UNIVERSITY OF HAWAI'I LAW REVIEW

VOLUME 15

1993

University of Hawai'i Law Review

Volume 15 / Number 1 / Summer 1993

George Marion Johnson Memorial Issue

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University of Hawai'i Law Review

Volume 15 / Number 1 / Summer 1993

The University of Hawai'i Law Review expresses its appreciation to the administration and staff of the William S. Richardson School of Law. The Law Review would also like to give special thanks to Yvonne Kobashigawa for her assistance and endless patience.

RECENT DEVELOPMENTS

GEORGE MARION JOHNSON
1900-1987

George Marion Johnson and the "Irrelevance of Race"

by Peter J. Levinson*

George Marion Johnson removed barriers to equal opportunity by the strength of his intellectual engagement in the struggle against discrimination. During the World War II period, he helped guide and direct the Fair Employment Practice Committee (FEPC)—making a sustained and unique contribution to governmental anti-discrimination efforts in the formative period of the civil rights movement. He provided distinguished leadership to Howard University School of Law from 1946 to 1958, a time of important accomplishments in that institution's history. In the late 1950's, George Johnson participated in shaping the United States Commission on Civil Rights—first as director of the legal staff and then as a Presidentially-appointed Commission Member. The challenges that still awaited him included leading a new university in Africa, teaching and writing at Michigan State University, and directing the pre-admission program at the University of Hawaii School of Law.

Growing up in San Bernardino, California early in the century, George contributed to a hardworking household by helping his mother launder the clothes of white families—and later by holding various part-time and summer jobs.[1] The Johnsons lived near the railroad

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* A.B. Brandeis University, 1965; J.D. Harvard University, 1968. The author, a member of the Hawaii bar, currently serves on the professional staff of a congressional committee. He acknowledges the sustaining encouragement of Dean Jeremy T. Harrison and Prof. Richard S. Miller of the William S. Richardson School of Law, University of Hawaii at Manoa for the author's effort to research and describe Dr. Johnson's inspiring life. The author greatly valued a personal friendship with Dr. Johnson that began in the early 1970s and continued until Dr. Johnson's death in 1987.

[1] GEORGE M. JOHNSON, THE MAKING OF A LIBERAL: THE AUTOBIOGRAPHY OF GEORGE M. JOHNSON 1-3, 5-6 (1984) (unpublished manuscript available in the William S Richardson School of Law Library, University of Hawaii at Manoa).

tracks in an integrated neighborhood convenient to the father's employment with the Santa Fe Railroad.[2] An Army training program made it possible for George, one of only two black students in his high school class, to enroll in the University of California at Berkeley.[3]

Financing higher education was no easy task for George Johnson. The termination of the Student Army Training Corps with the end of World War I necessitated an interruption in his studies.[4] After working as a janitor to pay his brother's tuition, George Johnson managed to return to the University—helping a professor's family with household chores, including washing diapers, in return for room, board, and a $5.00 weekly salary.[5] Three years of employment followed graduation—including night jobs at garages—before Johnson could begin his legal studies at the University of California's Boalt Hall with the help of part-time work.[6] Johnson, the only black student in his law school class,[7] obtained the L.L.B. in 1929—and seven years later achieved the high distinction of also earning a J.S.D.[8]

George Johnson's first major career commitment was to the new field of taxation. At the suggestion of Professor Roger Traynor, who would later become Chief Justice of the California Supreme Court, he sought employment with the State Board of Equalization, which administered California state taxes.[9] Johnson had been a student of Professor Traynor in courses on state and federal taxation.[10] Professor Traynor, who Johnson came to view as his "mentor,"[11] participated in drafting various California tax statutes including the Retail Sales Tax Act of 1933;[12] Johnson worked on regulations implementing the sales tax.[13]

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[2] *Id.* at 2.

[3] *Id.* at 4, 6.

[4] *Id.* at 7 - 8.

[5] *Id.* at 8.

[6] *Id.* at 10 - 12.

[7] *Id.* at 12.

[8] Reportedly no other black person had ever been awarded a University of California J.S.D. degree. Mary Dixon Norris, *Gets Board of Equalization Post and Howard U. Professorship*, CALIFORNIA EAGLE, May 30, 1940 (in collection of articles on George M. Johnson, Moorland-Spingarn Research Center, Howard University).

[9] Johnson, *supra* note 1, at 16.

[10] *Id.* at 14.

[11] *Id.*

[12] Adrian A. Kragen, *Chief Justice Traynor and the Law of Taxation*, 35 HASTINGS L. J. 801, 802 (1984).

[13] Biographical Sketch of George M. Johnson (on file at William S. Richardson School of Law, University of Hawaii at Manoa).

Tax litigation frequently raised significant constitutional law questions in the 1930's—with the Supreme Court struggling to reconcile national prerogatives and state powers. Issues of federalism were of central concern to states—such as California—seeking new sources of revenue. In this environment, George Johnson examined commerce clause limitations on state sales taxes—seeking to explain and synthesize the evolving case law. The task required intellectual rigor because judicial outcomes often turned on subtle factual distinctions.

In two related California Law Review articles, George Johnson demonstrated a mastery of detail and a dispassionate, judicious approach to legal problems that would become his stock in trade. The first piece[14] distinguished—based on relationship to interstate transportation—between sales transactions that a state could and could not tax. With reference to sales transactions legitimately subject to state taxation, Dr. Johnson described the Commerce Clause's requirement of nondiscrimination against out-of-state goods. The subsequent article[15] traced the evolution of Supreme Court doctrine away from rigid commerce clause limitations on state taxing power. Dr. Johnson criticized the judicial distinction "between activities that are integral parts of interstate commerce and those that are not"[16] and argued that "[t]he complete abandonment of the 'immunity rule,' with proper safeguards against discriminations against interstate commerce, would allow for greater recognition of the economic realities in this field of taxation."[17] He then focused on issues of fair apportionment when more than one state sought to tax activity. In subsequent years, Dr. Johnson would address the federal-state relationship and questions of fairness in the very different constitutional context of civil rights.

In 1939, Dr. Johnson left the California State Board of Equalization and began teaching at Howard University in the nation's capital—the start of a long academic career. Howard Law School, Dr. Johnson observed in his autobiography, had a faculty that was "small but scholastically outstanding."[18] Dr. Johnson accepted a substantial pay cut to teach there.

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[14] George M. Johnson, *State Sales Taxes and the Commerce Clause*, 24 CAL. L. REV. 155 (1936).

[15] George M. Johnson, *Multi-State Taxation of Interstate Sales*, 27 CAL. L. REV. 549 (1939).

[16] *Id.* at 557.

[17] *Id.*

[18] Johnson, *supra* note 1, at 25.

Racial prejudice in those days effectively barred black lawyers from teaching opportunities at most law schools. At an earlier point, one of Dr. Johnson's former professors had attempted unsuccessfully to get him a Boalt Hall appointment. George Johnson noted in that connection that Boalt Hall "was simply not ready for a Black person on the faculty."[19] William H. Hastie described Howard as "the one institution to which a colored man can at present look for an opportunity to teach law."[20] Dr. Johnson would observe that in 1950 (eleven years after his initial appointment at Howard) only 18 out of 1805 faculty members at law schools belonging to the Association of American Law Schools were black—and 16 out of the 18 were teaching at either Howard or one other institution, "Lincoln University School of Law which admits Negro students only and has an all-Negro faculty."[21]

Although Dr. Johnson came to Howard without a background in civil rights, he soon became a central figure in the struggle against employment discrimination. The establishment in 1941 of a Fair Employment Practice Committee—pursuant to Executive Order 8802—provided the institutional mechanism for confronting bias in jobs that impacted on defense efforts. A major study of the FEPC described that executive order as "the most important effort in the history of this country to eliminate discrimination in employment by use of governmental authority."[22] President Roosevelt acted in time to forestall a March-on-Washington planned by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters.

Dr. Johnson held various high level positions with the FEPC. Although Committee member Earl Dickerson favored Dr. Johnson for the executive secretary slot—initially the top staff post—the Committee selected former Virgin Islands governor Lawrence Cramer "[b]elieving that a black would have difficulty working with 'lily-white' government agencies."[23] The number two staff job of assistant executive secretary went to Johnson. When the Committee reorganized in 1943 under a

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[19] *Id.* at 24.

[20] *Quoted in* GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE 48 (1984).

[21] George M. Johnson, *Legal Profession*, in THE INTEGRATION OF THE NEGRO INTO AMERICAN SOCIETY 87, 95 (1951).

[22] LOUIS RUCHAMES, RACE, JOBS, & POLITICS: THE STORY OF FEPC 22 (1953) (hereinafter RUCHAMES).

[23] MERL E. REED, SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE 1941-1946, at 24 (1991) (hereinafter REED).

new executive order, Dr. Johnson served—for a period—as one of two assistant chairmen before becoming deputy chairman. Reed describes as "unthinkable [in the environment of the time] that George Johnson, who many blacks believed should have been appointed the FEPC chairman, could even be considered for such a position."[24]

Titles alone do not begin to convey the significance of Dr. Johnson's sustained involvement with the FEPC during the 1941-1945 period. As a result of repeated resignations, the chairmanship shifted four times during the years 1942 and 1943.[25] Dr. Johnson provided critically needed continuity to a Committee often beset by departures and efforts to curtail its operations.

The positions Dr. Johnson held involved substantial duties. "The assistant executive secretary," Louis Ruchames wrote, "served as general counsel and assumed charge of all matters relating to the hearings."[26] Responsibility for hearings later devolved to the Assistant Chairman who "acts as Director of the Hearings Division."[27] Deputy Chairman Johnson also served as Acting Director of the Legal Division—thus "[f]unctioning in this dual capacity."[28] Later FEPC Chairman Malcolm Ross "pointed out that the Deputy Chairman [George Johnson] is charged with the responsibility for supervising the activities of the several division heads, even though these heads are ultimately responsible to the Chairman."[29] Professor Reed describes George Johnson as "the epitome of organization" who "acted as the committee's 'lash,' keeping the heat on the staff."[30] He recounts:

> In his participation at committee meetings, he [Johnson] exhibited a sharp legal mind and talents for both confrontation and compromise.

