorized the doing and the manner of the act*, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or;
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (1979) (emphasis added).

However, Hawaii law is not in accord with the other subsections. In particular, subsection (d), which includes the phrase "or a managerial agent," is not in accord with Hawaii law which requires that the authorization or ratification come from "officers or any other person actually wielding the executive power of the corporation." *Kealoha*, 24 Haw. at 588.

[46] *In re Bankruptcy* of WPMK Corp., 59 Bankr. 991 (D. Haw. 1986) (court will not impose punitive damages on the principal unless he authorizes or ratifies the act, or unless he accepts the benefits of the unauthorized acts with actual or constructive knowledge of all the material facts); Jenkins v. Whittaker Corp., 551 F. Supp. 110 (D. Haw. 1982) (manufacturer not liable in punitive damages for allegedly defective atomic simulator), *cert. denied*, 479 U.S. 918 (1986); Chin Kee v. Kaeleku Sugar Co., 29 Haw. 524 (1926) (defendant company not liable for punitive damages arising from its employees taking of sugar cane from plaintiff's fields); Kahanamoku v. Advertiser Publishing Co., 26 Haw. 500 (1922) (newspaper not liable in punitive damages for libelous article written by employee).

Although Hawaii doesn't allow vicarious punitive damages, many other jurisdictions have adopted a more liberal view, holding principals liable for punitive damages even when they do not authorize, approve, or ratify the wrongful act of the agent.[47] These jurisdictions are concerned primarily with deterrence, taking the position that punitive awards are warranted if they will encourage employers to exercise closer control over their agents to prevent outrageous torts.[48]

D. Punitive Damage Liability in Specific Types of Cases

Punitive damages cannot be awarded on an independent basis—outrageous conduct by itself will not warrant a judicial remedy unless there is also a violation of a cognizable legal right. Thus, although the rules of pleading have been relaxed over the years, courts still consider whether the underlying cause of action permits an award of punitive damages.[49] This section examines punitive awards in connection with intentional torts, negligence, strict liability, and contracts.

Punitive damages are recoverable in intentional tort cases when circumstances of aggravation exist.[50] They have been awarded for assault and battery,[51] false imprisonment,[52] fraud,[53] and wrongful de-

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[47] Twenty states have adopted this view. LAW AND PRACTICE, *supra* note 26, § 24.07.

[48] W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 13 (5th ed. 1984).

[49] For example, contract actions were historically deemed not to permit punitive damages. *See generally,* LAW AND PRACTICE, *supra* note 26, Ch. 5 (1985).

[50] The commission of an intentional tort does not by itself necessarily mean that punitive damages are certain to be awarded. Just because the conduct was intentional does not mean that the *Bright* standard has been met. There is a distinction between intent to contact and intent to harm.

[51] Jendrusch v. Abbott, 39 Haw. 506 (1952) (punitive damages awarded to a hotel security officer, who was viciously assaulted and beaten by intoxicated hotel guests).

[52] Jacobson v. Yoon, 41 Haw. 181 (1955) (plaintiff, a saleslady in the defendant's store, recovered punitive damages where the defendants detained the plaintiff in a stockroom for two hours while accusing her of stealing cash).

[53] Silva v. Bisbee, 2 Haw. App. 188, 628 P.2d 214 (1981) (plaintiff recovered punitive damages where defendant, a real estate broker, sold plaintiff's property to a joint venture in which defendant himself was a partner, without disclosing such fact to plaintiff);

Anderson v. Knox, 297 F.2d 702 (9th Cir. 1961) (plaintiff recovered punitive damages where the defendant, an insurance salesman, induced the plaintiff to purchase policies blatantly unsuitable to the plaintiff's financial condition), *cert. denied,* 370 U.S. 915 (1962).

tention.[54] Punitive damages may also be awarded for the torts of libel[55] and trespass,[56] but these actions have different standards for imposing punitive damages.[57]

Hawaii courts have long recognized that punitive damages are recoverable in negligence actions.[58] The Hawaii Supreme Court rejected the argument that punitive damages are incompatible with the underlying theory of negligence, holding that punitive damages do not depend on the underlying tort classification,[59] but rather on the nature of the wrongdoer's conduct.[60] So long as the plaintiff establishes the requisite egregious conduct, there is no reason to disallow an award of punitive damages in a negligence or strict liability action.[61] Thus, it appears that punitive damages may be recovered in any tort action[62] where the defendant's conduct was sufficiently outrageous.

The Hawaii Supreme Court recently held in *Masaki v. General Motors Corp.*[63] that punitive damages are allowed in products liability actions based on strict liability.[64] The *Masaki* court found no conceptual

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[54] Howell v. Associated Hotels, Ltd., 40 Haw. 492 (1954) (plaintiff, a professional photographer, recovered punitive damages where the defendant's manager wrongfully and oppressively detained ektachrome transparencies owned by the plaintiff).

[55] Baldwin v. Hilo Tribune-Herald Ltd., 32 Haw. 87, 107 (1931) (in libel actions, punitive damages are not recoverable unless there is evidence of actual malice; presumed legal malice is insufficient).

[56] Bernard v. Loo Ngawk, 6 Haw. 214 (1877) (in trespasses to property, punitive damages are allowed only if there is special misconduct or aggravation).

[57] *See supra* notes 55, 56.

[58] Masaki v. General Motors Corp., 71 Haw. 1, 10, 780 P.2d 566, 572 (1989); Bright v. Quinn, 20 Haw. 504 (1911) (negligence action involving a hit-and-run automobile collision).

[59] Thus, as far as torts are concerned, the underlying cause of action is not very important. However, the analysis becomes different when other non-tort actions are considered.

[60] *Masaki*, 71 Haw. at 10, 780 P.2d at 572 (citing Wangen v. Ford Motor Co., 97 Wis. 2d 260, 266-67, 294 N.W.2d 437, 442 (1980)).

[61] *Id.*

[62] There are exceptions, however. For example, punitive damages are not recoverable under Hawaii's Wrongful Death Act because this statutorily created right was deemed not to include the right to recover punitive damages. Greene v. Texeira, 54 Haw. 231, 505 P.2d 1169 (1973).

[63] 71 Haw. 1, 780 P.2d 566 (1989).

[64] *Id.* at 9-11, 780 P.2d at 571-73. *See also* Vollert v. Summa Corp., 389 F. Supp. 1348, 1350 (D. Haw. 1975) (manufacturer of a defective helicopter that crashed and injured plaintiff liable for punitive damages); Man v. Raymark Indus., 728 F. Supp. 1461 (D. Haw. 1989) (punitive damages permissible in the mass tort context).

difficulty[65] in allowing punitive damages when the plaintiff can show the necessary aggravated conduct.[66] In other words, a plaintiff may bring forth evidence sufficient to prove strict liability, and then provide evidence of aggravated conduct to warrant punitive damages. This is reasonable because the facts of a given case may admit of a variety of torts. For example, a plaintiff should not be precluded from seeking punitive damages merely because she opted to pursue an action under strict liability instead of negligence, which may be more difficult to prove.[67]

While punitive damages have traditionally been awarded only in tort actions,[68] a growing number of jurisdictions allow punitive awards in contract actions. In Hawaii, it appears that punitive damages may be recovered under certain factual circumstances.

In 1970, the Hawaii Supreme Court, in *Goo v. Continental Casualty Co.*,[69] first considered whether punitive awards were recoverable in contract actions. In *Goo*, the court acknowledged that a growing number of jurisdictions allow juries to award punitive damages in appropriate contract cases.[70] Some jurisdictions allow punitive damages only where the breach of contract is accompanied by an independent tort.[71] Other jurisdictions permit punitive damages if the breach is accompanied by a fraudulent act, wanton in character and maliciously intentional.[72]

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[65] Some commentators argue that punitive damages are incompatible with products liability actions based upon strict liability. *See* Comment, *The Imposition of Punitive Damages in Product Liability Actions in Pennsylvania*, 57 Temp. L.Q. 203, 205 (1984). However, a majority of courts that have addressed the issue have permitted punitive awards in product liability actions. *Id.* at 210; LAW AND PRACTICE, *supra* note 26, § 6.14.

[66] *Masaki*, 71 Haw. at 11, 780 P.2d at 572.

[67] It is true that if the plaintiff succeeds in recovering punitive damages in a strict liability action, that the underlying facts of the case probably would have supported an action in negligence. However, at the inception of the action, the plaintiff does not know whether she will succeed in recovering punitive damages, and thus should not be restricted in the type of damages she can recover merely because she opted for strict liability rather than negligence.

[68] The RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979), states that "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."

[69] 52 Haw. 235, 473 P.2d 563 (1970).

[70] *Id.* at 240, 473 P.2d at 566.

[71] *Id.*

[72] *Id.*

However, the *Goo* court declined to decide the issue because it had become moot.[73]

In 1972, the Hawaii Supreme Court revisited the issue in *Dold v. Outrigger Hotel*.[74] Unfortunately, the court's discussion is confusing because it intermixes two issues within one section of the opinion.[75] The *Dold* court discussed whether punitive damages and damages for emotional distress were allowed in a breach of a contract action.[76]

> We are of the opinion that the facts of this case do not warrant punitive damages. However, the plaintiffs are not limited to the narrow traditional contractual remedy of out-of-pocket losses alone. We have recognized the fact that certain situations are so disposed as to present a fusion of the doctrines of tort and contract. Though some courts have strained the traditional concept of compensatory damages in contract to include damages for emotional distress and disappointment, we are of the opinion that *where a contract is breached in a wanton or reckless manner as to result in a tortious injury, the aggrieved person is entitled to recover in tort*. Thus, in addition to damages for out-of-pocket losses, the jury was properly instructed on the issue of damages for emotional distress and disappointment.[77]

By allowing the instruction on the issue of damages for emotional distress and disappointment, the *Dold* court implies that a wanton or reckless breach of contract may have occurred. Thus, by denying punitive damages on the "facts of this case," the *Dold* court also implies that punitive damages are not recoverable for a wanton or reckless breach of contract.[78]

However, by focusing just on the underlined phrase,[79] one might infer that punitive damages are allowed for breach of contract actions. This follows because punitive damages are generally recoverable in tort actions. Thus, if a person is "entitled to recover in tort,"[80] he should

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[73] *Id.* at 241, 473 P.2d at 567.

[74] 54 Haw. 18, 501 P.2d 368 (1972) (defendant hotel refused to provide accommodations because no space was available).

[75] *Id.* at 21-23, 501 P.2d at 371-72.

[76] *Id.*

[77] *Id.* (citations omitted) (emphasis added).

[78] However, another reasonable interpretation of the *Dold* court's language is that the issue of punitive damages in contract actions was again not decided. Stating merely that "the facts of this case do not warrant punitive damages" implies that the issue is premature or moot, depending on how the court construes the facts of this case.

[79] *See* note 77 and accompanying text.

[80] *See* underlined text accompanying note 77.

be entitled to recover punitive damages. Consequently, the court's murky language allows one to argue either way.[81]

Regardless of the ambiguity of the language in *Dold*, subsequent decisions have assumed without discussion that punitive damages may be awarded in a contract action when the breach is wanton, oppressive, malicious, or reckless.[82] In *Quedding v. Arisumi Bros.*,[83] the Hawaii Supreme Court reversed the trial court's award of punitive damages in a case involving a breach of a construction contract because there was no evidence of "wanton, oppressive, malicious, or reckless behavior" on the part of the defendant.[84] The court never discussed the threshold issue of whether punitive damages were ever recoverable. However, the analysis of the *Quedding* court infers that if the defendant's breach had been wanton, punitive damages would have been allowed. Thus, it appears that in Hawaii punitive damages are recoverable in contract actions.

In Hawaii, punitive damages are allowed as additional damages when egregious conduct exists. Hawaii has taken some steps to restrain the doctrine—the clear and convincing standard of proof and the restricted vicarious punitive liability are two examples. Nonetheless, Hawaii has also allowed the doctrine to expand into virtually all tort actions, and even contract actions. Accordingly, reforms are necessary to curb unwarranted growth and abuse of the doctrine.

III. Possible Reforms in the Doctrine of Punitive Damages

Proponents for punitive damage reform suggest that punitive awards have become so outrageously large and widespread as to constitute a crisis.[85] In 1987, the Institute for Civil Justice of the RAND Corpo-

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[81] Justice Marumoto argued (in his concurrence) against expanding punitive damages to contract cases. *See infra* note 139 and accompanying text.

[82] Cuson v. Maryland Casualty Co., 735 F. Supp. 966, 970 (D. Haw. 1990) ("It is clear in Hawaii that punitive damages may be awarded in a breach of contract case. . . . [P]unitive damages are only awardable where there has been a breach in a manner as to result in a tortious injury."); Quedding v. Arisumi Bros., 66 Haw. 335, 340, 661 P.2d 706, 710 (1983) (In a breach of a construction contract, punitive damages may be awarded if the conduct amounted to wanton, oppressive, malicious, or reckless behavior).

[83] 66 Haw. 335, 661 P.2d 706 (1983).

[84] *Id.* at 340, 661 P.2d at 710.

[85] *See, e.g.*, Sales & Cole, *supra* note 5, at 1154-55.

ration completed a study[86] which found two significant changes in recent years. First, punitive awards in business/contract[87] cases have become far larger and more frequent.[88] Second, the punitive damage awards have increased dramatically in size.[89]

However, the study also found some stability—punitive damages continued to be rarely assessed in personal injury[90] and product liability[91] cases.[92] As for intentional tort cases,[93] punitive awards continued to be moderate in amount.[94]

Although no empirical study of punitive awards in Hawaii exists, it appears that larger punitive awards are being granted in recent years.[95]

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[86] M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987) [hereinafter EMPIRICAL FINDINGS]. The empirical data covered all civil jury trials in Cook County, Illinois, and San Francisco County, California, from 1960 to 1984 and all civil jury trials throughout California from 1980 to 1984. *Id.* at v.