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[24] *Id.* at 350.

[25] *See* Letter from George M. Johnson, Deputy Chairman, FEPC, to J.R. Bryson, Member of Congress (December 15, 1943) (copy in George M. Johnson files, FEPC records, National Archives).

[26] RUCHAMES, *supra* note 22, at 137.

[27] Memorandum from George M. Johnson, Assistant Chairman, FEPC, to Francis J. Haas, Chairman, FEPC (September 20, 1943) (copy in George M. Johnson files, FEPC records, National Archives).

[28] Memorandum from George M. Johnson, Deputy Chairman & Acting Director of Legal Division, FEPC, to Theodore A. Jones, Administrative Officer, FEPC (December 11, 1943) (copy in George M. Johnson files, FEPC records, National Archives).

[29] Memorandum from George M. Johnson, Deputy Chairman, FEPC, to Malcolm Ross, Chairman, FEPC (October 3, 1944, denominated "*Rough Draft*") (copy in George M. Johnson files, FEPC records, National Archives).

[30] REED, *supra* note 23 at 352.

> His sense of order provided an organizational glue badly needed by committee and staff.[31]

The FEPC, in addition to focusing on employment discrimination against black people, gave considerable attention to national origin-related job bias. Dr. Johnson drafted correspondence for FEPC Chairman Malcolm Ross dismissing a suggestion that loyalty concerns justified denial of employment based on national origin. "The fact that an applicant for employment is of a particular national origin," a letter to a Member of Congress pointed out, "raises no presumption as to his loyalty."[32]

In another context, Dr. Johnson concluded that a contractual anti-discrimination clause could include a qualifying reference to "the Constitution and Laws of the State of California."[33] He noted, however, that a California Constitutional provision barring Chinese from public sector employment "may be questioned as applied to American citizens of Chinese ancestry" on Fourteenth Amendment grounds.[34] Dr. Johnson carefully pointed out that acceptance of the proposed language "should not be considered as precluding the Committee or other appropriate Federal Agency from raising the constitutional question . . . in a proper case."[35]

Discrimination in the civil service against Americans of Japanese ancestry also disturbed Dr. Johnson. "Both Will Maslow and George Johnson," Professor Reed recounts, "believed that the use of separate procedures in appointing Japanese-Americans was contrary to Executive Order 9346 [issued May 27, 1943]."[36]

Dr. Johnson gave careful attention to the details of FEPC hearing procedures. In discussing proceedings before Hearing Commissioners, he emphasized "informality" and "opportunity . . . at each stage for

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[31] *Id.*

[32] Letter from Malcolm Ross, Chairman, FEPC, to Compton I. White, U.S. House of Representatives (March 2, 1944, with "Johnson:mb" on last page) (copy in George M. Johnson files, FEPC records, National Archives).

[33] Letter from George M. Johnson, Deputy Chairman, FEPC, to Lt. Col. Frank S. Rowley, Chief, Legal Branch, Director of Material, Headquarters, Army Service Forces (February 8, 1945) (copy in George M. Johnson files, FEPC records, National Archives).

[34] *Id.*

[35] *Id.*

[36] REED, *supra* note 23, at 242.

an amicable adjustment of the dispute."[37] Due process concerns were central to his thinking. "What is perhaps most important," Dr. Johnson wrote to his staff, "is that all interested parties be given reasonable notice of the time and place of the hearing and afforded ample opportunity to appear and present evidence and to examine and cross-examine witnesses."[38]

FEPC hearings served the important functions of focusing public attention on employment practices and providing a mechanism for resolving intractable discrimination complaints. "Investigations and hearings were powerful tools that the FEPC used effectively throughout the war period," Professor Reed observed, "for most defense contractors were reluctant to face such scrutiny."[39] Dr. Johnson deserved great credit for his firm commitment to the integrity of the FEPC hearing process.

Although mary black people achieved employment gains during the war period itself as a result of FEPC activities, the post-war legal profession was a bastion of discrimination. A study by George Johnson, published in 1951, documented the status of black lawyers in America.[40] Greatly underrepresented in the legal profession, their numbers appeared to total under 2,000 among the nation's 200,000 attorneys.[41] Only approximately 25 black attorneys worked as federal government lawyers—out of an estimated federal attorney work force of 7,000—and black judges numbered only a few in the entire federal court system.[42] The American Bar Association, the leading professional organization for lawyers, practiced racial discrimination. "Five years ago," George Johnson wrote, "it was generally understood by lawyers throughout the country, that the Association did not want Negro lawyers as members."[43] Popular stereotypes also made it more difficult for black lawyers to get clients. "One factor operating to the disadvantage of the Negro lawyer," Johnson explained, "is the widespread assumption that judges and juries will manifest racial bias against

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[37] Memorandum from George M. Johnson, Acting Director, Hearings Division, FEPC, to Members of the Hearings Division, FEPC (September 22, 1943) (copy in George M. Johnson files, FEPC records, National Archives).

[38] *Id.*

[39] REED, *supra* note 23, at 346.

[40] *See* Johnson, *supra* note 21, at 87-102.

[41] *Id.* at 89.

[42] *Id.* at 93-94.

[43] *Id.* at 97.

Negro lawyers to the detriment of a client whom he represents, and that a Negro lawyer is powerless to help his client in this event."[44]

When Dr. Johnson left the FEPC—which was winding down its operations—and returned to Howard Law School as a full professor, the opportunities for black people from the South to study law were limited by the reality of segregation. In 1946, Dr. Johnson began what turned out to be a twelve year assignment as the Dean of Howard Law School—providing critical leadership during a period when the law school both helped to precipitate the dismantling of segregation and faced the adjustments that necessarily accompany the opening of options for prospective students. Faculty members, including Dean Johnson, participated in major constitutional litigation successfully challenging discriminatory practices. Howard Law School in turn faced the challenge of competition from other law schools.

Legal education at Howard, during the Johnson years, included remedial teaching to meet the needs of students disadvantaged by their former experiences in segregated institutions.[45] Rather than reject prospective students based on aptitude test scores, Howard fashioned "law school teaching techniques which will develop these skills and insights [required for "legal competence"], whenever such development is required, as part of the law school's educational program."[46] Dean Johnson recognized the need for sensitivity "to those student deficiencies that are due in whole or in part to the accident of environment. . . ."[47]

Historically Howard Law School provided the primary opportunity for black people in the United States to become attorneys. "For years," Dean Johnson pointed out in 1953, Howard Law School "furnished a majority of the nation's Negro lawyers and even today most of the Negro lawyers who are rendering the much needed legal service to the masses of Negroes in the South, received their legal training in Howard's School of Law."[48] By 1951, dramatic changes had taken place. "Recent court decisions," Dean Johnson explained, "have greatly

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[44] *Id.* at 91.

[45] *See* George M. Johnson, Annual Report 1951-1952 of the School of Law 57 (June 30, 1952) (available in Howard Law School Library).

[46] George M. Johnson, Annual Report 1955-1956 of the School of Law 69, quotation in brackets at 68 (June 30, 1956) (available in Howard Law School Library).

[47] *Id.*

[48] George M. Johnson, Annual Report 1952-1953 of the School of Law 64 (June 30, 1953) (available in Howard Law School Library).

accelerated the movement toward racial integration in private as well as public legal education."[49]

During his years as law school dean, Dr. Johnson became involved in a number of landmark civil rights cases. He participated in drafting the Supreme Court briefs in *Sweatt v. Painter*,[50] a case that rang the death knell for segregated legal education in the South; several years earlier Dean Johnson and another Howard Law School faculty member had "assisted in the preparation and trial"[51] of that case. All faculty members, Dean Johnson recounted in 1951, provided assistance in two cases "involving the validity of the system of racially segregated education in the District of Columbia."[52] In addition, Dean Johnson's name appeared on the Supreme Court briefs in both *Shelley v. Kraemer*[53] and *Brown v. Board of Education*.[54]

Dean Johnson envisioned a Howard Law School with a diverse student body that would attain academic preeminence in the civil rights field. He wrote in 1954:

> [T]here is reason to believe that, with an adequate scholarship program, a law review adequately financed, and salary adjustments to stimulate and retain able personnel, that the School of Law will attract its share of students without regard to race, creed or sex, and become the national center for the scholarly formulation and development of the American jurisprudence of civil rights.[55]

The Howard Law School of the future could build on its tradition of civil rights activism—which had found its fullest expression during the Johnson deanship.

Any recounting of George Johnson's leadership at Howard would be incomplete without listing two important events in the life of the law school. The publication in 1955 of the first issue of the Howard

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[49] George M. Johnson, Annual Report 1950-1951 of the School of Law 40 (1951) (available in Howard Law School Library).

[50] 339 U.S. 629 (1950). *See* Johnson, *supra* note 1, at 41.

[51] George M. Johnson, Annual Report 1946-1947 of the School of Law 5 (June 30, 1947) (available in Howard Law School Library).

[52] Johnson, *supra* note 49, at 11.

[53] 334 U.S. 1 (1948) (invalidating state court enforcement of restrictive covenants).

[54] 347 U.S. 483 (1954) (overruling the "separate but equal" doctrine and holding that racial segregation in public schools violates equal protection).

[55] George M. Johnson, Annual Report 1953-1954 of the School of Law 66 (June 30, 1954) (available in Howard Law School Library).

Law Review fulfilled one of Dean Johnson's major goals.[56] The following year, the law school moved into its own new three story building, ending the hardships associated with sharing very inadequate facilities.

Dean Johnson's service at Howard included discharging substantial instructional responsibilities. He taught taxation, a subject he introduced into the curriculum, and later also devoted teaching time to law journal activities. The future accomplishments of a number of his students became a source of considerable pride for him; his autobiography refers to 6th Circuit Judge Damon Keith, D.C. Court of Appeals Judge Julia Cooper Mack, Richmond Mayor Henry Marsh, and then-Virginia State Senator L. Douglas Wilder—to name some of them.[57] Dr. Johnson recounted with obvious satisfaction his contacts with Harris Wofford, the only Caucasian in his Howard Law School class, who went on to achieve prominence in civil rights activities.[58]

Dean Johnson cared deeply about the welfare of law school students. He viewed "increased scholarship aid for worthy students"[59] as a high priority. When financial pressure almost forced William Alfred Smith to withdraw from Howard Law School, Dean Johnson—Smith noted—"was irritated that I had not apprised him of my problems earlier";[60] Dean Johnson's intervention included a loan for books "out of his own personal funds."[61] This vignette captured the depth of George Johnson's commitment to students at Howard.

The challenge of helping to shape a new government agency with a civil rights mandate confronted George Johnson for the second time in 1958. Seventeen years earlier he had obtained a leave of absence from Howard Law School to work — under the aegis of a committee created by executive order — for the elimination of employment discrimination

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[56] At the time, Dean Johnson referred to the following "generally accepted" law journal related objectives: "(1) to train students in legal research, analysis and expression, and, (2) to serve the members of the legal profession and the public." George M. Johnson, *The Law School*, 1 HOWARD L.J. (preface to first issue) (1955).

[57] Johnson, *supra* note 1, at 47, 50, 51. L. Douglas Wilder more recently became Governor of Virginia.

[58] Johnson, *supra* note 1, at 45-46. Harris Wofford currently is a United States Senator from Pennsylvania.

[59] Letter from George M. Johnson, Dean, Howard Law School, to Mordecai W. Johnson, President, Howard University (June 26, 1953) (copy available in Howard Law School Library, accompanying George M. Johnson, Annual Report 1952-1953 of the School of Law).

[60] William Alfred Smith, *Foreword* to Johnson, *supra* note 1, at iv.

[61] *Id.*

in industries impacting our national defense effort. Now he would give up his deanship to accept another staff appointment—this time with a statutorily created commission concerned about denials of voting rights and violations of equal protection.

The decision to accept a position with the Commission on Civil Rights clearly involved personal risk for George Johnson—but the willingness to face uncertainty in order to accomplish something worthwhile was one of the strengths of Johnson's character. The Civil Rights Commission, an investigatory and advisory entity without enforcement powers, had an initial lifespan of only two years and an early membership deeply divided on civil rights issues. In spite of its precarious beginnings—and the understandable skepticism with which many viewed it—the Commission would endure and provide a factual foundation for major civil rights legislation.[62]

At an early point George Johnson recognized the importance of achieving a substantial measure of consensus on Commission "findings" in spite of the differing perspectives of Commission members. "I felt then, and I still feel," he wrote in his autobiography, "that the President and the Congress might be unwilling to accept the Commission's 'Recommendations,' but would be hard put to disagree with the 'findings' of a duly constituted governmental fact finding agency."[63] Dr. Johnson could look back with obvious satisfaction at the extent of Commission agreement on factual matters.[64]

After an organizational period, Johnson became Director of the Commission's Office of Laws, Plans, and Research. Staff director Gordon Tiffany, Johnson later recalled, wanted "a careful documentation and analysis of the nation's civil rights laws."[65] Dr. Johnson's scholarly approach to civil rights issues would stand him in good stead; he provided dispassionate leadership to the Commission's legal staff.

When J. Ernest Wilkins—the first black person to serve as a member of the Civil Rights Commission—resigned for health reasons after a short tenure, President Eisenhower nominated George Johnson to fill the vacancy. Dr. Johnson, who enjoyed strong support within the Commission, apparently won out over Philadelphia lawyer William T.

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[62] *See generally* FOSTER R. DULLES, THE CIVIL RIGHTS COMMISSION: 1957-1965 (1968) (A history of the Commission's early years, including the period of George Johnson's involvement).

[63] Johnson, *supra* note 1, at 61.

[64] *See* Johnson, *supra* note 1, at 62.

[65] Johnson, *supra* note 1, at 53.

Coleman.[66] Commission Vice Chairman Robert G. Storey, a former president of the American Bar Association, wrote that Dr. Johnson "consider[s] both sides of any question in a very admirable and lawyer-like manner."[67] Notre Dame President Father Theodore Hesburgh, who also served on the Commission, pointed out: "All of us who have worked with him have a high regard for his character, intelligence, and judgment."[68]

Dr. Johnson quickly became an active participant in Commission hearings, no longer limited to a planning role. Commissioner Hesburgh, presiding in Chicago, invited Dr. Johnson—still awaiting Senate confirmation—to join his future colleagues.[69] Dr. Johnson did not hesitate, because of his own uncertain status, to address issues forthrightly and offer controversial suggestions. Questioning whether the difference between the situation of a black person and an individual born in a foreign country is one of degree, he pointed out that "regardless of the amount of urbanization that a Negro may undergo, he does not lose his high visibility."[70] Dr. Johnson expressed agreement with "the suggestion . . . that legislation is not the sole answer"[71] but solicited "comment on the importance of legislation in controlling the grosser manifestations of discrimination until such time as we can get more enlightened."[72] He wondered aloud, in a discussion with another witness, "whether in our urban renewal and slum clearance programs we are making provisions for interracial living for lower income groups."[73] Later he suggested the utility of having "Negroes and whites at the policy level of an agency."[74]

Although the Commission Report focused on three major subjects—voting, education, and housing—its treatment of voting merits partic-

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[66] *See* Howard L. Dutkin, *Two Negroes in Lead For Civil Rights Post*, EVENING STAR, February 18, 1959 (in collection of articles on George M. Johnson, Moorland-Spingarn Research Center, Howard University). Years later, Coleman served in President Ford's cabinet as Secretary of Transportation.

[67] Letter from Robert G. Storey to George M. Johnson, *reprinted in* 105 Cong. Rec. 9848 (1959).

[68] 105 Cong. Record 9849 (1959) (quoting telegram from Father Hesburgh).

[69] Housing: *Hearings Before the United States Commission on Civil Rights* — Hearings Held in New York City, New York.; Atlanta, Georgia; Chicago, Illinois 617 (1959).

[70] *Id.* at 639.

[71] *Id.* at 640.

[72] *Id.*

[73] *Id.* at 680.

[74] *Id.* at 727.

ular emphasis. Commission findings on this subject discuss the inadequacy of available information on voting, problems with record preservation and access, impediments to voter registration, obstacles to subpoena enforcement, and the potential for involvement of "temporary Federal registrar[s]" in federal elections.[75] Dr. Johnson recalled devoting special attention to developing voting-related findings.[76]

The Report's most significant recommendation was drafted in response to the difficulties many Americans confronted in registering to vote. The Commission—with only a single dissent—favored providing, in limited circumstances, for Presidential designation of a person in federal government service "to act as a temporary registrar" with authority to issue "registration certificates" valid for voting in federal elections.[77] Years later Dr. Johnson viewed the recommendation on federal registrars as laying "the groundwork for the eventual congressional enactment of the Voting Rights Act of 1965."[78]

When the Commission issued its report to the President and Congress in September 1959, Dr. Johnson advocated action that went beyond Commission-adopted recommendations. On voting rights, Commissioner Johnson joined with Chairman Hannah and Commissioner Hesburgh in proposing a constitutional amendment to protect the franchise.[79] The same three Commissioners, addressing the subject of educational opportunity, recommended withholding federal funds to colleges and universities that apply racial barriers to student admission[80]—a funding ban Commissioner Johnson would extend to "all educational institutions that receive Federal funds, including public elementary and secondary schools."[81] The views of Commissioners Hesburgh and Johnson on housing emphasized federal agency action to prevent misuse of urban renewal authority, protect displaced persons, and facilitate the availability of appropriate housing.[82]

Commissioner Johnson, who had participated during his years as Dean of Howard Law School in successful, privately initiated, federal court litigation to vindicate rights, now emphasized the essential roles

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[75] REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1959, at 136-141.
[76] Johnson, *supra* note 1, at 62.
[77] REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1959, at 141-142.
[78] Johnson, *supra* note 1, at 63.
[79] REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1959, at 143-144.
[80] *Id.* at 328-329.
[81] *Id.* at 329.
[82] *Id.* at 541-543.

of other branches of the federal government. "The void created by inaction on the part of the legislative and executive branches," he wrote in a statement incorporated in the Commission Report, "must be filled with positive and constructive measures designed to remove from all Federal policies and practices any semblance of inconsistency with the mandate of the Constitution."[83] He pointed to both the restraining influence and "educative value" of laws.[84] Having argued that "[t]he development of public law should not be left primarily to private litigation,"[85] he endorsed "often proposed legislation to broaden the powers of the Attorney General to seek injunctive relief in civil rights matters."[86] Commissioner Johnson, however, also underscored the limitations of legislative action and law enforcement—emphasizing the importance of Federal Government leadership:

> It [the Federal Government] should seek to bring together leaders of both races who in good faith would explore ways and means to reduce tensions, create better understanding, increase respect for law and order, and organize the resources of the Nation in a concerted effort to eradicate within the foreseeable future inequalities based on race, color, religion, or national origin.[87]

In 1960 George Johnson's career took a dramatic turn when he agreed, on short notice, to perform a critical leadership role in the development of the University of Nigeria. Michigan State University, under contract with an agency of the U.S. State Department, sent an advisory group to Nsukka and designated Dr. Johnson as Chief of Party. Dr. Johnson became Acting Principal of the University on the day of its opening in October 1960—a position that was "the rough equivalent of an Acting University President in the United States."[88] Subsequently he provided administrative direction to the University as its Vice-Chancellor, a position that assumed particular importance because the University's Chancellor with a lifetime appointment, Dr. Nnamdi Azikiwe, served as Governor General of the Federation of Nigeria during the 1961-63 period and lived hundreds of miles from Nsukka; in 1963 Dr. Azikiwe became the country's President and

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[83] *Id.* at 556.
[84] *Id.* at 556-557.
[85] *Id.* at 556.
[86] *Id.* at 557.
[87] *Id.*
[88] Johnson, *supra* note 1, at 73.

remained in that post until a year and a half after Dr. Johnson returned to the United States.