[87] For the purpose of the RAND study, the "business/contract" category involved claims for money damages for fraud, business torts, and unfair business practices. *Id.* at 8.

[88] *Id.* at ix. The number of punitive awards in business/contract cases doubled in Cook County and tripled in San Francisco County between the late 1970s and early 1980s. *Id.* at vi.

[89] Ater having only awarded $9.02 million in punitive awards during the previous 20 years, Cook County juries awarded $55 million during the early 1980s. Also, the median punitive award rose from $13,000 in 1975-1979 to $43,000 in 1980-1984. EMPIRICAL FINDINGS, *supra* note 86, at 14-15.

In San Francisco, the total punitive damages awarded jumped from $12 million in 1960-1974, to $38 million in 1975-1984. The median punitive award rose from $23,000 in 1975-1979 to $63,000 in 1980-1984. *Id.*

[90] For the purposes of this study, the personal injury category included negligence and strict liability, but excluded personal injuries from assaults or other intentional torts. *Id.* at 9.

[91] Punitive damages were awarded in only four product liability cases in San Francisco and two in Cook County from 1960-1984. *Id.* at v.

[92] However, when punitive damages were recovered in personal injury cases, the awards were often large. *Id.* at vi.

[93] The "intentional torts" category included claims for defamation, discrimination, violations of civil liberties, and assaults. *Id.* at 8.

[94] *Id.* at ix.

[95] *E.g.*, Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989) ($11.25 million punitive award); Lozano v. Chevron U.S.A., Inc., Civ. No. 62539 (Haw. 1st Cir. Ct. Feb. 7, 1983) ($3.4 million compensatory award and $10.25 million punitive award in personal injury case involving death due to fire at oil storage facility); Ah Yat v. Chevron U.S.A., Inc., Civ. No. 62494 (Haw. 1st Cir. Ct. Feb. 7, 1983) ($3.9 million compensatory and $10.25 million punitive award in personal injury case involving death due to fire at oil storage facility). The plaintiffs in *Lozano* and *Ah Yat*

Given the expanding trend of granting punitive damages and its predicted adverse economic consequences,[96] examination of possible reforms in the application of punitive damages is in order.

This paper examines the following reforms: a better definition of the standard for punitive damage liability, caps on punitive awards, abolishing punitive damages in certain areas, requiring separate trials, payment of the punitive award to the state, allowing the judge to determine the amount of punitive awards, and prohibiting insurance for punitive damages.

A. A Better Definition of the Required Aggravated Conduct

Several jurisdictions have attempted to clarify the type of conduct necessary for a punitive award.[97] Such clarification may aid the jury in its deliberations, which in turn may lead to more equitable and uniform punitive awards.

Hawaii's verbose standard includes terms such as "willful," "wanton," "oppressive," and "malicious."[98] However, these terms are not clearly defined.[99] Hawaii's standard might be described as something less than malice but more than gross negligence.[100] Either the courts or the legislature should clarify the definitions of all the relevant terms,

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subsequently entered a joint $15 million settlement agreement with Chevron covering all damages. Anderson, *Fire at Pier 30: The $15 Million Chevron Case*, HONOLULU MAGAZINE, July 1984, at 52.

[96] *See supra* note 7.

[97] Alabama, California, Kentucky, Montana, New Jersey and Texas have enacted legislative definitions of the required conduct for punitive awards. LAW AND PRACTICE, *supra* note 26, § 21.22.

[98] *See supra* note 10, quote from Bright v. Quinn, 20 Haw. 504, 512 (1911).

[99] To define these terms as conduct which "implies a spirit of mischief or criminal indifference to civil obligations," does not significantly help the trier of fact to determine punitive damage liability. Some commentators believe that it is not possible to create a bright line definition, and that determining punitive liability requires flexibility. However, others argue that the more specific the definition, the narrower the inquiry, resulting in more equitable determinations. *See* LAW AND PRACTICE, *supra* note 26, § 21.22.

[100] Hawaii's standard does not require malice because willful indifference, wanton, or reckless conduct is sufficient. However, since conscious wrongdoing is required, proof exceeding gross negligence is required. R. SCHLOERB, R. BLATT, R. HAMMERSFAHR & L. NUGENT, PUNITIVE DAMAGES: A GUIDE TO THE INSURABILITY OF PUNITIVE DAMAGES IN THE UNITED STATES AND ITS TERRITORIES 21, 24 (1988) [hereinafter SCHLOERB]. Twenty-three states use a standard similar to Hawaii's. *Id.* at 21.

so that juries may more equitably administer punitive damages.[101]

Another possible reform would be to raise the required level of culpability to the malice standard.[102] A few jurisdictions have adopted such a standard.[103] However, whether such a reform would be effective in practice is unclear. Also, as a matter of policy, wanton or reckless behavior is arguably egregious enough to warrant punishment. Thus, changing to the more stringent malice standard may be too drastic—it would let too many wrongdoers slip out from under the punitive liability net.

B. Capping Punitive Damage Awards

"Capping" punitive damage awards refers to either a strict monetary limit or a variable limit based upon the amount of actual damages.[104] A minority of states currently have legislated caps on the amount of

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[101] For example, Texas elaborated on the meaning of "fraud" and "malice." Fraud is defined as fraud other than constructive fraud. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(6) (1989). Malice is defined as:

> (A) conduct that is specifically intended by the defendant to cause substantial injury to the claimant; or
>
> (B) an act that is carried out by the defendant with a flagrant disregard for the rights of others and with actual awareness on the part of the defedant that the act will, in reasonable probability, result in human death, great bodily harm, or property damage.

Id.

Alabama defines wantonness as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others" and oppression as conduct "[s]ubjecting a person to cruel and unjust hardship in conscious disregard of that person's rights." ALA. CODE § 6-11-20(b)(3), (b)(5) (1990).

California defines oppression as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." CAL. CIV. CODE § 3294(c)(2) (1990).

[102] Generally, to prove malice, the injured party must show that the alleged wrongdoer intended to harm the injured party. SCHLOERB, *supra* note 100, at 18, 19. By its definition the malice standard is difficult to meet since wanton or reckless conduct is insufficient. *Id.* at 19.

[103] For example, California requires that the defendant be guilty of oppression, fraud or malice. CAL. CIV. CODE § 3294 (1987). Arizona, Delaware, Iowa, Maine, Maryland, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, South Dakota and Virginia also require a showing of malice. SCHLOERB, *supra* note 100, at 18-20.

[104] *See generally* 1 L. SCHLUETER & K. REDDEN, PUNITIVE DAMAGES § 3.12 (2nd ed. 1989) [hereinafter REDDEN].

punitive awards.[105] The first question with this reform is whether such caps will pass constitutional muster.[106] The challenges are based on numerous constitutional grounds, including due process,[107] equal protection,[108] a right to access to the courts,[109] and a right to trial by jury.[110] The first two grounds stem from either the federal or state constitutions, while the latter two stem primarily from state constitutions.

The federal due process and equal protection issues were considered in 1978 by the United States Supreme Court in *Duke Power Co. v.*

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[105] In Colorado, punitive damages are generally limited to the amount of actual damages. COLO. REV. STAT. § 13-21-102(2) (1987).

In Florida, except for class actions and cases where the plaintiff can show with clear and convincing evidence that the award is not excessive, punitive damages are limited to three times the amount of compensatory damages. FLA. STAT. ANN. § 768.73(1)(a)-(b) (1986).

In Georgia, except in intentional tort and product liability cases, punitive damages are limited to $250,000. GA. CODE ANN. § 51-12-5.1(e)-(g) (1987).

In Oklahoma, punitive damages may not exceed the amount of actual damages, unless there is clear and convincing evidence of aggravated conduct. OKLA. STAT. ANN. tit. 23, § 9 (West 1987).

In Texas, except for cases involving malice or intent, punitive damages are limited to four times actual damages or $200,000, whichever is greater. TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (1987).

In Virginia, punitive damages are limited to $350,000. VA. CODE ANN. § 8.01-38.1 (1988).

Kansas, Ohio, and Alabama also have some form of cap on punitive damages. LAW AND PRACTICE, *supra* note 26, § 21.15 (1985).

[106] *See generally* Comment, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653 (1988); Note, *The Constitutionality of Florida's Cap on Noneconomic Damages in the Tort Reform and Insurance Act of 1986*, 39 U. FLA. L. REV. 157 (1987).

[107] *E.g.*, Fein v. Permanente Medical Group, 38 Cal. 3d 137, 157, 695 P.2d 665, 679, 211 Cal. Rptr. 368, 382 (plaintiff argued that the $500,000 cap on noneconomic damages violated due process because it limited the potential recovery of medical malpractice victims without providing them with an adequate quid pro quo), *appeal dismissed*, 474 U.S. 892 (1985).

[108] *E.g.*, Arneson v. Olson, 270 N.W.2d 125, 129 (N.D. 1978) (issue on appeal whether $300,000 damage cap for medical malpractice was an invidicous discrimination against malpractice victims).

[109] *E.g.*, Smith v. Department of Ins., 507 So. 2d 1080, 1087 (Fla. 1987) ($450,000 cap on damages that tort victim could recover for noneconomic losses violated victim's state constitutional right to access to courts).

[110] *E.g.*, Boyd v. Bulala, 647 F. Supp. 781, 788 (W.D. Va. 1986) (medical malpractice cap invades the province of the jury to determine the amount of damages and is thus unconstitutional), *modified*, 877 F.2d 1191 (4th Cir. 1989).

Carolina Environmental Study Group, Inc.[111] The *Duke* court held that a cap on the liability of nuclear power plants (in the event of nuclear accidents) was "a classic example of an economic regulation."[112] Since laws depriving economic rights are nonfundamental, they are subject to a mere rationality test, that is, presumed valid unless shown to be arbitrary or irrational.[113] The *Duke* court held the cap constitutional against both due process and equal protection attacks because it found Congress' objective of promoting atomic energy to be a rational goal.[114] Federal decisions since *Duke* have followed this holding.[115]

Since *Duke*, most state courts have applied the rational basis approach to due process and equal protection challenges on damage caps.[116] However, a few courts have applied intermediate level scrutiny.[117] Generally, states applying the rational basis test have upheld their caps,[118] while states applying a higher level of scrutiny have struck such statutes down.[119]

In addition to due process and equal protection attacks, some plaintiffs have relied on state constitutional provisions which guarantee open courts or trial by jury. The "open courts" provisions usually provide

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[111] 438 U.S. 59 (1978) (upheld provisions of the Price-Anderson Act that placed a $560 million liability limitation on nuclear accidents involving private nuclear power plants).

[112] *Id.* at 83.

[113] *Id.* at 83-84.

[114] *Id.* at 89, 93-94.

[115] *E.g.*, Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985).

[116] *E.g.*, Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977); Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980).

[117] *E.g.*, Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); State v. Phelan, 100 Wash. 2d 508, 671 P.2d 1212 (1983); Hunter v. North Mason High School Dist. 403, 85 Wash. 2d 810, 539 P.2d 845 (1975). The United States Supreme Court acknowledges that state courts may interpret state constitutional guarantees to be more protective of individual rights than their federal counterparts. PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

[118] *See, e.g.*, Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. 892 (1985); *but see*, Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359 (Tex. Ct. App. 1985).

[119] *E.g.*, Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); *see also*, REDDEN, *supra* note 104, § 3.12.

that existing common law rights will be preserved from unjustified legislative abrogation.[120]

In *Detar Hospital v. Estrada*,[121] the Texas Court of Appeals invalidated a cap on medical malpractice damages as violative of that state's open courts provision,[122] finding that the cap unreasonably infringed on the plaintiff's constitutional right to obtain full redress for his injuries.[123]

In *Sofie v. Fibreboard Corp.*,[124] the Washington Supreme Court held a statute limiting noneconomic damages void as against Washington's constitutional guarantee of trial by jury. The *Sofie* court held that the measure of damages is a question of fact within the jury's province.[125]

Under *Duke Power*, it appears that damage caps will generally withstand federal due process and equal protection challenges since the legislation must only pass rational basis scrutiny. However, states are free to interpret their own constitutions more broadly, and many have increased the level of scrutiny to the intermediate level. In addition, several states have voided damage caps under other state constitutional grounds. Thus, any punitive damages cap that Hawaii adopts will be subject to significant constitutional challenges.[126] Hawaii has not adopted any general cap on punitive damages, although punitive damages are restricted in certain areas.[127]

Putting constitutional issues aside, the effectiveness of caps must still be considered. Placing a general cap on any punitive award may be a simplistic solution. Since the punitive award is supposed to relate to the degree of malice and wealth of the defendant, a general cap may

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[120] *See* Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987); Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359 (Tex. Ct. App. 1985).

[121] 694 S.W.2d 359 (Tex. Ct. App. 1985).

[122] TEX. CONST. art. I, § 13.

[123] *Detar*, 694 S.W.2d at 366.

[124] 112 Wash. 2d 636, 771 P.2d 711 (1989).

[125] *Id.* at 651, 771 P.2d at 726. *See generally* Note, *Challenging the Constitutionality of Noneconomic Damage Caps: Boyd v. Bulala and the Right to a Trial by Jury*, 24 WILLAMETTE L. REV. 821 (1988).

[126] Challenges are prone to come under the state constitutional grounds of due process, equal protection, and the right to trial by jury.

[127] There is a $10,000 cap on punitive damages for violations of HAW. REV. STAT. § 477 (Fair Credit Extension). Punitive damages are not allowed against the State of Hawaii. HAW. REV. STAT. § 662-2 (1989). Punitive damages are not allowed under Hawaii's Wrongful Death Statute. In Re Air Crash Disaster Near Chicago, 644 F.2d 594, 632 (7th Cir.), *cert. denied*, Lin v. American Airlines, Inc., 454 U.S. 878 (1981).

not be flexible enough to properly cover all possible defendants.[128] Even a punitive cap which is based on some multiple of the compensatory damages may not be flexible enough because there are situations where significant punitive awards may be warranted even in the absence of any compensatory damages.[129]

A better solution is to have specific punitive damage caps for each type of action where awards have become excessive. For example, Hawaii could adopt a punitive damage cap of $1 million dollars for medical malpractice suits, while capping punitive damages at $10 million dollars for products liability actions.[130] Creating specifically tailored caps would be a positive step toward curbing excessive awards, while still preserving the ability to punish and deter egregious misconduct.

C. Abolishing Punitive Damages in Certain Areas of Law

A few states have abolished awards of punitive damages in certain areas.[131] Obviously, abolishing punitive damages against particular defendants vitiates the goals of punishment and deterrence in those instances. Constitutional challenges to such legislation are analogous to

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[128] For example, consider the consequences of adopting a general punitive damage cap of one million dollars. Now suppose a multi-billion dollar oil company were to recklessly spill a million gallons of crude oil off the Waikiki shoreline, causing billions of dollars of damage to the environment and the tourist industry. In this case a one million dollar punitive award may neither match the degree of malice nor adequately punish the defendant corporation. On the other hand, if one individual assaults another person, a punitive award of $900,000 may be excessive while still being less than the cap.

[129] *E.g.*, Howell v. Associated Hotels, Ltd., 40 Haw. 492 (1952) (plaintiff, a photographer, recovered $1,850 in punitive damages without recovering any compensatory damages when the defendant oppressively detained plaintiff's transparencies).

[130] Cases may still arise where the punitive cap would be either too small or too large, but a properly tailored cap would keep the number of inequitable cases to a minimum.

[131] New Hampshire enacted legislation outlawing punitive damages in any action unless otherwise provided by statute. N.H. REV. STAT. ANN. § 507.16 (1987).

Illinois banned punitive awards in medical and legal malpractice actions. ILL. ANN. STAT. ch. 110, para. 2-115 (Smith-Hurd 1987).

In Texas, Oregon and Ohio, punitive damages against drug manufacturers have been abolished if the drug was manufactured and labelled in accordance with Food and Drug Administration regulations. TEX. CIV. PRAC. & REM. CODE. ANN. § 81.003 (1987); OR. REV. STAT. § 30.927 (1988); OHIO REV. CODE ANN. § 23.927 (Anderson 1988).

that of caps on punitive awards.[132] The Hawaii legislature considered a bill[133] that would abolish punitive awards under common law,[134] but the bill died in the judiciary committee without testimony or committee reports. In any event, there is no reason to completely abolish punitive damages. In many cases the doctrine of punitive damages provides the only means for punishing and deterring outrageous conduct. Punitive damages should only be abolished in areas where they serve no purpose or where the awards have become too excessive. Hawaii has only abolished punitive damages in the context of state immunity[135] and wrongful death actions.[136]

Perhaps one area where punitive damages should be abolished is contract cases. Punishment and deterrence are arguably not needed in the context of contracts. Punitive damages should be allowed in contract cases only when there is an independent tort.[137] In *Dold v. Outrigger Hotel*,[138] Justice Marumoto presented persuading arguments:

> I would join with the other courts of this nation and prohibit [punitive damages] in all contract actions. This would overcome the confusion and doubt engendered by the majority opinion in this case and preserve a freedom of contract unclouded by uncertain legal penalties. . . . "it is of doubtful wisdom to add to the risks imposed on entering a contract this liability to an acrimonious contest over whether a breach was malicious or fraudulent."

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[132] *See supra* section III(B). Abolishing punitive awards is equivalent to a punitive damage cap of zero.

[133] Section 1 of H.B. 1810-86 stated in part:

> No court or agency in this state in any action not arising out of contract shall award[,] in addition to actual damages[,] damages in the form of punitive or exemplary damages for the sake of example or by way of punishing the defendant. This section shall not apply in any case in which multiple damages, such as treble damages, may be awarded under statute.

H.B. 1810, 13th Leg., Reg. Sess. § 1 (1986).

[134] Oddly, the bill would exclude common law punitive awards in contract actions. *See* note 133.

[135] HAW. REV. STAT. § 662-2 (1989) (state not liable for punitive damages).

[136] *In re* Air Crash Disaster Near Chicago, 644 F.2d 594, 632 (7th Cir.), *cert. denied*, Lin v. American Airlines, Inc., 454 U.S. 878 (1981).

[137] A majority of jurisdictions allow punitive damages in such situations. REDDEN, *supra* note 104, § 7.3(A). This is also the only situation recognized by the Restatement (Second) of Contracts: "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

[138] 54 Haw. 18, 501 P.2d 368 (1972).

> Of course where the breach is intertwined with a tort then punitive damages may be given. There seem to be two classes of such situations. . . . where the breach of contract is accompanied by a fraudulent act, and . . . where the breach is accompanied by an independent tort.[139]

D. Payment of the Punitive Award to a State Fund

Several jurisdictions have enacted legislation limiting the amount a plaintiff can recover by awarding part of the punitive award to a state fund.[140] If the true purpose of punitive damages is to deter and punish (and not to increase compensation), then giving most of the money to the state is a logical alternative, and it will test the sincerity of the plaintiff's punitive claim. In 1986 the Hawaii State Senate considered a bill that would allocate all of the punitive award to the State:

> In any action not arising out of contract and resulting in punitive or exemplary damages, the monetary relief finally awarded for the sake of example or by way of punishing the defendant *shall be deposited to the general fund of the State*; provided that the moneys so deposited shall be appropriated . . . to nonprofit organizations and individuals under chapter 42 that provide legal assistance to indigent persons. The director of finance shall report to each legislature the amount of moneys available under this section. This section shall not apply in any case in which multiple damages, such as treble damages, may be awarded under statute.[141]

Not surprisingly, the Hawaii Academy of Plaintiffs' Attorneys, Inc., opposed this bill, arguing that this reform would eliminate deterrence. They argued that as a practical matter, fewer plaintiffs would be able to pursue legal recourse because plaintiffs would not be able to afford the litigation costs without the punitive award.[142]

This reform is also subject to constitutional challenges. In *McBride v. General Motors Corp.*,[143] a Georgia statute that gave the state 75% of any punitive award was held unconstitutional. The *McBride* court held

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[139] *Id.* at 26-27, 501 P.2d at 373-74 (Marumoto, J., concurring) (citations omitted).

[140] These jurisdictions include Colorado, Florida, Georgia, Illinois, Iowa, Missouri and Oregon. LAW AND PRACTICE, *supra* note 26, § 21.16.

[141] S.B. 2104, 13th Leg., Reg. Sess. § 1 (1986) (emphasis added). This bill died in the Senate Judiciary Committee.

[142] *Testimony of Hawaii Academy of Plaintiffs' Attorneys, Inc., in Opposition to Senate Bill No. 2104-86 Relating to Punitive Damages*, S.B. 2104, 13th Leg., Reg. Sess. (1986).

[143] 737 F. Supp. 1563 (M.D. Ga. 1990).

that the statute violated due process,[144] equal protection,[145] the excessive fines provision,[146] and the double jeopardy provision.[147] The court held that because the Georgia statute only dealt with punitive damages in products liability cases, it discriminated between product liability claimants and other claimants.[148] The court further held that awarding the state 75% of the punitive award removed the civil nature of the previous statute, and changed it into a fine made for the benefit of the State, contrary to the constitutional prohibitions as to excessive fines and to the double jeopardy clause.[149]

If this reform is adopted several issues[150] will need to be addressed: (1) Must the state be made a party to the action? (2) Does the state have an interest in the action and can it intervene? (3) Can the state require a claimant to bring a punitive claim? (4) Are the damages which are paid to the state fines, forfeitures, or criminal penalties so as to affect the burden of proof, evidentiary rules, or the availability of insurance coverage? (5) How will such a law be applied to settlement agreements? and (6) Would such a law constitute double jeopardy?

Payment of part or all of the punitive award to a state fund only addresses the fairness of the doctrine. Thus, while this reform may remove what is perceived to be a windfall to the plaintiff, it will not directly remedy the problem of the increasing frequency and excessiveness of punitive awards.

E. Separate Trials for Punitive Damages

Several jurisdictions[151] have enacted legislation mandating a separate trial for punitive damages claims.[152] This would keep the jury from becoming biased due to evidence of the defendant's wealth, which would only be admissible in the second trial.

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[144] Of both the U.S. CONST. amend. XIV, § 1, and the GA. CONST. art. I, § 1.

[145] Of both the U.S. CONST. amend. XIV, § 1, and the GA. CONST. art. I, § 1.

[146] Of both the U.S. CONST. amend. VIII, and the GA. CONST. art. I, § 1.

[147] U.S. CONST. amend. V.

[148] *Id.* at 1569.

[149] *Id.* at 1578.

[150] *See* LAW AND PRACTICE, *supra* note 26, § 21.17.

[151] California, Georgia, Missouri, Montana, and Ohio have some form of bifurcation requirement for punitive damages. LAW AND PRACTICE, *supra* note 26, § 21.21.

[152] For example, in Missouri any party can request bifurcation—the first trial would determine the punitive damage liability, and the second would determine the amount of the punitive award. MO. ANN. STAT. § 51-12-51 (Vernon 1987).

Rule 42 of the Hawaii Rules of Civil Procedure allows the court to separate trials if prejudice would occur. However, as a practical matter of judicial economy, judges infrequently bifurcate their trials for punitive damage liability.

This reform primarily addresses the fairness of the punitive damage doctrine to the defendant.[153] It does not directly address the problems of excessive punitive awards and the expansion of the doctrine.

F. Judicial Determination of the Punitive Award

Many commentators advocate that the judge, rather than the jury, should determine the amount of the punitive award.[154] At least one jurisdiction has adopted such a reform.[155] While juries may be competent to determine punitive damage liability, judges are better qualified to determine the proper amount of punitive awards.[156] Judges will usually have a better understanding of social policies and economics, and have experience in dispensing punishment from criminal proceedings. Judges are also less likely to be inflamed by passion or prejudice.

This reform would parallel criminal trials where the sentence is imposed by the judge after conviction by the jury. The Hawaii State Senate considered a similar reform:

> If the court finds that a case presents a significant risk of resulting in a seriously excessive award, the court shall instruct the jury to decide whether a defendant should be held liable for punitive damages. [I]f the

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[153] One commentator believes that "fundamental fairness" requires that bifurcated trials be allowed upon request. Ellis, *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 1007 (1989).

[154] *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 220 (1973); DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. COUNSEL J. 344, 352-53 (1976); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1320-25 (1976); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 530 (1957); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1171 (1966). It is also provided for in the Department of Commerce's Proposed Uniform Product Liability Law. *See* DEP'T OF COMMERCE, DRAFT UNIFORM PRODUCT LIABILITY LAW § 120(b), 44 Fed. Reg. 3,002 (1979).

[155] CONN. GEN. STAT. ANN. § 52-240(b) (West Supp. 1989) ("If the trier of fact determines that punitive damages should be awarded [in a products liability case], the court shall determine the amount of such damages").

[156] *See* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L. J. 639, 664 (1980).

jury decides upon punitive damages, the *court shall determine the amount thereof.*[157]

The Hawaii Academy of Plaintiffs' Attorneys, Inc., opposed this bill. They argued that such reform would violate the injured person's right to a jury trial, and that existing remedies are more than ample to prevent excessive awards.[158] The state constitutional right to a jury trial is a valid issue that has not been decided in Hawaii. One could argue that determining the amount of the punitive award is a question of fact within the jury's province.[159] On the other hand, determining the amount of punitive damages resembles sentencing more than fact-finding.[160]

If this reform can withstand constitutional challenges, it might be quite effective in controlling the application of punitive damages. While punitive damage caps may be effective for the most part, the inherent rigidity still creates a risk of unjust results.[161] Allowing the judge to fix the punitive amount retains flexibility while gaining better control.

G. Eliminating Insurance for Punitive Damages

The issue of insurability of punitive damages involves several competing policies,[162] including freedom of contract, public welfare, punishment, and deterrence. Typically, a court must first determine, in the absence of explicit language, whether an insurance policy covers punitive damages. Then, if punitive damages are covered, the court must decide whether to void the insurance on public policy grounds. The Hawaii legislature solved the first problem by enacting a statutory presumption against coverage: "Coverage under any policy of insurance issued in this State shall not be construed to provide coverage for punitive or exemplary damages unless specifically included."[163]

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[157] S.B. 2250, 13th Leg., Reg. Sess. (1986) (emphasis added). This bill never got past the judiciary committee.

[158] *Testimony of Hawaii Academy of Plaintiffs' Attorneys, Inc. Relating to Trials (Senate Bill 2250-86)*, S.B. 2250, 13th Leg., Reg. Sess. (1986). The mentioned "adequate remedies" probably refer to the court's power of remittitur.

[159] *See* Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989).

[160] *See* Ellis, *supra* note 153, 1004.

[161] That is, some cases may arise where the proper punitive award should be much greater or much less than the maximum allowed by the cap.

[162] *See generally*, LAW AND PRACTICE, *supra* note 26, §§ 7.11-7.14; Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009 (1989); SCHLOERB, *supra* note 100.

[163] HAW. REV. STAT. ANN. § 431:10-240 (1988) (due to publication error, this statute has been omitted from HAW. REV. STAT.).

However, the second question remains—whether courts should void insurance coverage of punitive damages on public policy grounds. Hawaii courts have yet to address this issue, but when the time comes, the sound choice is to allow coverage.