The University of Nigeria experienced dynamic growth under Dr. Johnson's stewardship. Enrollment jumped from 220 for the 1960-61 academic year to 1,828 for 1963-64.[89] Rapid development in the academic sphere accompanied an expanding student body. "Since 1960," Dr. Johnson recounted, "the university moved from one modest Arts Faculty to seven different faculties for 1964-65, namely, Arts, Agriculture, Education, Engineering, Law, Science, and Social Studies."[90] During Dr. Johnson's tenure, Enugu became the sight of a second campus, which included a much needed Economic Development Institute.[91] The University's physical plant became transformed during a four year period—with the number of "academic buildings," to cite only one example, increasing from two to thirty-five.[92]

Statistics documenting rapid change, however, do not begin to describe the uniqueness of Dr. Johnson's experience as an American educator in Nigeria during the 1960-64 period. The opening of the University of Nigeria coincided with Nigeria's independence from Great Britain; the aspirations and needs of a new nation—and the divisions among its people—provided the backdrop for the university's development. Dr. Azikiwe had championed the establishment of a university that "should not only be cultural, according to the classical concept of universities, but . . . should also be vocational in its objective and Nigerian in its content."[93]

The University of Nigeria's curriculum reflected the substantial influence of the American land grant college model. "This system then," Nduka Okafor of the University of Nigeria writes, "with its emphasis on vocational, utilitarian, rather than classical subjects, its democratisation of higher education, its wide range of subjects including General Studies, its electives and credit-system, was imported into Nigeria, where for just over a century educational ideas had been supplied mainly by Britain."[94] Dr. Johnson, however, would have

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[89] George M. Johnson, *The University of Nigeria*, in NEW UNIVERSITIES IN THE MODERN WORLD 87, 98 (Murray G. Ross ed., 1966).

[90] *Id.* at 102.

[91] *Id.* at 87, 93.

[92] *Id.* at 88.

[93] Znamdi Azikiwe, Speech in the Eastern House of Assembly (May 18, 1955), in ZIK: A SELECTION FROM THE SPEECHES OF NNAMDI AZIKIWE 280, 283 (1961).

[94] NDUKA OKAFOR, THE DEVELOPMENT OF UNIVERSITIES IN NIGERIA 193 (1971).

challenged Okafor's assessment, emphasizing instead a combination of American and British influences on a curriculum designed to meet Nigerian needs.[95]

During George Johnson's administration, the University of Nigeria substantially transformed opportunities for higher learning in a new nation. Nigerians, interested in pursuing advanced study, no longer had to gain admission to the British orientated University of Ibadan. The University of Nigeria opened doors for many Nigerians—and offered educational programs, responsive to the exigencies of life in Nigeria, that had not been available elsewhere. Although the number of universities in Nigeria increased to five in 1962, enrollments at the three newest institutions remained quite low during Vice Chancellor Johnson's years in Nsukka.

Dr. Johnson's work in Africa can be viewed in the context of his efforts, during the previous generation, to challenge the manifestations of racial prejudice in American life. The University of Nigeria's motto, "'To Restore the Dignity of Man,'" Okafor writes, "may be seen as the epitome of the yearnings of West Africans for over a century and might indeed be interpreted 'To Restore the Dignity of the Negro.'"[96] An inspirational message emphasizing the restoration of dignity must have carried special resonance not only for West Africans but also for the African-American who became the University of Nigeria's first administrative head. George Johnson, who had fought expressions of racism in his own country, seemed particularly suited to lead a university dedicated to the restoration of dignity.

Reflecting on his sojourn in Nigeria, Dr. Johnson lamented a resurgence of tribalism that he found so difficult to explain.[97] He attributed prejudice against black people in America to the legacy of slavery but wondered whether he "would have been able to make more of a contribution" in Nigeria if he had understood tribalism there better.[98] Dr. Johnson's achievements at the University of Nigeria proved to be considerable, but he remained concerned about the divisive forces beyond his control.

After returning to the United States in 1964, Dr. Johnson became actively involved in teaching, research, and administrative activities at

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[95] *See* Johnson, *supra* note 89, at 90.

[96] Okafor, *supra* note 94, at 118.

[97] Johnson, *supra* note 1, at 79-80, 100.

[98] *Id.* at 80.

Michigan State University. He chaired a committee concerned with increasing black student enrollment and black faculty appointments—and then served as Assistant to the President for Equal Opportunity. A professor in the College of Education's Department of Administration and Higher Education, Dr. Johnson became an authority on the relationship between education and the law. He taught graduate seminars on education law and wrote a book[99] that analyzed education-related issues in their increasingly complex legal framework. A sabbatical spent in Honolulu facilitated Dr. Johnson's research on *Education Law* and convinced George and Evelyn Johnson to live there in retirement. "We," Dr. Johnson recounted, "were very favorably impressed with the climate and the multicultural and multiracial composition of the citizens of Hawaii."[100]

Retirement for George Johnson did not signify an end to academic pursuits in law and education. His interests in advancing civil rights and encouraging educational attainment—which had sustained him for most of his career—became his avocation. The Hawaii Supreme Court library provided the facilities for Dr. Johnson to continue his research on developing constitutional issues—with emphasis on recent U.S. Supreme Court decisions—and the emerging legal environment for addressing problems in education.

The April 1974 United States Supreme Court decision in *DeFunis v. Odegaard*[101] bridged Dr. Johnson's two major interests and provided the legal backdrop for a major innovative undertaking under Dr. Johnson's leadership at the University of Hawaii School of Law. Marco DeFunis' application to the University of Washington Law School had not received the same treatment as applications from minority group members. Denied admission, DeFunis prevailed on an equal protection claim in a state trial court. By the time the case reached oral argument in the United States Supreme Court, DeFunis already had registered for the final quarter of his law school studies. The Supreme Court, with four justices dissenting, decided that the case had become moot. Justice Brennan, in a dissent joined by Justices Douglas, White, and Marshall, concluded that the case was "ripe for decision"[102] and favored resolving the constitutional issues. Only Justice Douglas, in a separate dissent, actually addressed the merits.

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[99] *See* GEORGE M. JOHNSON, EDUCATION LAW (1969).

[100] Johnson, *supra* note 1, at 105.

[101] 416 U.S. 312 (1974).

[102] DeFunis v. Odegaard, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting).

The Douglas dissent engendered intense interest at the time among educators—including those at the University of Hawaii School of Law—exploring the potential for special admission programs. Two widely utilized criteria for law school admission—LSAT scores and college grades—Justice Douglas recognized, suffered from inherent limitations. "There are many relevant factors, such as motivation, cultural backgrounds of specific minorities that the test [LSAT] cannot measure," Justice Douglas wrote, "and they inevitably must impair its value as a predictor."[103] A formula that incorporates college grades is problematic because of varying academic standards—"one school's A is another school's C."[104] Successful efforts to predict grades in law school, in any event, overlook a salient fact: "The law student with lower grades may in the long pull of a legal career surpass those at the top of the class."[105] In Justice Douglas' view, "A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment."[106] His approving reference to law school summer programs—"in which potential students who likely would be bypassed under conventional admissions criteria are given the opportunity to try their hand at law courses"[107]—was particularly relevant to the incipient pre-admission program at the University of Hawaii School of Law.

Special summer programs at mainland law schools provided limited precedents for a substantially more intensive academic year program in Hawaii. A discussion of the impetus for New York University's summer program pointed out that "[a]s late as 1965 many urban law schools had but token minority representation in their classes; at New York University that year only one black student matriculated in an entering group of 287."[108] Emory University's summer program "forcefully demonstrated that large numbers of talented black students are being screened out of the study of law by an exaggerated reliance on the Law School Admission Test scores."[109] The University of Denver

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[103] *Id.* at 329 (Douglas, J., dissenting).

[104] *Id.* at 330 (Douglas, J., dissenting).

[105] *Id.*

[106] *Id.* at 340 (Douglas, J., dissenting).

[107] *Id.*

[108] Graham Hughes, et al., *The Disadvantaged Student and Preparation for Legal Education The New York University Experience*, 1970 TOLEDO L. REV. 701, 708.

[109] Nathaniel E. Gozansky & Michael D. DeVito, *An Enlightened Comparison. The Relevant Strengths and Weaknesses of the CLEO Program and the Pre-Start Program of Emory University*, 1970 TOLEDO L. REV. 719, 741.

embarked on a summer program because "[t]here are few Mexican-American lawyers in the Rocky Mountain Region, though the area harbors a large Mexican-American population."[110] The University of New Mexico established a Special Scholarship Program in Law for American Indians—including summer instruction preceding entry to various law schools—with "[t]he immediate aim" of "respond[ing], in a modest way, to the present need for Indian lawyers."[111] The Council on Legal Education Opportunity (CLEO) sponsored a number of summer institutes; "[a]t the outset CLEO's aim was to increase the number of minority students enrolled in American law schools."[112] The University of Hawaii pre-admission program, like mainland summer programs, would seek to advance affirmative action objectives—but the University of Hawaii would follow a more ambitious and comprehensive approach.

In preparation for its second year of operations, the University of Hawaii School of Law sought to provide an alternative law school admission opportunity for a limited number of students from "educationally disadvantaged backgrounds."[113] Initially rejected for regular admission, these students could develop their skills in a pre-admission program and seek to earn a place in the following year's entering class. Participation in the pre-admission program would not be limited exclusively to persons with specific ethnic backgrounds, although the plight of "[t]he economically depressed population groups in Hawaii—primarily Hawaiian, Samoan, and Filipinos"[114] would provide the major impetus for this affirmative action effort. The School of Law was determined to address the striking underrepresentation of these ethnic groups among the State's lawyers. Generally noncompetitive

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[110] William S. Huff, *The Propriety of Preparatory Programs for Minority Students*, 1970 TOLEDO L. REV. 747, 748.