At first blush, the arguments for voiding insurance of punitive damages appear persuasive. The landmark case of *Northwestern National Casualty Co. v. McNulty*[164] held that public policy prohibits insuring against punitive damages. The *McNulty* court reasoned that one cannot punish nor deter a wrongdoer if he has insurance to cover the financial penalty; insurance shifts the burden of punitive damages to the insurer, and ultimately to the public in the form of higher premiums; and since criminal sanctions are uninsurable as against public policy, punitive damages should similarly be uninsurable.[165]

On the other hand, there are sound counter-arguments for allowing insurance of punitive damages. Insurance does not negate punishment and deterrence of egregious conduct because defendants will still feel the impact of the punitive award in several ways. The amount of the punitive award may be greater than the defendant's coverage, he may subsequently be unable to obtain insurance, his insurance premiums may drastically rise, and the stigma of the punitive award remains. In addition, the wrongdoer may be subject to criminal sanctions.

The *McNulty* court refered to a undesirable "shifting" of the burden from the wrongdoer to the insurance company and the public. However, in reality, no shifting occurs because the insurance company's premium for covering punitive damages is based on its exposure. Voiding the insurance coverage only grants a windfall to the insurer who should be held to the contract he voluntarily entered into.

In *Harrell v. Travelers Indemnity Co.*,[166] insurance for punitive damages was upheld. The *Harrel* court noted that it was contrary to public policy to insure against liability arising out of the commission of intentional torts.[167] Hence, if punitive damages were recoverable only for intentional misconduct, then it would be sensible to void the insurance of punitive damages as against public policy. However, because punitive

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[164] 307 F.2d 432 (5th Cir. 1962) (the case involved the reckless operation of an automobile and was an application of Florida and Virginia law).

[165] *Id.* at 440-41.

[166] 279 Or. 199, 567 P.2d 1013 (1977) (insurance upheld in the context of reckless driving).

[167] *Id.* at 202, 567 P.2d at 1016.

damages were recoverable for a wide spectrum of conduct,[168] public policy did not mandate voiding the insurance contract.

While some jurisdictions have followed *McNulty*,[169] Hawaii should not. As noted by a California court,

> [I]nsurance coverage is valid in jurisdictions where punitive damages are allowed in respect of gross negligence or reckless or wanton conduct. On the other hand, the authorities in jurisdictions where punitive damages are limited to cases involving fraud, oppression or malice have generally invalidated insurance coverage for punitive damages on public policy grounds.[170]

Since Hawaii is among those jurisdictions that allow punitive damages for reckless or wanton conduct,[171] it should continue to allow insurance for punitive damages.[172]

V. Conclusion

The expansion of punitive damages may not yet be a widespread problem in Hawaii. The occasional cases with extremely large punitive awards tend to distort everyone's perception of the punitive damage doctrine. In many instances, punitive awards are reasonable in amount and aptly punish and deter undesirable conduct. Therefore, reforms must be specifically tailored for those aspects that require control.

This paper has considered many different approaches to reform, some more drastic than others. These approaches may be combined and implemented with varying degrees of effectiveness. First, Hawaii courts or the legislature should better define the necessary aggravated conduct. Second, the judge should decide the amount of the punitive

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[168] Hawaii also allows punitive damages for a wide spectrum of conduct. *See supra* note 10 and accompanying text.

[169] Florida, New Jersey, New York, and Kansas have voided insurance for punitive damages. Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 52 (Fla. App. 1965); Lo Rocco v. New Jersey Mfrs. Indem. Ins. Co., 82 N.J. Super. 323, 197 A.2d 591 (1964); Teska v. Atlantic Nat'l Ins. Co., 59 Misc. 2d 615, 300 N.Y.S.2d 375 (1969); Guarantee Abstract & Title Co. v. Interstate Fire & Casualty Co., 228 Kan. 532, 618 P.2d 1195 (1980). *See also*, Annotation, *Liability Insurance Coverage as Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R. 4th 11 (1990).

[170] City Prod. Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494, 500-01 (1979).

[171] *See supra* note 10 and accompanying text.

[172] A possible compromise between the competing policies would be to void punitive damage insurance only when the defendant is liable for intentional misconduct.

award. If such reform is too drastic a change, the alternative is more punitive damage caps. Hawaii should conduct an empirical study of punitive awards in Hawaii's courts. Then the legislature should adopt punitive damage caps in the areas where frequent and excessive punitive awards are found. Products liability and medical malpractice are two likely areas of concern. Third, Hawaii should prohibit the expansion of the punitive damage doctrine into areas where it serves no purpose, such as in contract law. Finally, in order to dispense punitive damages more fairly, Hawaii should consider granting separate trials for punitive damages, and allocating a portion of the punitive award to the State.

Punitive damages have for too long been a perplexing area in our common law—applied without meaningful standards nor adequate judicial control. However, the doctrine has not outlived its usefulness. There will always be a need for powerful tools to combat egregious misconduct; the power of the doctrine is unmatched and without substitute. Yet it is precisely this power which demands that more control be exercised over the application of punitive damages. Adoption of the aforementioned reforms will be a positive step in that direction. Unless affirmative judicial and legislative action is initiated, the doctrine of punitive damages will continue to expand uncontrollably, eroding the credibility of our civil jurisprudence and causing severe economic harm.

Randall H. Endo

Evolution of the Act of State Doctrine: *W.S. Kirkpatrick Corp. v. Environmental Tectonics Corp.* and Beyond

I. Introduction

The ability of a nation to engage in international relations is inherent in the concept of sovereignty.[1] However, the United States Constitution provides little guidance on how foreign affairs responsibility shall be allocated amongst the three branches of government.[2] The United States Supreme Court clearly views the political branches as having the predominant role in the field of foreign affairs.[3] However, article III of the Constitution authorizes the United States Supreme Court to hear cases between United States citizens and a foreign state or foreign

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[1] *See, e.g.*, United States v. Curtis-Wright Export Corp., 299 U.S. 304, 318 (1936)(The power to make international agreements "is inherently inseparable from the conception of nationality"); Burnet v. Brooks, 288 U.S. 378, 396 (1933)(The United States "is vested with all the powers of government necessary to maintain an effective control of international relations"). *See generally* J. Nowak, R. Rotunda, & J. Young, Constitutional Law § 6.1, at 189 (3d ed. 1986).

[2] *See, e.g.*, Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors Under the Act of State Doctrine*, 35 Stan. L. Rev. 327, 343 (1983); L. Henkin, Foreign Affairs and the Constitution 16-17 (1972)("the attempt to build all the foreign affairs powers of the federal government with the few bricks provided by the Constitution has not been accepted as successful").

[3] *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972)(the Executive Branch is charged "with primary responsibility for the conduct of foreign affairs"); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)("[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations" (citation omitted)); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments").

citizens.[4] Such cases frequently involve significant foreign policy implications. In order to avoid judicial intrusion into the domain of the political branches, the United States Supreme Court has developed the act of state doctrine.

The act of state doctrine is a judicially created doctrine which generally requires courts in the United States to refrain from sitting in judgment on acts of a governmental character committed by a foreign state within its own territory.[5] Although the doctrine is easy to state, it has proven quite nettlesome in its application. Courts have articulated several rationales for the doctrine, with little consensus on its underlying purpose or functional nature.[6] In addition, courts and commentators have proposed a multitude of exceptions which may limit application of the doctrine.[7] This confusion has led some commentators to advocate legislative reform to either modify or abolish the doctrine.[8]

The act of state doctrine generally operates to bar adjudication of claims properly before the court. Accordingly, the doctrine should be narrowly applied.[9] Although some commentators have accused the

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[4] U.S. CONST. art. III, § 2 provides in relevant part:

> The Judicial Power 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 Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects . . . .

[5] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 (1988).

[6] The act of state doctrine has been described variously as a doctrine of judicial abstention, issue preclusion, and choice of law. For cases discussing judicial abstention *see* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697 (1976) ("[t]he major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil"); Hunt v. Mobil Oil Corp., 550 F.2d 68, 74 (2d Cir. 1977) ("the act of state doctrine . . . is a manifestation of judicial abstention"), *cert. denied*, 434 U.S. 984 (1977). For a case discussing issue preclusion *see* Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918); *see generally* Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 45 (1990). For an opinion discussing choice of law *see* Alfred Dunhill of London v. Cuba, 425 U.S. 682, 726 (Marshall, J., dissenting) ("the act of state doctrine merely tells a court what law to apply to a case").

[7] *See infra* note 95. *See generally* Dellapenna, *supra* note 6, at 74-109.

[8] *See, e.g.*, Dellapenna, *supra* note 6, at 126-30; Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986); Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 LAW & POL'Y IN INT'L BUS. 369 (1980).

[9] International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982)("The decision to deny access to judicial relief

judiciary of hiding behind the doctrine in order to avoid deciding cases involving difficult international issues,[10] several recent cases evidence a trend toward narrowing the scope of the doctrine.

This note will discuss these cases, including the recent United States Supreme Court decision *W.S. Kirkpatrick Corp. v. Environmental Tectonics Corp*,[11] in which the Court attempts to resolve some of the confusion which has surrounded application of the doctrine. Although the *Kirkpatrick* decision does settle some areas of confusion, it leaves other questions relating to the proper application of the doctrine unresolved.

Part II of this note will discuss the history and development of the act of state doctrine. Part III will examine the *Kirkpatrick* decision, focusing on both the questions about the doctrine answered by the decision as well as those left unanswered. Part IV will compare the methods which courts have used to analyze the applicability of the doctrine, as seen in two recent decisions by the United States Courts of Appeal for the Second and Ninth Circuits involving suits by the Republic of the Philippines against Ferdinand Marcos.[12] The discussion of these cases will address some of the unsettled application issues. Part V will offer the authors' comments and conclusions.

II. History and Development of the Act of State Doctrine

The act of state doctrine began to emerge in American jurisprudence in the late eighteenth and early nineteenth centuries.[13] The United States Supreme Court has identified its 1812 decision in *The Schooner*

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is not one we make lightly.") *See also* Note, *When Nations Kill: The Liu Case and the Act of State Doctrine in Wrongful Death Suits*, 12 Hastings Int'l & Comp. L. Rev. 465, 478 n.80 (1989).

[10] *See, e.g.*, Bazyler, *supra* note 8, at 328.

[11] W.S. Kirkpatrick & Co., Inc., v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990).

[12] Republic of the Philippines v. Marcos (*Marcos II*), 862 F.2d 1355 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989)(*see infra* notes 130-50 and accompanying text); Republic of the Philippines v. Marcos (*Marcos I*), 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom.* Ancor Holdings, N.V. v. Republic of the Philippines, 480 U.S. 942 (1987), *cert. denied sub nom.* New York Land Co. v. Republic of the Philippines, 481 U.S. 1048 (1987)(*see infra* notes 107-29 and accompanying text).

[13] *See, e.g.*, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 336 (1822); L'Invincible, 14 U.S. (1 Wheat.) 238, 253 (1816); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 135 (1812); Hudson v. Guestier, 10 U.S. (6 Cranch) 281, 283 (1810); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796).

Exchange v. M'Faddon[14] as the origin of the doctrine in American courts.[15] *The Schooner Exchange* involved a vessel purportedly owned by two United States citizens.[16] The owners alleged that the vessel was seized on the high seas by agents of Napoleon and refitted as a French naval vessel.[17] When the vessel later called at the port of Philadelphia, the owners sued the vessel, in rem, seeking to regain possession.[18] The United States Supreme Court dismissed the case, holding that "[t]he sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign . . . the questions to which such wrongs give birth are rather questions of policy than of law . . . they are for diplomatic, rather than legal discussion . . . ."[19] The Court later referred to this passage as the basis of both foreign sovereign immunity and the act of state doctrine.[20]

The modern formulation of the act of state doctrine originated in *Underhill v. Hernandez*.[21] Hernandez was a military commander carrying on operations under the authority of a revolutionary government in Venezuela.[22] Hernandez captured the city of Bolivar in which Underhill, a United States citizen in charge of the city's water supply, resided,[23] and refused Underhill's request for a passport to leave the city.[24] Consequently, Underhill sued Hernandez for damages caused by this detention.[25] The District Court for the Eastern District of New York dismissed the suit against Hernandez on the basis of sovereign immunity.[26] This decision was affirmed by the United States Court of Appeals for the Second Circuit and the United States Supreme Court.[27]

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[14] 11 U.S. (7 Cranch) 116 (1812).

[15] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972). However, one commentator has argued that the origin of the act of state doctrine in American courts predates The Schooner Exchange v. M'Faddon. *See* Dellapenna, *supra* note 6, at 9.

[16] 11 U.S. (7 Cranch) at 117.

[17] *Id.* at 117-18.

[18] *Id.* at 117.

[19] *Id.* at 146.

[20] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972).

[21] 168 U.S. 250 (1897).

[22] *Id.* at 250.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Underhill v. Hernandez, 65 F. 577, 579 (1895), *aff'd*, 168 U.S. 250 (1897).

[27] *Id.*

Instead of determining whether Hernandez was entitled to sovereign immunity, the United States Supreme Court chose to focus on the act itself.[28] The Court articulated what has become known as the "classic" formulation of the act of state doctrine:[29]

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[30]

Although the act of state doctrine and foreign sovereign immunity share a common origin,[31] the holding in *Underhill* marked a clear departure from the theory of sovereign immunity. Sovereign immunity operates to deprive a court of jurisdiction.[32] The United States Supreme Court in *Underhill*, however, stated only that courts in the United States will not pass judgment on the acts of a foreign sovereign committed within its own territory. Thus, unlike foreign sovereign immunity, the act of state doctrine does not defeat a court's jurisdiction, but instead merely precludes inquiry on certain issues.[33] The United States Supreme Court thus created an independent basis of immunity which has become known as the act of state doctrine.[34]

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[28] 168 U.S. at 252.

[29] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1963).

[30] *Underhill*, 168 U.S. at 252.

[31] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972).

[32] The Foreign Sovereign Immunity Act of 1976 (28 U.S.C. § 1602-1611 (1988)) provides in § 1604 that "a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided in [28 U.S.C. §§ 1605-1607]."); *See* Argentine Republic v. Amarada Hess Shipping Corp., 488 U.S. 428, 435 n.3 (1989)("personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in [28 U.S.C.] §§ 1605-1607 applies").

[33] Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918) stated:

> [The act of state doctrine] does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.

Id.

[34] *See, e.g.*, Bazyler, *supra* note 8, at 331-32.

A. The Purpose of the Act of State Doctrine

Courts have articulated two theoretical bases for the act of state doctrine. The traditional view holds that the doctrine is compelled by the nature of sovereign authority.[35] This view, in turn, may be based either on notions of comity,[36] or on international law.[37] The traditional view appeared to set forth an absolute tenet that acts of a sovereign government within its own territory could not be challenged in United States courts.[38]

The more modern approach, based on the principle of separation of powers between the executive and the judicial branches, originated in *Banco Nacional de Cuba v. Sabbatino*.[39] *Sabbatino* arose from the Cuban nationalization of American-owned assets in Cuba in retaliation for a

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[35] *See, e.g., Underhill*, 168 U.S. at 252 ("[e]very sovereign state is bound to respect the independence of every other sovereign state"); Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency.").

[36]

> Comity . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

[37] The phrase "[e]very sovereign state is bound to respect the independence of every other sovereign state . . ." in the *Underhill* formulation (*see supra* note 30 and accompanying text) suggests that the doctrine goes beyond the non-obligatory concept of "comity." Presumably, if a nation "is bound" it must be bound under international law. Dellapenna, *supra* note 6, at 13.

[38] *See, e.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897) (*see supra* notes 21-34 and accompanying text); Oetjen v. Central Leather Co., 246 U.S. 297 (1918). *Oetjen* arose from events surrounding the Mexican Revolution of 1911. The revolutionary government headed by General Villa purportedly illegally seized two consignments of hides and sold them to a private party. The private party then brought the hides to the United States where the original owner filed suit in replevin. The United States Supreme Court held that Villa (whom one commentator characterized as "little more than an extraordinarily successful bandit" (Dellapenna, *supra* note 6, at 58)) was protected by the act of state doctrine.

[39] 376 U.S. 398, 423 (1963). The United States Supreme Court stated that the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Id.*

reduction in the Cuban sugar import quota to the United States.[40] Justice Harlan, writing for an eight-justice majority, stated:

> If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.[41]

He further noted that "[w]e do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply . . . or by some principle of international law."[42]

By characterizing the underlying rationale of the doctrine "as a consequence of domestic separation of powers,"[43] Justice Harlan provided the judiciary with greater discretionary power in reviewing the acts of a foreign sovereign. According to Harlan, courts should examine the "balance of relevant considerations" in order to determine whether adjudication of a given issue will unduly interfere with the nation's foreign affairs:[44]

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.[45]

Sabbatino thus sets forth a balancing test under the separation of powers approach: the "degree of codification or consensus concerning a particular area of international law"[46] versus the significance of the

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[40] *Id.* at 401.

[41] *Id.* at 427-28.

[42] *Id.* at 421.

[43] W.S. Kirkpatrick & Co. Inc., v. Environmental Tectonics Corp., 110 S. Ct. 701, 704 (1990)(quoting *Sabbatino* at 423).

[44] *Sabbatino*, 376 U.S. at 428.

[45] *Id.*

[46] *Id.*

issues for the nation's foreign affairs.[47] Although the holding in *Sabbatino* has been roundly criticized,[48] this case-by-case balancing approach retains considerable judicial support.[49]

B. *Modern Developments In the Act of State Doctrine*

Since *Sabbatino*, the United States Supreme Court has considered the act of state doctrine in only three cases: *First National City Bank v. Banco Nacional de Cuba*;[50] *Alfred Dunhill of London, Inc. v. Cuba*;[51] and *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l.*[52] In both *Dunhill*

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[47] *Id.* at 427-28. *See also* Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U.L. REV. 203, 205 (1984)(discussion of balancing approach to act of state analysis).

[48] *See, e.g.*, Kline, *An Examination of the Competence of National Courts to Prescribe and Apply International Law: The* Sabbatino *Case Revisited*, 1 U.S.F. L. REV. 49, 54-100 (1966); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 18-27 (1970).

Most of the criticism of *Sabbatino* focuses on the actual holding itself, not the balancing approach. In *Sabbatino*, the U.S. Supreme Court held that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. Congress quickly passed an amendment to the Foreign Assistance Act of 1964 (Pub. L. No. 88-633, § 301(d), 78 Stat. 1009, 1013 (codified at 22 U.S.C. § 2370(e)(2) (1982)) which overturned this precise holding.

[49] *See, e.g.*, Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 728 (1976)(Marshall, J., dissenting); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406-08 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); International Ass'n of Machinists and Aerospace Workers v. OPEC, 649 f.2d 1354, 1358-61 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir. 1988).

[50] 406 U.S. 759 (1972). *City Bank* involved the nationalization of American-owned banks in Cuba. City Bank liquidated bonds belonging to Banco Nacional and applied the proceeds to offset losses caused by the nationalization. Banco Nacional brought suit seeking to recover the value of the bonds. *Id.* at 760-61.

[51] 425 U.S. 682 (1976). In *Dunhill*, the United States Supreme court refused to apply the act of state doctrine to bar claims arising out of Cuba's nationalization of five privately owned cigar manufacturers. After the nationalization, the Cuban government named "interventors" to take control of the seized companies. American importers, including Dunhill, paid the interventors monies owed for pre-intervention shipments. The former owners of the Cuban businesses sued the importers for the monies due on cigars shipped before the intervention. The interventors refused to reimburse the importers for these pre-intervention amounts. *Id.* at 685.

[52] 110 S. Ct. 701 (1990).

and *City Bank*, the Court was severely divided with four separate opinions in each case. The opinions in *Dunhill* and *City Bank* demonstrate two fundamental approaches to the act of state doctrine. The plurality opinions suggest that the act of state doctrine should be applied to any act of a foreign sovereign subject to certain exceptions.[53] Four Justices joined in dissenting opinions in both cases, arguing that the *Sabbatino* balancing test should be applied and that specific exceptions are unnecessary. One commentator has labeled the dissents' approach as the "pure" theory of the *Sabbatino* test.[54]

In *Dunhill*, Justice White, writing for a four justice plurality, stated that "nothing in the record reveals an act of state with respect to interventors' obligation to return monies mistakenly paid to them."[55] Justice White, however, did not clearly articulate why the challenged acts were not protected by the act of state doctrine. The plurality held that even if these were acts of state, the act of state doctrine would not protect commercial acts by a state.[56] This marked the first time that the United States Supreme Court embraced a specific exception to the act of state doctrine. Justice Marshall in his dissent pointed out that "[t]he carving out of broad exceptions to the doctrine is fundamentally at odds with the careful case-by-case approach adopted in *Sabbatino*."[57]

III. THE *Kirkpartick* Decision

In its most recent act of state case, *W.S. Kirkpatrick Corp. v. Environmental Tectonics Corp.*,[58] the United States Supreme Court, in a unani-

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[53] In *City Bank*, Chief Justice Burger along with Justices Rehnquist and White supported a "Bernstein" exception and an exception for counterclaims (see *infra* note 95); Justice Douglas supported a waiver exception. 406 U.S. at 764-73. In *Dunhill*, a four-Justice plurality supported an exception for commercial acts. 425 U.S. at 695-706.

[54] Dellapenna, *supra* note 6, at 67-73.

[55] *Dunhill*, 425 U.S. at 690.

[56] *Id.* at 695-706.

[57] *Id.* at 728 (Marshall, J., dissenting).

[58] 110 S. Ct. 701 (1990). The controversy in *Kirkpatrick* involved two U.S. companies competing for a government contract in Nigeria. The government of Nigeria awarded W.S. Kirkpatrick & Co. the contract, but Environmental Tectonics claimed that Kirkpatrick had bribed Nigerian officials. Environmental Tectonics brought suit in the United States District Court for the District of New Jersey, seeking damages under the Racketeer Influenced and Corrupt Organizations Act and the Robinson-Patman

mous opinion, refused to apply the act of state doctrine on the ground that the challenged act did not qualify as "an act of state."[59] In *Kirkpatrick*, Environmental Tectonics alleged that W.S. Kirkpatrick & Co. had bribed Nigerian officials in order to receive a Nigerian defense contract.[60] Nigerian law prohibited payment or receipt of bribes in connection with government contracts.[61] Environmental Tectonics sought damages for the lost contract under various federal and state statutes.[62] The defendants moved to dismiss the complaint on the ground that the act of state doctrine barred the action.[63]

Prior to deciding whether the doctrine barred the suit, the United States District Court for the District of New Jersey requested and received a letter from the legal advisor to the United States Department of State regarding the executive branch's view of the doctrine's applicability to the case.[64] The State Department suggested that the doctrine did not apply because the litigation involved inquiry into the *motivation* for the Nigerian government's award of the contract to Kirkpatrick, rather than inquiry into the legal validity of the award.[65] The district court dismissed the claim despite the State Department letter supporting adjudication of the claim on the merits.[66]

Act (15 U.S.C. § 13 *et seq.* (1988)). *Kirkpatrick* sought to dismiss the suit on act of state grounds. 110 S. Ct. at 702-03.

The act of state doctrine may apply even where no foreign sovereign is a named defendant, if the validity of the acts of a foreign sovereign will be passed on by the court. *See, e.g.*, Hunt v. Mobil Oil Corp., 550 F.2d 68, 75-78 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977) (refusing to hear suit by independent oil producer against the major oil producers because it would require inquiry into Libya's motivation for nationalizing the plaintiff's assets).

[59] 110 S. Ct. at 702-03.

[60] *Id.*

[61] *Id.*

[62] *Supra* note 58.

[63] 110 S. Ct. at 703.

[64] Environmental Tectonics Corp. v. W.S. Kirkpatrick, 659 F. Supp. 1381, 1402 (D.N.J. 1987).

[65] *Id.* at 1403. *See* Industrial Investment Dev. v. Mitsui & Co., Ltd., 594 F.2d 48 (5th Cir. 1979)(precluding all inquiry into the motivation behind sovereign acts would uselessly thwart legitimate U.S. goals if adjudication would not result in an embarrassment to the executive branch); Williams v. Curtiss-Wright Corp., 694 F.2d 300 (3d Cir. 1982)(act of state doctrine did not apply because the claim did not question the validity of the foreign government's acts, but rather the motivation behind those acts).

[66] 659 F. Supp. at 1391-98.

The district court found the Ninth Circuit Court of Appeals holding in *Clayco Petroleum v. Occidental Petroleum*[67] controlling. *Clayco* held that the act of state doctrine applies "if the inquiry presented for judicial determination includes the motivation of a sovereign act which would result in embarrassment to the sovereign or constitute interference in the conduct of foreign policy of the United States."[68] The district court ruled that because Environmental Tectonics would have to show that the government of Nigeria or its officials had accepted bribes, the act of state doctrine barred the suit.[69]

The Court of Appeals for the Third Circuit reversed, finding application of the doctrine unwarranted on the facts of the case.[70] The court emphasized the State Department's opinion that adjudication of the case would not harm the interests of the executive branch,[71] and held that Kirkpatrick had not met the burden of showing that the act of state doctrine barred the suit.[72]

The United States Supreme Court affirmed the court of appeals decision holding the act of state doctrine inapplicable.[73] In its discussion, the Court initially acknowledged that its description of the jurisprudential foundation for the doctrine had evolved through the years.[74] The Court indicated that it now views the doctrine as based on the

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[67] 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). Clayco claimed that Occidental had bribed the petroleum minister of Umm Al Qaywayn, who happened to be the ruler's son, in order to obtain a valuable oil concession. *Id.* at 405. The court noted that a sovereign decision regarding the exploitation of important natural resources was a public act which could be protected by the act of state doctrine. *Id.* at 406-07. The court also noted that investigating the bribery charge might embarrass the United States in its conduct of foreign policy because doing so involved impugning the character of a foreign official. *Id.* at 407. The *Clayco* court thus refused to inquire into the motivation behind a foreign sovereign's acts, following the holding in Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir. 1976).

[68] *Environmental Tectonics*, 659 F. Supp. at 1392-93 (citing Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983).

[69] 659 F. Supp. at 1393. The district court felt that this would result in embarrassment to Nigeria or interfere with the conduct of United States foreign policy. *Id.*

[70] Environmental Tectonics Corp. v. W.S. Kirkpatrick Corp., 847 F.2d 1052, 1058-61 (3rd Cir. 1988).

[71] *Id.* at 1061-62.

[72] *Id.* at 1067.

[73] 110 S. Ct. at 707.

[74] *Id.* at 704. *See supra* notes 35-42 and accompanying text. Originally, the Court had identified the doctrine as "an expression of international law, resting upon 'the highest considerations of international comity and expediency.'" *Id.* (citing Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918)).

principle of domestic separation of powers between the executive and judicial branches.[75]

The United States Supreme Court then addressed the "exceptions" approach of applying the act of state doctrine. The Court noted the *Dunhill* and *City Bank* plurality opinions supporting the commercial activities and Bernstein exceptions.[76] Although the parties argued at length over the applicability of these possible exceptions, the Court found it unnecessary to reach the question of exceptions to the doctrine's applicability because an alternative reason for denying the doctine's applicability existed.[77] The Court thus did not expressly rule on the validity of the proposed exceptions to the act of state doctrine.[78]

Rather than discussing possible exceptions to the doctrine or its underlying purposes, the Court focused on whether the challenged act met the definitional requirements to qualify as an act of state.[79] The

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[75] *Id.* (citing *Sabbatino*, 376 U.S. at 423). The Court stated that the doctrine reflects "'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Id.*

[76] *Id.* at 704. *See supra* notes 50-57 and accompanying text.