[111] Thomas W. Christopher & Frederick M. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 TOLEDO L. REV. 691, 699.

[112] Nancy Fulop, *The 1969 CLEO Summer Institute Reports: A Summary*, 1970 TOLEDO L. REV. 633, 678.

[113] Narrative of the University of Hawaii Pre-Admission to Law School Program Institutional Grant Request 1 (part of proposal for federal funding dated April 28, 1975) (on file with William S. Richardson School of Law, University of Hawaii at Manoa).

[114] Proposal for federal funding for project entitled "University of Hawaii School of Law Pre-Admission Programs for Applicants from Special Population Groups" 1 (dated May 13, 1974) (on file with William S. Richardson School of Law, University of Hawaii at Manoa).

performances on the Law School Admission Test underscored the need for a special program. "The unfortunate circumstance of admitting and then failing persons of weak educational backgrounds with little or no preparation and lead time for them to prepare themselves for law school was sought to be avoided."[115]

George Johnson's interest in the welfare of Hawaii—and his commitment to an active retirement—redounded to the benefit of the new University of Hawaii School of Law. Dean David Hood did not have to look far to find the ideal director for the pre-admission program—an educational innovator long interested in expanding access to higher education. Dr. Johnson's professional life evidenced a commitment to public service that made him an excellent role model in a program with "the objective ultimately of increasing the contribution of these persons to their communities through their training as lawyers."[116]

Dr. Johnson's qualities of empathy and discipline complemented each other during his year at the University of Hawaii. Leigh-Wai Doo, Assistant Dean of the School of Law during George Johnson's service, remembered him as warm, compassionate, kind, and understanding.[117] Dr. Johnson provided support to his students while requiring adherence to academic standards.[118]

Prof. Cliff Thompson, who served as Dean of the University of Hawaii School of Law during the 1977-1978 academic year, particularly remembered George Johnson's insights on the development of successful mentor relationships.[119] Educators, in Dr. Johnson's view, needed to communicate that they would do anything before the final testing stage

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[115] Narrative of the University of Hawaii Pre-Admission to Law School Program Institutional Grant Request, *supra* note 113, at 5.

[116] Title I, H.E.A. (Higher Education Act of 1965) Final Project Report, Project ID #74-002-005, for project entitled "Tutorial Project for Law School Applicants from Special Population [Groups]" 3 (attachment to Memorandum from Leigh-Wai Doo, Assistant Dean, University of Hawaii School of Law to Wesley Park, Associate Dean, College of Continuing Education & Community Services, University of Hawaii at Manoa, dated August 4, 1975) (copy on file with William S. Richardson School of Law, University of Hawaii at Manoa).

[117] Interview with Leigh-Wai Doo, formerly Assistant Dean, University of Hawaii School of Law, Honolulu, Hawaii (December 27, 1990).

[118] *Id.*

[119] Telephone interview with Prof. Cliff Thompson (August 21, 1992). Prof. Thompson's recollections of Dr. Johnson — an "enormously engaging, charming, and wise person" — were based on a number of informal discussions with him a few years after Dr. Johnson headed the pre-admission program.

to help students fulfill their potentials.[120] The corollary, which Dr. Johnson also believed in communicating clearly, was that students would be on their own when the time arrived to take the examination.[121]

Under George Johnson's leadership, the pre-admission program made legal institutions and concepts relevant and understandable to non-lawyers. Dr. Johnson knew, from his relatively recent Michigan State University experience, how to teach a law-related subject outside the traditional law school environment. He recognized, from years of activism, that the law provided a potent instrument for societal change—and he was uniquely qualified to communicate a dynamic view of law to his students.

Pre-admission program students took Dr. Johnson's Introduction to Law Seminar for the full academic year, enrolled each semester in one law school and one non-law school course, and met separately with Dr. Johnson in weekly counseling sessions. The Johnson seminar emphasized understanding—from diverse perspectives—the role of law and the operations of the legal system, encouraged concentrated analysis of judicial decisions, and fostered the development of skills in legal expression. Seminar students learned to brief cases, undertake other legal writing assignments, and answer practice examination questions. Dr. Johnson's conscientious efforts in counseling sessions to provide each student with individualized assistance tailored to specific needs—including providing helpful critiques of written work—contributed immeasurably to the pre-admission program's success.

Although "the prognosis for success in law school for all of these [eleven pre-admission] students would have been *negative* were it not for their experience in the Program,"[122] ten went on to attend the University of Hawaii School of Law as regular students, receive their degrees, and gain admission to the Hawaii bar.[123] The positive, long term impact of the 1974-75 pre-admission program, however, could be measured not only in the achievements of its alumni but also in a new perception of law school accessibility by members of disadvantaged ethnic groups.[124] A law school committed to providing opportunity for

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[120] Telephone interview with Prof. Cliff Thompson, *supra* note 119.

[121] *Id.*

[122] Narrative of the University of Hawaii Pre-Admission to Law School Program Institutional Grant Request, *supra* note 113, at 8.

[123] Johnson, *supra* note 1, at 109.

[124] Interview with Leigh-Wai Doo, *supra* note 117.

Hawaii's citizens proved that educational deficiencies could be overcome in a supportive environment.

George Johnson was a dignified man of judicious demeanor who believed in the "irrelevance of race."[125] He worked to uplift the lives of minority group members without embracing policies that would exclude others. At Howard he included a few Caucasian lawyers in his recommendations for academic appointments[126]—and at the University of Hawaii he favored maintaining pre-admission program participation possibilities for persons with underprivileged backgrounds who might not fall within specific ethnic groups.[127] A thoughtful man of reason, Dr. Johnson sought through government service, constitutional advocacy, and academic pursuits to advance principles of equal rights and fulfill promises of equal opportunity.

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[125] Johnson, *supra* note 1, at 114. Dr. Johnson summed up his feeling about Hawaii in these words: "My twilight years in racially and ethnically heterogeneous Hawaii have thus been blessed. The warm and genuine friendships we have developed are testimony to the irrelevance of race. On such testimony, 'I rest my case!'" *Id.*

[126] *See* Johnson, *supra* note 1, at 51.

[127] Interview with Leigh-Wai Doo, *supra* note 117.

Economic Development Versus Environmental Protection: Executive Oversight and Judicial Review of Wetland Policy

I. Introduction

Landowners and developers typically assume that they can legally proceed with grading and fill activities (for example, levelling property in preparation for subsequent construction or other use) once the necessary state and local permits are obtained. If a project will affect wetlands,[1] however, section 404 of the Clean Water Act (CWA)[2] may require the landowner or developer to obtain further permission from the U.S. Department of the Army's Corp of Engineers (Corps). Persons who violate section 404 can face penalties of up to $25,000 per day of violation and one year of imprisonment; the Corps may also order violators to remove all unpermitted fill and any structures built on the fill, and require restoration of the area to its preproject condition at the violator's own expense.[3] Even those persons experienced in dealing with wetland regulations are caught by surprise with a Corps enforcement order and subsequent penalties.[4] All landowners, developers, and

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[1] The term "wetlands" is defined by the U.S. Army Corps of Engineers to include:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(b) (1992). For a discussion of the rationale for regulating development in wetland areas, see *infra* notes 57-59 and accompanying text.

[2] 33 U.S.C. §§ 1251-1387 (1991) (amending the Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816). For a description of § 404, see *infra* part III. Authority to regulate wetlands is also provided by: the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. § 403 and § 407 (1991); the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1413 (1991); and the Fish and Wildlife Coordination Act, 16 U.S.C. § 662 (1991).

[3] 33 U.S.C. § 1344(s) (1991).

[4] Consider Bill Ellen, nonprofit wildlife rescue center operator and former environmental engineer, who worked carefully with the Soil Conservation Service and the Corps to secure thirty-eight permits for a project to convert a Maryland estate into a 103-acre wildlife sanctuary. After a new, expansive interpretation of the "wetlands" definition was issued in 1989 (*see infra*, part III.B.2.a), however, the same Corps

their legal representatives should therefore monitor the evolving federal regulatory scheme and take steps to ensure accountability for any significant changes. Environmental and community activists committed to the preservation of wetland resources should be equally vigilant.

Existing statutory ambiguity under the CWA[5] reflects an enduring conflict between economic development and environmental protection.[6] The struggle between these two forces has affected many development projects in Hawai'i,[7] and in the nation as a whole. Sometimes landowners become subject to enforcement action because they are unaware that their property contains wetland areas.[8] Previously exempt prop-

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official that Mr. Ellen had been working with ordered all work on the project stopped. The pressure of deadlines under previously-signed subcontracts led to "mistakes" and, ultimately, a jail sentence for Mr. Ellen. *EPA's Most Wanted*, WALL STREET JOURNAL, Nov. 18, 1992, at A16. *See also The MacNeil/Lehrer News Hour* (PBS television broadcast, Jan. 1, 1993) (featuring Bill Ellen's plight).

[5] *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985) (noting that Congress did not provide clear guidance under the CWA).

[6] Oliver A. Houck, *More Net Loss of Wetlands: The Army-EPA Memorandum of Agreement on Mitigation Under the § 404 Program*, 20 ENVTL. L. REP. 10,212, 10,212 (June 1990). For the direct quote from Mr. Houck on this point, see *infra* text accompanying note 61.

[7] *See, e.g.*, Christopher Neil, *Kailua hills are alive with the sound of discord*, SUNDAY STAR-BULLETIN & ADVERTISER, Jan. 17, 1993, at A27. Neil mentioned the withdrawal of a development proposal by Kaneohe Ranch for the Hamakua Marsh after encountering stiff opposition from Kailua Neighborhood Board members and nearby residents in June 1992, and discussed more recent opposition to a subsequent proposal to build a retirement community and community center on the same site. *Id.*

A battle over development of the Ka'elepulu wetlands in windward O'ahu, which began in 1978 with a prior landowner, was only recently resolved at substantial cost to the current developer. *See* Letter from attorney Ronald Y. Amemiya to Honolulu City Councilman John Henry Felix (Jan. 13, 1992) (on file with Ronald L. Walker, Wildlife Program Manager for the State of Hawaii Department of Land and Natural Resources). Residents' objections to an application for an after-the-fact Corps permit for the wetland fill resulted in a leveraged settlement wherein the developer must spend $700,000 to mitigate for lost wetland acreage ($500,000 for habitat creation, and $200,000 for permanent maintenance). *Id. See also* Thomas Kaser, *Disputed Enchanted Lake project gets the go-ahead*, HONOLULU ADVERTISER, Dec. 13, 1991, at A14.

[8] In 1986, after the community objected to the start of construction for a house in the vicinity of Kawainui Marsh, the landowner abandoned his plans (which were proceeding in accordance with a valid building permit up to that point) when told that a section 404 permit was also required. Telephone Interview with Donna Kokubun, President, Hawaii Chapter of the National Audubon Society (Nov 20, 1992).

erties can also fall under the Corps' jurisdiction when a landowner's own activities, or those of third parties (including federal, state, and local government entitites as well as private parties), create artificial wetlands on a particular site.[9] Even where the presence of wetlands is recognized, however, the regulated community often remains uncertain how to proceed. Unless regulators provide both large and small developers with greater predictability, the current guidelines and standards will continue to deter vital investments.

From the perspective of environmentalists and other activists, on the other hand, wetland regulations can represent a useful tool for thwarting or temporarily stalling controversial projects.[10] Delays and the added costs of penalties and project modifications have been sufficient, in some cases, to derail otherwise profitable ventures in the past.[11] A

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[9] *See* Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) (upholding Corps regulation of unintended wetland environments resulting from artificial or even accidental property alterations).

[10] Several individuals and groups, including Ho'okahe Wai Ho'oulu 'Aina (HWHA) as caretakers of a *kalo lo'i* (taro farm) supported by an *auwai* (irrigation ditch) from Manoa Stream, objected to plans for the development of a Hawaiian Studies Building on the site because of adverse effects on these associated wetland areas (including pooled water emanating from the nearby Wa'ahila culvert). Letter from Michael T. Lee, Chief of the Corps Operations Division, to Gordon Matsuoka, State Public Works Engineer for the Department of Accounting and General Services (Aug. 17, 1992) (on file with author). Initial statements by the Corps indicated that the filling of all wetlands, including man-made wetlands such as the *kalo lo'i*, *auwai* and Wa'ahila ditch, is subject to the Clean Water Act. *Id.* The Corps issued a cease and desist order two months later, when it discovered that boulders, rocks, soil and grubbed vegetation fell into Manoa Stream as a result of construction activities. Letter from Michael T. Lee to Gordon Matsuoka (Oct. 16, 1992) (on file with author). The Corps ultimately reversed its initial claim of jurisdiction with respect to the *lo'i* (as insignificant and "relatively recent manmade water features," which are not normally located in fastlands), *auwai* (also relatively small and constructed on normally fastland areas), and Wa'ahila tributary (because it is "not designated on the Geological Survey map as an intermittent stream" and is already culverted for 200 feet upstream from the project). Letter from Lt. Col. James T. Muraisuchi, U.S. Army District Engineer, to Gordon Matsuoka (Dec. 9, 1992) (on file with author). As of late January, 1993, the project awaits approval of a § 404 permit for a proposed revetment to prevent further accidental fill of the Manoa Stream. *Id.*

[11] For example, environmentalists have staved off a variety of development proposals for Kailua's Kawainui Marsh, the state's largest wetland, including a 400-unit housing project and a massive park built on filled land. *Kawainui Marsh's future to be discussed*, HONOLULU STAR-BULLETIN, Sep. 23, 1992, at A5.

particularly revealing example involves the development of a wetland area west of Kapa'akea Homesteads on the island of Moloka'i, which is the subject of ongoing litigation between the Corps and the site's developer.[12]

Conflict, however, is not inevitable under the current regulatory regime. State and federal governments have worked out mitigation plans and set-asides for protected wetland areas in some cases, effectively balancing economic concerns with the conservation of wetland functions and values.[13] Creative conflict resolution is clearly possible under the current regulatory system; nonetheless, controversies over wetlands regulation persist because of uncertainty regarding the relative value ascribed to the economy versus the environment.

The friction between economic development and environmental protection received significant attention during the 1992 campaign for President of the United States. The incumbents, President George Bush and Vice President J. Danforth Quayle, sought to characterize their Democratic opponents, Arkansas Governor Bill Clinton and U.S. Senator Al Gore, as radicals planning to protect the environment at the

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[12] *See* File No. 89-015, with the Corps' Pacific Operations Division at Fort Shafter, in Honolulu, Hawai'i. In an area zoned for housing, the developer apparently exercised due diligence in obtaining necessary county and state permits, for which the appropriate federal agencies were also notified. *Id.* Although a December 1976 Final Environmental Impact Statement prepared for a flood control project at Kapa'akea indicated the absence of any endangered species, the sighting of a Hawaiian stilt by a Corps field officer led to an enforcement action in 1989 halting the nearly completed project. *Id.* Subsequent offers by the developer to provide mitigation, involving the creation of larger wetland areas and payment of substantial monetary amounts, have been summarily rejected by the United States Fish & Wildlife Service (USFWS). *Id. See also* File No. 92-006 (concerning litigation over illegal fill activity in the Maunawili wetlands on the island of O'ahu).

[13] Plans for the expansion of Azeka's Supermarket in Kihei, Maui (Kanaha Pond) ran into trouble when the USFWS determined that the property, located near Kahana Pond, served as a habitat for stilts when wet. Letter from Ernest Kosaka, USFWS Field Supervisor, Pacific Islands Office, to Lt. Col. Donald T. Wynn, U.S. Army Corps (Apr. 27, 1990) (on file with Ronald L. Walker, Wildlife Program Manager, State of Hawai'i Department of Land and Natural Resources). Subsequent negotiations led to a suitable compromise permitting construction while adequately protecting valuable wildlife habitat, at a cost of approximately $470,000. Letter from Lt. Col. Donald T. Wynn to Ernest Kosaka (Nov. 20, 1990) (on file with Ronald L. Walker, DLNR). *See also supra* note 7 (discussing adoption of a mitigation plan for development of the Ka'elepulu wetlands) and *infra* text accompanying note 58 (listing important wetland functions and values).

expense of humans.[14] The incumbents themselves were often accused in the media of gutting vital environmental statutes in order to appease big business.[15] In 1991 and 1992, the Bush-Quayle Administration's regulatory review body, the Council on Competitiveness, gained increasing power and prominence as it battled to weaken federal environmental regulations concerning wetlands, hazardous waste, and clean air.[16]

After the 1992 election, the Clinton Administration eliminated the Council on Competitiveness.[17] Regulatory review under the Clinton-Gore Administration might have shifted the balance of interests toward environmental protection,[18] but the administration's fundamental message remained that economic and environmental policies need not be mutually exclusive.[19] The polarized reactions to the former Competitiveness Council suggest, however, that the conflict between environmental and economic interests will likely persist.[20] Public willingness

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[14] *See* Michael Kranish and Scot Lehigh, *Insults Fly as Clinton, Bush Travel to Key States*, BOSTON GLOBE, Oct. 30, 1992, at 1. President Bush referred to Vice Presidential candidate Al Gore as "Ozone Man," stating that "[t]his guy is so far off in the environmental extreme, we'll be up to our neck in owls and out of work for every American. This guy is crazy. He is way out, far out, man." *Id.*

[15] *See, e.g.*, Dianne Dumanoski, *Environment Not Gaining Ground During Campaign*, BOSTON GLOBE, Oct. 4, 1992, at 1.

[16] *Id.*

[17] *Gore lauds abolishment of rule-reviewing body*, HONOLULU ADVERTISER, Jan. 23, 1993, at D1 (citing Vice President Al Gore as stating that "an existing review process under the Office of Management and Budget will make sure businesses are not burdened by federal regulations"); *see also* Eric Pianin and David S. Hilzenrath, *Clinton to Press Major Deficit Cut; Short Term Stimulus, Tax Reduction Fade*, WASHINGTON POST, Jan. 12, 1993, at A1 (quoting Leon Panetta's assertion, during hearings on his own confirmation as Director of the Office of Management and Budget, that Vice President Gore plans to organize a new regulatory review panel).

[18] Vice President Gore believes that the United States should utilize "every means . . . to preserve and nurture our ecological system." Albert Gore, EARTH IN THE BALANCE (1992) (*cited in* Bruce S. Klafter, *Businesses Should Head Gore's Manifesto*, SAN FRANCISCO CHRONICLE, Nov. 30, 1992, at B3).

[19] Dumanoski, *supra* note 15. Bill Clinton acknowledged that he had put jobs ahead of the environment as Governor of Arkansas, but also stated that in the process he learned that this is a "false choice." *Id.*

[20] The Bush Administration's efforts to balance the conservation ethic with the competing interests of the regulated community were reminiscent of the effort to vindicate private property rights under the Regulatory Reform Task Force led by then Vice President Bush. Houck, *supra* note 6, at n. 10 (citing Exec. Order No. 12291, 48 Fed. Reg. 21,466 (1983)).

to accept executive influence over regulatory policy-making (also known as executive oversight) has its limits, whether economic development or environmental protection is the motivating factor.[21] Both the proper role of the executive branch in this evolving process and the appropriate standard for judicial review of such issues require careful analysis.