> Some Justices have suggested possible exceptions to application of the doctrine where [the policies underlying the doctrine] would seemingly not be served: an exception, for example, for acts of state that consist of commercial transactions, since neither modern international comity nor the current position of our Executive Branch accorded sovereign immunity to such acts, *see* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-706 (1976)(opinion of White, J.); or an exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals, *see* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768-70 (1972)(opinion of Rehnquist, J.).

110 S. Ct. at 704.

See infra note 95 (listing exceptions to act of state doctrine which have been suggested).

[77] 110 S. Ct. at 704.

[78] Although the *Kirkpatrick* Court declined to expressly hold on the validity of "exceptions" to the act of state doctrine, a comparison of *Kirkpatrick* with the facially similar case of Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404 (9th Cir. 1983), *cert. denied*, 444 U.S. 1040 (1984). demonstrates that the complex issues involved in act of state cases are ill-suited to an "exceptions" approach. *See infra* notes 93-100 and accompanying text.

[79] 110 S. Ct. at 704. *See, e.g., Dunhill*, 425 U.S. at 695 (the burden of proving acts of state rests on defendant); Letelier v. Chile, 488 F. Supp. 665, 674 (D.C. Cir. 1980)(acts outside of foreign country asserting act of state doctrine not protected under doctrine); Jiminez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962)(challenged act must be official act of sovereign to qualify for the doctrine's protection).

Court stated that the act of state doctrine is implicated only where a court is called upon "to declare invalid, and thus ineffective . . . the official act of a foreign sovereign."[80] Because *Kirkpatrick* did not require such a determination, the Court held the act of state doctrine did not apply.[81]

The United States Supreme Court thus rejected Kirkpatrick's contention that the potential embarrassment to the government implicated the act of state doctrine.[82] The Court's holding appears to limit the scope of the act of state doctrine. Earlier act of state cases stressed the importance of avoiding judicial interference with the nation's conduct of foreign affairs.[83] However, in *Kirkpatrick*, the Court held that the act of state doctrine was not implicated where a court was not called upon to assess the validity of a foreign sovereign's public act, even if adjudication could interfere with foreign relations.[84]

In response to Kirkpatrick's assertion that the policies underlying the act of state doctrine supported application of the doctrine to the case,[85] the Court indicated that the *Sabbatino* balancing test deals with these concerns.[86] The Court held that if the challenged acts qualified as acts of state, the *Sabbatino* balancing test might then apply to limit the doctrine's applicability if the policies underlying the act of state doctrine did not justify its application.[87] However, if the challenged acts fail to satisfy the definitional requirements to qualify as acts of state, the doctrine does not apply even if the balance of considerations

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[80] 110 S. Ct. at 704 (citing Ricaud v. American Metal Co., 246 U.S. 304, 310 (1918)).

[81] *Id.* at 705. "Act of state issues only arise when a court *must decide*— that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *Id.* (emphasis in original).

[82] *Id.* at 705-07.

[83] *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 687 (1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1964); Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989), *cert. dismissed*, 111 S. Ct. 27 (1990).

[84] 110 S. Ct. at 705-07.

[85] 110 S. Ct. at 706. The Court identified the policies underlying the act of state doctrine as "international comity, respect of the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations". *Id.*

[86] *Id.* at 706-07.

[87] *Id.*

outlined in the *Sabbatino* test would support application of the doctrine.[88]

Thus *Kirkpatrick* clarifies that the *Sabbatino* test may be used to narrow, but not widen, the scope of the act of state doctrine. Under *Kirkpatrick*, if a court is not called on to declare a foreign sovereign's official act invalid, no amount of balancing can implicate the doctrine.[89] The United States Supreme Court stated that "the act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."[90]

The Court in *Kirkpatrick* sets forth a two-step process for determining whether to invoke the act of state doctrine. First, the court must evaluate whether adjudication requires inquiry into the validity of the public acts of a foreign sovereign. Not all acts involving a foreign sovereign will be protected.[91] If the court finds the challenged acts do not qualify as acts of state, the doctrine does not apply and further consideration of the doctrine is not necessary. However, if the act does qualify as an act of state, the court must then weigh the "balance of relevant considerations" to determine whether application of the doctrine is justified in light of the underlying policies.[92]

The United States Supreme Court, however, did not address whether the second step of this analysis was to take the form of a "pure" balancing test, or whether the court must find some particular exception to the act of state doctrine.[93] The approach of adopting broad exceptions to the act of state doctrine diverts attention from the fundamental policy issues and creates pointless confusion.[94] In light of the *Dunhill*

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[88] *Id.*

[89] *Id.*

[90] *Id.* The Court emphasized that "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 707.

[91] Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (subordinate government official's unratified acts not acts of state); Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962) (only "official" acts of former dictator would qualify as acts of state), *cert. denied sub nom.* Jimenez v. Hixon, 373 U.S. 914 (1963); Letelier v. Chile, 488 F. Supp. 665, 674 (D.C. Cir. 1980) (acts must take place within country's territory).

[92] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

[93] *See supra* note 54 and accompanying text and *infra* note 95.

[94] *See, e.g.*, Dellapenna, *supra* note 6, at 4 (professor Dellapenna refers to "rampant confusion surrounding the act of state doctrine"); Bazyler, *supra* note 8, at 329 ("[T]he confusion seems to be getting worse with each successive court opinion").

plurality's support of a commercial activity exception, the Court's failure to expressly rule on the propriety of the "exceptions approach" can only lead to a further proliferation of proposed exceptions.[95]

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[95] No less than ten different exceptions have found some measure of support:

(1) The Bernstein Exception. This exception precludes application of the act of state doctrine if the State Department issues a letter informing the court that the executive branch deems application of the doctrine unnecessary in a given case. *See, e.g.*, Bernstein v. N.V. Nederlandische—Amerikaansche Stoomvaart—Maatschappij, 210 F.2d 375 (2d Cir. 1954).

(2) The Commercial Activity Exception. This exception provides that commercial activity will not be protected by the act of state doctrine even if the sovereign is directly involved in the activity. *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-706 (1976).

(3) The United States Property Situs Exception. Courts will refuse to apply the act of state doctrine to shield an act of a foreign state which affects property in the United States unless such act is consistent with United States law and policy. *See* Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51-52 (2d Cir. 1965)(refusing to enforce Iraqi confiscatory decree in the United States because decree violated bill of attainder clause and fifth and fourteenth amendment due process rights), *cert. denied*, 382 U.S. 1027 (1966).

(4) Violation of Customary International Law. This exception holds that the act of state doctrine should not be invoked to preclude review of acts of a foreign state where it is found that the acts violate customary international law. *See, e.g.*, Liu v. Republic of China, 892 F.2d 1419, 1433 (9th Cir. 1989), *cert. dismissed*, 111 S.Ct. 27 (1990)(court held that there is "international consensus condemning murder"); Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984)(dictum supporting the customary international law exception).

(5) Treaty Exception. This exception is similar to the exception for violations of customary international law except that the act of the foreign sovereign is found to have violated an international treaty. *See* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984)(Ethiopia refused to pay compensation for Kalamazoo's expropriated holdings even though a treaty between the United States and Ethiopia prohibited the taking of property without just compensation).

(6) Human Rights Exception. This exception recognizes an exception to the act of state doctrine for any claim arising out of an alleged violation of fundamental human rights. *See, e.g.*, Comment, *Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 353 (1981); Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191 (1983).

(7) Governmental Extinction. This exception holds that the act of state doctrine should not be applied to acts of a government which no longer exists. *See* Menzel v. List, 49 Misc. 2d 300, 311, 267 N.Y.S.2d 804, 816 (Sup. Ct. 1966)(theft of paintings during World War II by agents of the Nazi government), *aff'd in part, modified in part*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *rev'd on other grounds*, 24 N.Y.2d 91, 246

The opposite conclusions regarding the applicability of the act of state doctrine in the facially similar cases of *Kirkpatrick* and *Clayco* demonstrate that the complex issues in act of state cases are ill-suited to the formulation of broad exceptions. In *Clayco*, allegations of bribes to high ranking government officials to obtain oil leases resulted in dismissal on act of state grounds.[96] In *Kirkpatrick*, allegations of bribes to Nigerian government officials to obtain defense contracts there did not require dismissal on act of state grounds.

If the courts follow the exceptions approach to analyzing act of state doctrine questions, both seem to involve commercial activity. A commercial activity exception to the doctrine would require the *Clayco* Court to deny the applicability of the doctrine in a case with serious foreign policy implications.[97] If applying the bribery exception, once again, the doctrine would not be available in *Clayco*.[98] The exceptions

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N.E.2d 742, 298 N.Y.S.2d 979 (1969).

(8) Waiver. This exception holds that the act of state doctrine should not be applied where the foreign government consents to the court's examination of the validity of the state's act. *See, e.g.*, Compania de Gas de Nuevo Laredo v. Entex, Inc., 686 F.2d 322, 326 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983).

(9) Counterclaims. This exception holds that the act of state doctrine should not be applied to counterproceedings. *See, e.g.*, Alfred Dunhill of London v. Cuba, 425 U.S. 682, 733 (1976) (Marshall, J., dissenting); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972) (Rehnquist, J., plurality opinion).

(10) Bribery. This exception would hold the doctrine inapplicable in cases involving bribes. *See e.g.*, Recent Decision, *Act of State—A Bribery Exception to the Act of State Doctrine? Act of State Doctrine Bars Judicial Inquiry Into the Validity of a Foreign Sovereign's Acts, But Not Into the Motivations Behind the Acts. W.S. Kirkpatrick, Inc. v. Environmental Tectonics, 110 S.Ct. 701 (1990)*, 22 VAND. J. TRANSNAT'L L. 1231 (1989); Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U.L. REV. 203 (1984).

[96] Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d, 404, 406-09, (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). The Ninth Circuit Court of Appeals found the potential interference with foreign policy justified application of the doctrine to bar the suit. *Id.*

[97] The oil minister charged with accepting bribes was the son of the country's ruler. *Clayco* at 405.

[98] *See generally* Note, *Act of State—A Bribery Exception to the Act of State Doctrine? Act of State Doctrine Bars Judicial Inquiry into the Validity of a Foreign Sovereign's Acts, But Not into the Motivations Behind the Acts. W.S. Kirkpatrick v. Environmental Tectonics, 110 S.Ct. 701 (1990)*, 22 VAND. J. TRANSNAT'L L. 1231 (1989); Note, *International Commercial Bribery and the Act of State Doctrine*, 67 WASH. U.L.Q. 601 (1989); Note, *The Act of State Doctrine and the Problem of Judicial Inconsistency*, 14 N.C. J. INT'L L. & COMMERCIAL REG. 495 (1989).

approach offers no advantages over the "pure" balancing approach and reduces the judicial systems' flexibility to deal with cases such as *Clayco*.[99]

A better approach would be to abandon adopting specific exceptions and to focus instead on the underlying purpose of the act of state doctrine. Since *Sabbatino* there has been general agreement that the goal of the act of state doctrine is to avoid judicial interference in the conduct of the nation's foreign affairs.[100] As seen in the Ninth Circuit's decision in *Marcos II*, this result can be accomplished through use of the *Sabbatino* balancing test without resorting to specific exceptions.

IV. The Marcos Cases

The United States Courts of Appeal for the Second and Ninth Circuits apparently followed the "pure" theory[101] of applying the *Sabbatino* balancing approach in refusing to invoke the act of state doctrine to bar claims against Ferdinand Marcos.[102] In these cases, decided before the Supreme Court decision in *Kirkpatrick*, the Republic of the Philippines brought several suits against Marcos alleging, *inter alia*, that Marcos and his allies had systematically looted the Philippine treasury.[103] In each of the cases, the Courts of Appeal avoided applying the act of state doctrine without resorting to the rubric of exceptions.

The United States Court of Appeals for the Second Circuit held that Marcos' acts were "private" rather than "public" and thus not protected by the act of state doctrine.[104] The Second Circuit held that even if Marcos' acts were considered "public," the act of state doctrine would not bar adjudication since there would be little potential for interference with the executive's conduct of foreign affairs.[105]

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[99] *See also* International Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981) (involving issues easily categorized as "commercial activity," in which use of the act of state doctrine to bar the suit seems appropriate).

[100] *See infra* note 115 and accompanying text.

[101] *See supra* note 54 and accompanying text.

[102] Republic of the Philippines v. Marcos (*Marcos II*), 862 F.2d 1355 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (*see infra* notes 130-50 and accompanying text); Republic of the Philippines v. Marcos (*Marcos I*), 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom.* Ancor Holdings, N.V. v. Republic of the Philippines, 480 U.S. 942 (1987), *cert. denied sub nom.* New York Land Co. v. Republic of the Philippines, 481 U.S. 1048 (1987) (*see infra* notes 107-29 and accompanying text).

[103] *Id.*

[104] Marcos I, 806 F.2d at 359.