This comment begins by considering the propriety of executive influence on regulatory policy governing wetlands.[22] Part II critically examines the mandatory deference model provided by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[23] and considers the potential application of this model through judicial review of evolving wetlands regulations under section 404 of the Clean Water Act (CWA). This comment argues that despite section 404's recognized ambiguities, overly-deferential judicial review is inappropriate, especially where proposed regulatory changes are apparently inconsistent with existing interpretations of the CWA.[24] Any

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[21] Consider the growth in size and influence of the "Wise Use Coalition," established to oppose environmental regulations adversely affecting human social conditions—especially as related to jobs and American competitiveness. As a legislative staff member to U.S. Sen. John Breaux during the first session of the 102nd Congress, the author observed a concerted lobbying effort called the "Fly-in for Freedom." Fishing, logging, homebuilding, and other industries lobbied against environmental protection bills and for a greater accomodation of economic concerns. Some of the environmental statutes scheduled for reauthorization in 1993, and therefore possibly subject to similar lobbying pressure, include the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1991), the Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1991), and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1991). *See also* New York v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992) (rejecting plaintiffs' challenge of EPA-issued Clean Air Act regulations allegedly altered in response to the wishes of the Competitiveness Council)

[22] Under President George Bush and Vice President J. Danforth Quayle, the Council on Competitiveness and the White House Domestic Policy Council significantly impacted proposals to reformulate wetlands policy under section 404 of the Clean Water Act. Richard S. Stenger, *ALL WET*, ENVIRONMENTAL ACTION, Nov.-Dec. 1991, at 12-14.

[23] 467 U.S. 837 (1984).

[24] Existing interpretations of the CWA suggest that the balance of interests under this statute favors environmental protection over economic development. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (recognizing the breadth of congressional concern for protection of water quality and aquatic ecosystems, especially wetlands, and noting their central value in the hydrologic cycle); Smithwick v. Alexander, 12 ENVTL. L. REP. 20,432 (4th Cir. 1981) (finding the balance tilting decisively in favor of wetlands protection); *see also* Jeffrey M. Lovely, Comment, *Protecting Wetlands: Consideration of Secondary and Social and Economic Effects by the United*

agency decision-making process that merely reacts to the views of the executive branch lacks independence and effectively violates democratic principles of accountability. Part III reviews the historical evolution of section 404 in order to support Part II's conclusions regarding statutory ambiguity, accountability, and independence. Subparts A and B of Part III cover the periods before and after introduction of the "no net loss" policy for wetlands. The no net loss policy appeared, initially, to unify competing wetland perspectives.[25] Later, the phrase simply highlighted a fundamental conflict between developers and conservationists that is enshrined in the statute.[26]

After laying these foundations, this comment turns to the task of offering recommendations to ensure accountability for future agency decisions. Part IV echoes the suggestion of Northwestern University School of Law Professor Thomas Merrill that courts should review regulatory changes through precedent-based judicial deference to the executive branch.[27] Professor Merrill's "executive precedent" model

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States Army Corps of Engineers in its Wetlands Permitting Process, 17 B.C. ENVTL. AFF L. REV. 647, 677-78 (1990) (stating that the CWA was "enacted to protect the natural environment," not to decide between the economic interests of alternative sites as a matter of public policy) (citing Mall Properties, Inc. v. Marsh, 672 F. Supp. 561, 573 (D.Mass. 1987)). *Contra* Hoffman Homes, Inc. v. Environmental Protection Agency, 961 F.2d 1310 (7th Cir.), *vacated to facilitate settlement negotiations*, 975 F.2d 1774 (7th Cir. 1992), cited *infra* notes 54-55 and accompanying text; *see also infra* note 49 for an interpretation of the CWA suggesting that the phrase "unacceptable adverse impacts" at 33 U.S.C. § 1344(c) arguably indicates Congress' willingness to accept some adverse wetland impacts, for example, when the balance of interests favors economic development.

Other statutes demonstrate that Congress knows how to give economic interests higher priority than environmental protection, or at least an equally balanced consideration. *See infra* notes 45 (highlighting a statutory provision designed to prevent economic disruption or unemployment), 46 (cataloging environmental statutes that pay greater attention to economic interests by calling for cost-benefit analyses), 91 (noting that some environmental protection statutes simply establish long term goals), and 92 (listing environmental protection statutes that require a balanced consideration of economic interests).

[25] *See infra* note 84 (citing the National Wetlands Policy Forum as the genesis for a consensus strategy on the regulation of wetlands).

[26] *See infra* part III.B.1

[27] *See generally* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969 (1992). Professor Merrill's expertise in this area comes from his 1987 to 1990 service as Deputy Solicitor General, Department of Justice, when he argued or helped brief a large number of U.S. Supreme Court cases involving the "*Chevron* doctrine." *Id.* at 969.

achieves many of *Chevron*'s regulatory-efficiency goals, but refuses to sanction executive influence unchecked by meaningful judicial review. Part V provides two more immediate remedies. First, subpart A recommends legislation requiring the disclosure of an agency's rationale for succumbing to executive oversight. Then, subpart B draws upon analogous criticisms of Clean Air Act (CAA)[28] developments in order to encourage explicit clarification of Congress's intent. Congressional reauthorization or amendment could provide a viable opportunity to replace the ever-shifting political rhetoric between economic and environmental concerns with a more stable, harmonious regime.

II. Judicial Deference Under *Chevron*

In enacting the CWA, Congress sought to provide uniform water quality protection to a broad scope of areas with inherently different functions and values.[29] Unfortunately, the original legislative drafters lacked the scientific knowledge necessary to determine appropriate standards. The resulting delegation of authority was necessarily ambiguous.[30] Before the United States Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[31] courts generally applied "discretionary deference" (based on an arbitrary and capricious standard of review) to agency interpretations of ambiguous laws.[32] After

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[28] Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7671q (1991).

[29] Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. 1251-1387 (1991)).

[30] Merrill, *supra* note 27, at 997 (noting that similarly ambiguous delegations are found in many other statutes establishing jurisdictional or boundary limitations). *See also* Solid State Circuits v. U.S. Environmental Protection Agency, 812 F.2d 383 (8th Cir. 1987) (discussing alleged violations of constitutional due process presented by the inability to weigh, in advance, the probable validity or applicability of a CERCLA clean-up order, given that the statute imposes treble liability for failing to comply with a valid order). In *Solid State Circuits*, the Court of Appeals for the Eighth Circuit characterized the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), 42 U.S.C. §§ 9601-9675 (1988), as "in some circumstances . . . silent or ambiguous." *Id.* at 392.

[31] 467 U.S. 837 (1984) (holding that the EPA's interpretation of the term "stationary source," as permitting polluting-facility owners to treat all emitting devices as if they were under a single "bubble," represented a valid construction of the Clean Air Act).

[32] *Cf.* Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) (applying a "hard look" standard to hold that a decision by the Secretary of Transportation, rescinding a passive automobile restraint requirement, was arbitrary and capricious because it was not supported by a reasoned analysis).

Chevron, however, the courts can apply "pure deference" to these interpretations when Congressional direction is imprecise. The pure deference standard effectively precludes full judicial consideration of the substantive issues associated with policy disputes.[33] For example, the ambiguity inherent in section 404 could theoretically prevent the judiciary from determining whether expansive executive oversight unduly influences agency decisions.[34]

In *Chevron*, the United States Supreme Court acknowledged that agencies "may within the limits of [congressional] delegation, properly rely upon an incumbent administration's views of wise policy" to inform its judgments.[35] Where Congress has "directly spoken to the precise question at issue," the Court will adopt and enforce that answer; if the statute is ambiguous, however, judicial review shifts into a pure deference mode, which permits agencies to "fill the gap" with any reasonable construction of the statute.[36] In effect, "administrative actors become the primary interpreters of federal statutes and [courts are] relegate[d] to the largely inert role of enforcing unambiguous statutory terms."[37]

Professor Merrill criticizes the Court's expressed rationale for adopting a restrictive, deferential framework in *Chevron*. The Court justifies deference to the executive branch by invoking democratic principles of accountability.[38] Merrill suggests, on the other hand, that this expli-

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[33] Merrill, *supra* note 27, at 1002 (arguing that contextual factors, such as the degree of the agency's expertise and the existence of reliance interests implicated by the agency's interpretation, are ignored by the courts).

[34] *See generally id.* (noting that *Chevron* can be read to require mandatory deference to agency interpretations where Congress provided ambiguous statutory guidance); *see also infra* notes 35-37 and accompanying text.

[35] 467 U.S. at 865-66. The disputed issue in *Chevron* could be seen as part of the deregulatory thrust of the early Reagan Administration. Merrill, *supra* note 26, at 975; *see also Chevron*, 467 U.S. at 857-59. In response to the wishes of the Reagan Administration, the EPA "interpreted the term 'stationary source' in the Clean Air Act to permit owners of polluting facilities to treat all emitting devices as if they were under a single 'bubble,' thereby minimizing the costs of complying with the emissions standards" established by the Act. *Id.* at 975-76 (citing 467 U.S. at 840). The Court of Appeals for the District of Columbia Circuit invalidated the EPA's interpretation, in a prior stage of the litigation, largely because it was contrary to prior precedent. Merrill, *supra* note 26, at 989.

[36] *Id.* at 842-45.

[37] Merrill, *supra* note 27, at 969-70.

[38] *See id.* at 978-79 (suggesting that the Court viewed "agency decisionmaking [as] always more democratic than judicial decisionmaking because all agencies are accountable . . . to the President [who is elected by the people]").

cation is based upon a "fictitious delegation" of legislative power from Congress to executive agencies.[39] According to Merrill, this "dubious fiction . . . threatens to undermine [the functional theory of separation of powers,] the principal constitutional constraint on agency misbehavior."[40] *Chevron* effectively permits agencies not only to make policy within the limits of their organic statutes, but also to define these limits.[41]

Despite *Chevron*'s apparent holding that an implementing agency may change regulations simply by articulating a rational basis for its decision, courts should assume (unless Congress expressly provides to the contrary) that Congress expects agencies to apply their experience and expertise when reformulating regulatory policy. The secrecy inherent in the executive oversight process, however, often produces incomplete administrative records and furthers hidden agendas. The courts should not, therefore, use *Chevron* to validate rulemaking that is no more than a response to political choices.[42]

Admittedly, the challenged regulatory about-face by the Environmental Protection Agency (EPA) in *Chevron* took place pursuant to a new philosophy introduced by President Ronald Reagan.[43] The Court expressly determined, however, that the EPA's decision was a "reasonable accommodation of manifestly competing interests."[44] The Court noted, in addition, that Congress "sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality."[45] Correspondingly, the courts could logically extend this reasoning to

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[39] *Id.* at 1014.