[105] *Id.*

The United States Court of Appeals for the Ninth Circuit, focusing on the underlying purpose of the doctrine, held that because the purpose of the doctrine is to "[k]eep the judicial branch out of foreign affairs," the doctrine has "no applicability" where a deposed dictator seeks to defeat a claim brought against him by his former country.[106]

A. Republic of the Philippines v. Marcos (Marcos I)[107]

In *Marcos I*, the Republic of the Philippines (Republic) sought to recover several New York properties allegedly purchased with assets wrongfully taken from the Philippines by ex-President Ferdinand Marcos and his wife Imelda.[108] The owners of the properties, alleged to be holding the properties for the Marcoses' benefit, raised the act of state doctrine as a defense when the Republic sought an injunction prohibiting the sale or encumbrance of those properties.[109] The United States District Court for the Southern District of New York acknowledged that the doctrine might later apply to bar the suit, but held that based on the incomplete record then before the court, the act of state doctrine did not require dismissal.[110] Finding that the Republic had satisfied the requirements for the issuance of a preliminary injunction, the district court granted the Republic's motion.[111]

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[106] *Marcos II*, 862 F.2d at 1360-61.

[107] Republic of the Philippines v. Marcos (*Marcos I*), 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom.* Ancor Holdings N.V. v. Republic of the Philippines, 480 U.S. 942 (1987), *cert. denied sub nom.* New York Land Co. v. Republic of the Philippines, 481 U.S. 1048 (1987).

[108] *Id.*

[109] *Id.* at 346. The Republic sought the recovery of five properties located in New York. Four of the properties were owned by three Panamanian corporations which had issued bearer shares to unknown persons. *Id.* at 347. The evidence linking the properties to the Marcoses was "complex and circumstantial." *Id.* at 349. After a detailed review of the evidence the Court of Appeals for the Second Circuit found sufficient support for the allegations that the Marcoses were the beneficial owners of the properties. *Id.* at 350.

[110] New York Land Co. v. Republic of Philippines, 634 F. Supp. 279 (S.D.N.Y. 1986), *aff'd sub nom.* Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom.* Ancor Holdings, N.V. v. Republic of the Philippines (1987), *cert. denied*, 481 U.S. 1048 (1987).

[111] 806 F.2d at 344, 346 (citing 634 F. Supp. 279, 281 (S.D.N.Y. 1986). Under the test outlined in Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70 (2d Cir. 1979), the applicant for a preliminary injunction must show (a) irreparable injury and (b) either: (1) likelihood of success on the merits or (2) sufficiently serious

On appeal, the United States Court of Appeals for the Second Circuit affirmed, noting that *Sabbatino*[112] indicated the underlying rationale of the doctrine is concern over the proper separation of powers between the coordinate branches of the United States government.[113] The Second Circuit stated that while the foundation of the doctrine lies in separation of powers concerns, the ultimate decision to invoke the doctrine belongs to the court.[114] Circuit Court of Appeals cases subsequent to *Sabbatino* have identified the potential interference with foreign relations as the most important consideration in determining the applicability of the act of state doctrine.[115] The United States Supreme Court, however, had not explicitly ruled on this issue.

Prior act of state cases established various limits on the doctrine's availability. These limits included the *Sabbatino* balancing test, procedural and definitional limitations to the doctrine, and suggested exceptions to the applicability of the doctrine.[116] *Sabbatino* indicated that these decisions are to be made on a case-by-case basis.[117]

As the United States Supreme Court holding in *Kirkpatrick* demonstrates, if the party seeking the doctrine's protection fails to satisfy a

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questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in his favor. The district court found the Republic had met this burden. New York Land Co. v. Republic of the Philippines, 634 F. Supp. 279, 281 (S.D.N.Y. 1986).

[112] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[113] 806 F.2d at 358. *See* Henkin, *supra* note 2 suggesting that the United States Constitution is ambiguous about the limits on the role of the judicial branch in cases involving foreign affairs.

[114] 806 F.2d at 358 (citing Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 n.2 (2d Cir. 1985), *cert. dismissed*, 473 U.S. 934 (1985)). In *Marcos I*, the Court of Appeals for the Second Circuit found the United States Executive Branch had indicated that the suit would not be an improper intrusion on the Executive Branch's management of foreign affairs. 806 F.2d at 357 n.3. The court of appeals found the Executive Branch's position to be a relevant but not dispositive factor in determining whether to invoke the act of state doctrine. *Id.* at 358.

[115] DeRoburt v. Gannett Co., 733 F.2d 701, 703 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 607 (9th Cir. 1976) (potential interference with foreign relations is the crucial element in determining whether deference should be accorded in a given case), *cert. denied*, 472 U.S. 1032 (1985).

[116] *Marcos I*, 806 F.2d at 359 (burden of establishing that particular conduct constitutes an act of state is on the party invoking the defense); *Underhill*, 168 U.S. at 252 (act must be within foreign sovereign's territory); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (acts must be "official"); *see also, supra* note 95.

[117] *Sabbatino*, 376 U.S. at 428.

procedural burden, or fails to show that the challenged acts meet the definitional requirements to qualify as an act of state, the doctrine will not apply.[118] However, before *Kirkpatrick*, the exact definition of "act of state" had not been provided by the United States Supreme Court.[119] Other cases determined the the doctrine's applicability by looking at whether applying the doctrine would further the purposes of the doctrine.[120] The United States Supreme Court's divided decisions in *Dunhill* and *City Bank* left the lower courts uncertain about the proper application of the *Sabbatino* balancing test.

In *Marcos I*, the Second Circuit approached the issue of the applicability of the act of state doctrine by first considering the procedural and definitional limitations to the doctrine. The court quoted the definition of the act of state doctrine in the Restatement (Second) of Foreign Relation Law which provides that United States courts "will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests."[121] The use of a definition of act of state which did not mention the purpose of the doctrine reflected the initial approach taken by the Second Circuit in determining whether the act of state doctrine applied to bar the case.

The court first focused on whether the challenged acts qualified as acts of state,[122] noting that the definition of an act of state has developed to require that "the acts must be *public* acts of the sovereign."[123] The court made the "crucial distinction"[124] between Marcos' acts as head of state, which might be protected by the act of state doctrine even if illegal under Philippine law, and his purely private acts.[125] Because the

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[118] *Kirkpatrick*, 110 S. Ct. at 704-07.

[119] Questions regarding the scope of acts covered by the doctrine will continue to arise. *See* Liu v. Republic of China, 892 F.2d 1419 (9th. Cir. 1989). *Liu* presented two of these questions: (1) What level of foreign official must authorize the acts for them to be considered "official" acts of state subject to the doctrine's protection? (2) Are decisions of foreign courts to be considered acts of state? *Id.*

[120] *See supra* notes 6-10.

[121] *Marcos I*, 806 F.2d at 358 (quoting RESTATEMENT (SECOND) OF FOREIGN RELATION LAW § 41 (1965)).

[122] *Marcos I* at 358. *See also*, Comment, *International Relations—Act of State Doctrine—Marcos' Assets as Act of Philippine State—Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986), cert. dismissed, 107 S. Ct. 1597 (1987)*, 11 SUFFOLK TRANSNAT'L L.J. 509, 517 (1987).

[123] 806 F.2d at 358 (citations omitted). *See supra* note 116.

[124] *Id.* at 359.

[125] *Id.*

defendants had failed to show that the challenged acts fit within the definition of acts of state, the court held that the act of state doctrine did not yet apply.[126]

Thus, in *Marcos I*, the Court of Appeals for the Second Circuit limited the use of the act of state doctrine by focusing on whether the challenged acts qualified as acts of state. However, the court also stated that even if the defendants were later able to show that the challenged acts qualified as acts of state when perpetrated, two other considerations might limit the applicability of the doctrine.[127]

First, the potential for interference with the executive branch's conduct of foreign policy was greatly reduced because the Marcos government no longer existed.[128] Second, justification for applying the doctrine is weaker when a foreign nation itself asks United States courts to scrutinize the actions of its government.[129] Both of these considerations, which address whether barring the claims would serve the purpose of the doctrine, reflect the *Sabbatino* balancing test. They indicate that had the acts qualified as acts of state, the Second Circuit Court of Appeals would likely have limited the use of the doctrine on the grounds that applying the doctrine to the case would not advance the interests the doctrine was designed to serve.

B. Republic of the Philippines v. Marcos (Marcos II)[130]

A few months after the Second Circuit Court of Appeals found the act of state doctrine inapplicable in *Marcos I*,[131] a divided three-member panel of the Court of Appeals for the Ninth Circuit held that the act of state doctrine barred a similar suit brought by the Republic against

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[126] *Id.* at 359-60.

[127] *Id.* at 359.

[128] *Id.* (citing *Sabbatino*, 376 U.S. at 428).

[129] *Id.* at 359.

[130] Republic of the Philippines v. Marcos (Marcos II), 862 F.2d 1355 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (*rehearing en banc reversing* Republic of the Philippines v. Marcos, 818 F.2d 1355 (9th Cir. 1987)).

[131] Republic of the Philippines v. Marcos (Marcos I), 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom.* Ancor Holdings, N.V. v. Republic of the Philippines, 480 U.S. 942 (1987), *cert. denied sub nom.* New York Land Co. v. Republic of the Philippines, 481 U.S. 1048 (1987) (*see supra* notes 107-29 and accompanying text).

Marcos in the Ninth Circuit.[132] This decision was later reversed by the Ninth Circuit sitting *en banc*. The panel's discussion of the act of state doctrine is noteworthy because it demonstrates the current confusion surrounding application of the doctrine.

The panel stated that the case implicated the act of state doctrine "in its most fundamental sense,"[133] because adjudicating the claims would require a United States court to inquire into the validity of the acts of a foreign sovereign within his own territory.[134] The panel noted that the main purpose of the act of state doctrine is to prevent judicial interference in foreign affairs.[135]

The Ninth Circuit panel approached the issue of the applicability of the act of state doctrine by first considering the procedural and definitional limits on the act of state doctrine. The panel found that the Republic's characterization of Marcos' acts, power, and status in the complaint had discharged Marcos' burden of producing evidence demonstrating that the challenged acts qualified as acts of state.[136] Finding that many of the challenged acts "were an exercise of [Marcos'] authority as the country's head of state and, as such, were the sovereign

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[132] Marcos II, 818 F.2d 1473; Comment, *Republic of Philippines v. Marcos: The Act of State Doctrine As a Defense to Civil Liability for Former Officials of Foreign Governments*, 6 UCLA PAC. BASIN L.J., 134, 135 (1989) (argues that the case was "wrongly decided"); Note, *Through the Past, Darkly: A Re-Examination of the Act of State Doctrine in Republic of Philippines v. Marcos*, 18 SW U.L. REV. 255, 280 (1989) ("act of state doctrine should not protect acts by foreign heads of state that contravene that nation's laws"); Note, *Republic of Philippines v. Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 AM. U.L. REV. 225, 247 (1988) (decision was "inconsistent with precedent" and defies the basic policies underlying the doctrine); Thompson, *RICO and the Chase After the Marcos Billions; Deposed Dictators Can't Hide in the Ninth Circuit*, 9 CA. LAW. 20 (1989).

[133] 818 F.2d at 1482.

[134] *Id.* at 1481. The panel viewed the *Underhill* formulation of the doctrine as expressing the "essence" of the act of state doctrine "as it is applied in our courts today." *Id.*

[135] *Id.* at 1482 (citing International Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981) ("The doctrine, as developed by precedent, expresses a strong sense that in questioning the validity of foreign acts of state the judiciary may hinder this country's international diplomacy and 'embarrass the United States in the eyes of the world.'"), *cert. denied*, 454 U.S. 1163 (1982).

[136] *Id.* at 1482 n.6. This conclusion is criticized as ignoring the "well established principle that the burden of proving that an act is official rests with the party seeking the protection of the act of state doctrine." Note, *Republic of Philippines v. Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 AM. U.L. REV. 225, 248 (1988).

acts of the Philippines,"[137] the panel rejected the Republic's assertion that the act of state doctrine did not apply because Marcos' acts did not qualify as acts of state.[138] Thus, the challenged acts had met the procedural and definitional requirements to qualify as acts of state.

The panel then discussed whether invoking the doctrine to bar adjudication of the claims on the merits furthered the purpose of the doctrine. Although the possibility of judicial interference in foreign affairs was reduced because Marcos no longer held power and the Republic had requested the adjudication of the claims, the panel found the possibility of judicial interference in foreign affairs still existed.[139] The panel accordingly held that the act of state doctrine barred inquiry into the legality of Marcos' acts while President.[140]

C. Marcos II *(rehearing en banc)*[141]

Because of the controversy created by the panel's decision, the Court of Appeals for the Ninth Circuit decided to rehear the case *en banc*.[142] The *en banc* court began its analysis with the premise that "[t]he purpose of the [act of state doctrine] is to keep the judiciary from

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[137] 818 F.2d at 1482, 1484-85. The Republic's complaint alleged that Marcos had improperly acquired assets through the expropriation of property and the creation of public monopolies. The panel found these to be purely governmental acts. *Id.* After finding the challenged acts were "governmental in character", the panel stated that United States courts uniformly refused to question the motives underlying such acts. *Id.* at 1485 (citing Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 407 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)).

[138] 818 F.2d at 1483. The Republic contended that to the extent the acts were illegal under Philippine law, they could not qualify as public, governmental acts. *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987).

[139] 818 F.2d at 1486 n.14 The panel mentioned the possibility of upsetting current Philippine government if the court found Marcos' actions were completely legal and proper and the possibility that litigation might take years during which time Marcos' faction might regain power. The panel failed to consider that invoking the doctrine to bar the suit would be more likely to embarrass the United States and interfere with the conduct of foreign relations because it would upset the current Philippine government to be denied a remedy. The possibility of upsetting an undetermined future government of the Philippines by hearing the case does not outweigh the possibility of upsetting the current government of the Philippines by denying to adjudicate the Republic's claims. The panel should thus have limited the applicability of the act of state doctrine in this case.

[140] *Id.* at 1490.

[141] 862 F.2d 1355 (9th Cir. 1988)

[142] *Id.*

embroiling the courts and the country in the affairs of the foreign nation whose acts are challenged."[143]

In contrast to the initial focus on the definitional and procedural limitations as done by the panel in *Marcos II*, and the Second Circuit Court of Appeals in *Marcos I*, the *en banc* court first focused on whether the underlying reasons for the doctrine supported its application in this case. The court stated that although a dictator in power would likely receive protection under the doctrine, a former dictator would find it difficult to employ the defense because the "balance of considerations" would shift.[144]

The *en banc* court narrowed the scope of the act of state doctrine by expressly stating that the act of state doctrine has "little or no applicability" in cases against former dictators.[145] However, this narrowing in the scope of the doctrine is not framed as an exception to the act of state doctrine. The court makes it clear that the act of state doctrine should not be applied because protecting an ex-dictator against claims by his former country does not serve the doctrine's purpose.[146] Rather than referring to possible exceptions to the act of state doctrine to deny the doctrine's applicability, the court employed the *Sabbatino* balancing test.

The *en banc* court also reviewed the panel's holding that the Republic had discharged Marcos' burden of demonstrating the challenged acts were acts of state. Because the panel's holding conflicted with precedent,[147] the *en banc* court indicated that the panel had erred in finding that the challenged acts qualified as acts of state.[148] The *en banc* court found that Marcos had not met the procedural burden of demonstrating the applicability of the doctrine.[149] The acts therefore would also be denied act of state protection under the procedural and definitional limits on the doctrine.[150]

The analysis of the *en banc* Court of Appeals for the Ninth Circuit in *Marcos II* exemplifies the approach courts should follow when con-

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[143] *Id.* at 1360.

[144] *Id.* at 1360 (citing *Sabbatino*, 376 U.S. at 428. Sabbatino suggests that when the government alleged to have perpetrated the challenged acts is no longer in existence there may be less justification for applying the doctrine).

[145] *Id.* at 1360-61.

[146] *Id.* at 1360.

[147] *See supra* note 116.

[148] *Marcos II* at 1360-61.

[149] *Id.* at 1361.

[150] *Id.*

sidering application of the act of state doctrine. Initially, a court should consider whether the foreign affairs implications are significant enough to justify declining to adjudicate the case on the merits. If the the court concludes the potential foreign affairs implications justify further consideration of the doctrine, the court should then proceed to determine whether the defendant has met the burden of demonstrating the challenged acts qualify as acts of state which the doctrine may protect. Finally, if the acts do fall within the definition of "act of state", the court must consider if all the relevant factors justify protecting the challenged acts under the doctrine.

IV. COMMENTARY AND CONCLUSION

Because the United States Supreme Court decisions prior to *Kirkpatrick* had not established a definite standard for act of state doctrine analysis, confusion has surrounded the application of this judicially created doctrine in the lower courts. District courts and the courts of appeal, uncertain about the proper scope and application of the doctrine, have focused on different factors and reached inconsistent conclusions. Aside from the potential injustice to individual litigants from improper application of the doctrine, the most serious problem resulting from the confusion has been the needless waste of scarce judicial resources.[151]

The act of state doctrine plays an important role in preventing courts of the United States from embroiling themselves in the political affairs

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[151] The inefficiency resulting from the uncertain application of the act of state doctrine in the lower courts may in itself create injustice for individual litigants by delaying their opportunity to have the claim tried on the merits for years. The history of several cases brought against Marcos by individuals seeking damages under 28 U.S.C. § 1350 (Alien Tort Claims Act) provide a good example of the ineffeciency and injustice caused by the confusion. The plaintiffs in these cases sought recovery for claims such as murder, torture and other human rights violations. The district court dismissed on act of state doctrine grounds in 1986. In 1990 the cases were reinstated based on the holding of the *en banc* Ninth Circuit Court of Appeals in *Marcos II*. *See* Trajano v. Marcos, No. 86-0207 (D. Haw. July 18, 1986), *appeal docketed*, No. 86-2448 (9th Cir. Aug. 20, 1986); Hilao v. Marcos, No. 86-390 (D. Haw. July 18, 1986), *appeal docketed*, No. 86-2449 (9th Cir. Aug. 20, 1986); Sison v. Marcos, No. 86-0225 (D. Haw. July 18, 1986), *appeal docketed*, No. 86-2496 (9th Cir. Aug. 27, 1986). For a description of these cases *see*, Recent Development, *Alien Tort Claims Act: Act of State Doctrine Requires Dismissal of Human Rights Claims Brought Against Former Philippine President Residing in the United States*, 27 VA. J. INT'L LAW 433 (Winter 1987).

of the nation. However, since the doctrine typically operates to bar adjudication of cases otherwise properly before the court, it should apply only where the potential for interference with the nation's foreign affairs is clear. The goal of preventing improper judicial intrusion into foreign affairs would be achieved most efficiently through use of the "pure" form of the *Sabbatino* balancing of relevant considerations test rather than focusing on specific exceptions to the act of state doctrine to deny its applicability.[152]

The recent decision in *Kirkpatrick* provides welcome guidance for the lower courts on the proper application of the act of state doctrine. The decision limits the scope of the doctrine by providing a bright line rule that the doctrine does not apply unless adjudicating the claim requires questioning the validity of the public acts of a foreign sovereign within its own jurisdiction. This ruling helps to clarify the requirements that a party attempting to assert the act of state doctrine must satisfy to implicate the doctrine. However, *Kirkpatrick* did not reach important unresolved issues regarding the proper analysis to follow if the party does satisfy the burden of showing that the challenged act qualifies as an act of state.

In cases where the burden of showing the challenged act does qualify as an act of state is met, the *en banc* Ninth Circuit Court of Appeals' holding in *Marcos II* demonstrates an appropriate approach. The *en banc* court held the act of state doctrine inapplicable primarily because denying to adjudicate the claims would not serve the purposes the doctrine was designed to serve.

Despite the emphasis in *Kirkpatrick* that the doctrine does not apply unless the challenged act qualifies as an act of state, courts should not necessarily focus their initial inquiries exclusively on the issue of whether the challenged acts meet the definitional requirements developed to limit the application of the doctrine. The courts should instead attempt to resolve the issue of the doctrine's applicability in the most efficient manner possible. Some cases, such as *Kirkpatrick*, present fact patterns where the failure of the challenged acts to meet the definitional requirements provides the easiest resolution to the question of the doctrine's applicability. Other cases, such as *Marcos I* and *Marcos II*, present fact patterns where denial of the doctrine's applicability is more

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[152] The exceptions to the act of state doctrine which have found support in the courts are better viewed as establishing precedent for similar cases. This approach will allow the courts more flexibility to determine the doctrine's applicability based on the purpose application of the doctrine would serve in a given case.

easily based on the *Sabbatino* balance of relevant considerations test. In order to resolve the issue of the doctine's applicability in the most efficient manner, a court should examine whether *either* the definitional requirements established by *Kirkpatrick* and other cases *or* the *Sabbatino* balance of relevant considerations test provides easy grounds to deny the doctrine's applicability.

Thus, when the act of state doctrine is raised as a defense, initially a court should broadly consider whether the facts of the case may justify application of the doctrine as a defense under the *Sabbatino* balancing test. If the court believes the doctrine may apply, or is unsure based on the facts then before it, the court should then allow the defense to present its relevant evidence.

Applying the *Sabbatino* balancing test in a general fashion, before taking extensive evidence on whether the challenged acts meet the procedural and definitional requirements, would prevent the waste of judicial time and resources in determining whether the acts qualified as acts of state in cases where the balance of relevant considerations is clearly against allowing the act of state doctrine to bar the claim.[153] This approach would also have the advantage of focusing the courts on the purposes the doctrine was designed to serve.

If the court finds further consideration of the act of state doctrine justified, the court should then consider whether the defendant has met the procedural and definitional requirements of demonstrating that the challenged acts qualify as acts of state. Finally, if the defendant meets these requirements, the court should determine whether the act of state

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[153] The increased efficiency this initial "purposes of the doctrine" step would achieve is demonstrated in *Marcos I*. *See supra* notes 107-129 and accompanying text. *See also*, Comment, *International Relations—Act of State Doctrine—Marcos' Assets as Act of Philippine State, Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986), cert. dismissed, 107 S.Ct. 1597 (1987)*, 11 SUFFOLK TRANSNAT'L L.J. 509 (1987)("The United States Court of Appeals for the Second Circuit goes to great lengths to analyze whether Marcos' acquisition of the properties fell within the confines of an official sovereign act.").

The act of state defense was still being asserted in the district court in *Marcos I* as late as 1990 because the Second Circuit Court of Appeals based its holding that the act of state doctrine did apply on the grounds that the defendants had not yet established that the challenged acts satisfied the definitional requirements. *See* United States of America v. Marcos, (S.D.N.Y. March 12, 1990)(1990 U.S. Dist. LEXIS 2678); If the Second Circuit court had based its holding that the doctrine did not apply on the grounds that the balance of relevant considerations did not justify its application, further consideration of the act of state doctrine would have been unnecessary after the court dealt with the issue for the first time in 1986.

doctrine should be applied to bar the claim by balancing the relevant considerations based on all the facts, as outlined in *Sabbatino*. Approaching act of state doctrine cases through this three-step application of the *Sabbatino* balancing test will result in more efficiency and consistency in deciding these cases.

Mark Haugen and Jeff Good

Book Review: *Hawaii Rules of Evidence Manual* by Addison M. Bowman

Reviewed by Judge Samuel P. King[1]

The Hawaii Rules of Evidence have come of age.

So says Professor Addison M. Bowman who, of all people, is most qualified to judge as he was the reporter for the original codification and author of the original commentaries. To memorialize this maturity, Professor Bowman has put together in one volume the definitive reference material for the practicing attorney. This book will now join the Hawaii Revised Statutes as part of every Hawaii lawyer's basic library.

The book's format is designed for maximum usefulness. Each rule is presented in its present form along with the original commentary. This much is identical to what is set forth in Hawaii Revised Statutes Chapter 626; but there is much more.

A section on the legislative history, if there is any, follows each rule. There were three drafts and five committee reports on the proposed rules. All of them are covered in this section. Extracts from the committee reports are especially helpful as they expand on the commentary with insights into what language in the legislative drafts was deleted or changed and why. The book also notes and explains Legislative amendments made since 1980.

Some rules have no legislative history other than the progress of the rule through the legislative process. For other rules, there is substantial and meaningful legislative history. The exposition on Rule 613 regarding Prior Statements of Witnesses gives valuable strategy for trial practice.

If the Hawaii Intermediate Court of Appeals had easy access to legislative reports, as supplied by Professor Bowman's manual, the

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[1] Senior Judge, United States District Court, District of Hawaii.

court might not have enunciated the wrong standard of review of the trial court's decision on the competency of a rape victim to testify in *State v. Gonsalves*.[2] The court said that "[t]he question of competency of a witness to testify is addressed to the trial court's discretion. . . . Consequently, the appropriate standard of appellate review is the abuse of discretion test."[3] However, as set out in the manual at § 603.1-1,[4] the Conference Committee Report on this issue stated specifically that the trial ruling "should not be determined based on whether the trial court had abused its discretion . . . a witness is either qualified or disqualified, and it is not a matter of degrees."[5] As Professor Bowman points out, the result would have probably been the same under either test in this particular case;[6] but one is left with a certain feeling of disharmony.

We are then treated to pure Bowman expertise in a section (with subsections) which he labels "Analysis of rule ___." Here we find every Hawaii case in the last ten years (through 1989) relating to evidentiary matters, learned expositions on significant problem areas, and references to federal authorities where there has been no Hawaii pronouncement. His analysis of Rule 403 is especially sophisticated.

Professor Bowman not only analyzes the rule, he also analyzes the subject matter. Thus there are subsections entitled "Res ipsa loquitur",[7] "Intoxilyzer cases",[8] "Other accidents",[9] "Demonstrations and videotapes",[10] "The 'crime of fraud' exception",[11] and others. Relevant cases in these areas are collected and analyzed together. Some make fun reading, as, for example, the analysis of Hawaii's cases on "Excited utterances",[12] and the exposition on "Other accidents".[13]

To make the volume more useful to the practicing lawyer and where he has felt that it would be helpful to do so, Professor Bowman has made "Practice Suggestions" regarding each side's tactics. These merit

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[2] 5 Haw. App. 659, 706 P.2d 1333 (1985).
[3] *Id.* at 665, 706 P.2d at 1338-39 (citations omitted).
[4] A. Bowman, Hawaii Rules of Evidence Manual 212-13 (1990).
[5] *Id.* at 213.
[6] *Id.* at 215.
[7] *Id.* § 301-2A, at 39.
[8] *Id.* § 402-2A, at 74.
[9] *Id.* § 403-2C, at 89.
[10] *Id.* § 403-2F, at 97.
[11] *Id.* § 503-2E, at 157.
[12] *Id.* § 803-2B(2), at 341.
[13] *Id.* § 403-2C, at 89.

careful study whenever a rule so treated is under consideration.

Chapter 12, entitled "Objections to Evidence", is taken from the Hawaii Criminal Benchbook which was also written by Professor Bowman. Chapter 13, entitled "Criminal Cases and the Sixth Amendment", examines evidentiary issues that arise in criminal cases under the United States Constitution and the Hawaii Constitution.

This not the place or time to discuss the innovations in the Hawaii Rules of Evidence which have survived the test of ten years of application. Whatever is not explained in the commentaries, legislative histories, and analyses may be found in Professor Bowman's law review article, *The Hawaii Rules of Evidence.*[14]

If you haven't bought your copy of Bowman's Evidence Manual yet, hurry to the bookstore before they are all gone!

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[14] 2 U. HAW. L. REV. 431 (1981).