[40] *Id.* at 998; *see also id.* at 994.

[41] *Id.* at 997.

[42] *See* Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 303 (1991). Consider New York v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992), in which the Court of Appeals for the District of Columbia Circuit rejected the allegation that the EPA improperly relied upon the views of the Competitiveness Council when it abandoned proposed rules under the Clean Air Act. The court held that the EPA's decision to omit materials separation requirements (designed to control industrial emissions) was adequately supported by the administrative record *Reilly*, 969 F.2d at 1149-51. The agency based its decision on uncertainty over associated costs, as identified through testimony by the U.S. Conference of Mayors' National Resource Recovery Association. *Id.*

[43] *Chevron*, 467 U.S. at 857-59.

[44] *Id.* at 865.

[45] *Id.* at 851. The Clean Air Act contains a provision entitled "Measures to *prevent economic disruption or unemployment*." 42 U.S.C. § 7425 (1991) (emphasis added).

support increased consideration of economic factors in the regulation of wetlands. A careful consideration of the language, policies, and history of the CWA, however, suggests that Congress intended broader protection of water quality than air quality. Whereas other environmental protection statutes pay significant attention to cost-benefit analyses,[46] reflecting Congress' intent to accept certain risks to human safety and environmental degradation, an equivalent commitment to balancing economic and ecological concerns is not readily apparent in the CWA.[47]

Potential judicial analysis of section 404 policy decisions is complicated, however, by the ambiguity generally associated with wetlands regulation. Proponents of President Bush's Wetland Protection Plan[48] could argue that Congress did not intend the CWA as a full wetland protection measure; in other words, the Act was designed only to protect those ecosystems that serve important water quality functions.[49]

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[46] *See, e.g.*, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1991) (accepting, implicitly, that environmental and other harms associated with pesticides are outweighed by their beneficial uses); Coastal Zone Management Act, 16 U.S.C. § 1454(b)(7) (1991) (balancing ecological, cultural, historic and esthetic values as well as needs for economic development); National Environmental Policy Act, 42 U.S.C. § 4331(b)(5) (1991) (recognizing the government's responsibility to achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities); *id.* § 4332 (1991) (recognizing, indirectly, the need to consider economic and technical factors when analyzing impacts on the human environment); Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act), 42 U.S.C. § 6901(a)(2) (1991) (recognizing that economic and population growth needs require increased industrial production).

[47] *Compare supra* note 24 and *infra* part III.A.1 (discussing the congressional compromise between economic and environmental concerns under the Clean Water Act, in other words, bifurcating administrative authority under both the Corps and EPA) *with supra* notes 45-46 and *infra* notes 91-92 (noting that statutory guidance concerning the appropriate balance between these competing interests under the CWA is not as specific as other statutory references, including cost-benefit analyses and other balancing tests). A possible explanation for this difference is that Congress acted upon a perceived need for broader protection against human impacts on water resources, as opposed to impacts on the air.

[48] Fact Sheet from the White House Office of the Press Secretary, *Protecting America's Wetlands* (Aug. 9, 1991) (on file with the author) [hereinafter President Bush's Wetlands Plan].

[49] *See* Clean Water Act, 33 U.S.C. § 1344(c) (1991). The Administrator of the EPA is authorized to veto any permit issued by the Corps for the discharge of dredged or fill material:

whenever he determines, after notice and opportunity for public hearings, that

Advocates for this proposition might draw support from the United States Supreme Court's decision in *United States v. Riverside Bayview Homes*,[50] which noted that section 404 provides ambiguous guidance.[51] Given a hypothetical decision by the EPA to increase the scope of allowable adverse impacts on wetlands,[52] therefore, the *Riverside* decision could serve as precedent for judicial deference, à la *Chevron*, to this new interpretation of the CWA's statutory mandate. Under *Chevron*, a restrictive EPA interpretation of the CWA would apparently be entitled to deference.[53] The decision by the Court of Appeals for the Seventh Circuit in *Hoffman Homes, Inc. v. Environmental Protection Agency*[54] lends additional support to claims for limited section 404 application. The Seventh Circuit interpreted *Riverside* restrictively to support its holding that the CWA does not either explicitly, or through delegation of Congress' constitutional power to regulate interstate commerce (under Article I, Section 8 of the Constitution), authorize regulation of all wetland resources.[55]

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the discharge of such materials into such area will have an *unacceptable adverse effect* on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Id. (emphasis added). The phrase "unacceptable adverse effect" could be interpreted as an indication of Congress' willingness to accept some adverse wetlands impacts, notwithstanding the CWA's general commitment to environmental protection. *See also* 40 C.F.R. § 231.2(e) (1991) (codifying the EPA's veto authority through regulations covering any adverse impact resulting in the significant loss of, or damage to, wildlife habitat).

[50] 474 U.S. 121 (1985).

[51] *Id.* at 132.

[52] President Bush arguably sought to implement this decision in his Wetlands Protection Plan, *supra* note 48. *See also infra* subpart III.B.4 (discussing the growing tide of economic conservativism in the United States, and the corresponding desire for an interpretation of section 404 that provides greater consideration of economic interests).

[53] See, e.g., New York v. Reilly, 969 F.2d 1147 (D.C. Cir. 1992) (rejecting plaintiffs' allegation that the EPA improperly relied upon the views of the Competitiveness Council when it abandoned proposed rules under the Clean Air Act).

[54] 961 F.2d 1310 (7th Cir. 1992) (invalidating EPA's regulation defining waters of the United States to include isolated wetlands). On Sept. 4, 1992, this decision was vacated upon grant of rehearing, to facilitate settlement negotiations. Hoffman Homes Inc. v. Environmental Protection Agency (*Hoffman Homes II*), 975 F.2d 1774 (7th Cir. 1992).

[55] *Hoffman Homes*, 961 F.2d at 1311, 1320 (finding that isolated intrastate wetlands are excluded from federal regulation, and potential use of such wetlands by migratory birds is insufficient to invoke federal regulatory authority); *cf.* Leslie Salt Co. v. United

Overly-deferential analysis under *Chevron*, however, constitutes little more than a rubber stamp for otherwise questionable administrative procedures. Agencies adopting any regulatory changes pursuant to executive oversight should support these changes with detailed explanations of their rationale for succumbing to outside views. Regardless of the merits associated with the Bush Administration's attempt to inject greater balance in section 404, the process that generated President Bush's Wetlands Plan remains disconcerting for two reasons: (1) influence was applied behind closed doors, not in public hearings; and (2) increased attention to economic concerns is apparently inconsistent with existing statutory interpretations of section 404.[96] Given the high stakes of the wetlands debate, and the potential for continued polarization of the environmental and economic constituencies, administrative efforts to modify existing wetland regulations should avoid the appearance of impropriety that surrounded the Competitiveness Council. Attempts to harmonize environmental and economic interests under the Clean Water Act must adhere to democratic principles of accountability and be immune from undue influence.

III. The Evolution of Section 404 Wetland Policy

Part II, above, argued that broad judicial deference with respect to changes in wetland regulations is inappropriate, despite statutory ambiguity, because of deeply-ingrained democratic values related to independence and accountability under our system of government. A review of section 404's historical development provides a better understanding of the underlying inconsistencies associated with wetlands regulation. This part also illustrates the fact that executive oversight can change regulatory policy without sufficient public accountability.

In the past, most people viewed wetlands as wastelands, a home to mosquitos, ooze, and pestilence, that were to be "diked, drained, and filled in for housing developments and industrial complexes, converted

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States, 896 F.2d 354 (9th Cir. 1990) (upholding the U.S. Army Corps of Engineers' regulatory jurisdiction over man-made wetlands and wetland areas having the potential to serve as migratory bird habitat).

[96] *Compare supra* notes 24 and 46 (indicating (i) a broad concern by Congress for water quality protection, especially with respect to wetlands, (ii) a rejection of cost-benefit balancing under the CWA, as compared to other environmental statutes which require such analysis, and (iii) that the balance of interests will, in any event, tilt decisively in favor of wetland protection.) *with supra* note 45 and *infra* notes 91-92 (listing statutes that employ cost-benefit analyses and other flexible approaches to the conservation and management of resources in an effort to balance economic and environmental impacts equitably).

to farmland, [or] used as receptacles for household and hazardous waste."[57] Eventually, heightened awareness revealed wetlands as sensitive transitional areas with subtle intrinsic values, serving vital environmental functions such as ground water recharge; flood and sediment control; prevention of shoreline erosion and saltwater intrusion; wildlife habitat formation; water quality maintenance; enhancement of biological productivity; and provision of recreational opportunities.[58]

Despite numerous benefits furnished by wetlands and continuing losses of such areas, however, federal wetland initiatives do not provide comprehensive protection for this vital natural resource. For example, high value wetlands are lost every year because activities such as draining, excavating and channelizing are not regulated.[59] Section 404, which requires permits for the placement of dredge and fill material in the waters of the United States, is the most important federal regulatory program for wetland protection. The ambiguous Congressional guidance provided in this legislation, however, allows a divisive conflict to persist.

A. Before the No Net Loss Policy

Despite progressive regulatory revisions, and almost twenty years of litigation, section 404's competing constituencies, i.e. developers and conservationists, remain polarized as the nation's wetland resources continue to dissipate. A bifurcated administrative structure under section 404, divided between the U.S. Army Corps of Engineers (Corps) and the EPA,[60] provides:

> a recipe for *endless conflict* between those who would protect what is the United States' most productive and endangered ecosystem—its wetlands—and those who would exercise their most fundamental economic right—to develop the land they own.[61]

1. Institutionalized conflict and uncertainty

Congress awarded administration of the section 404 permit program to the Corps, based on that agency's previous experience with permit

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[57] Barbara Sleeper, *Wetlands, Wonderlands*, ANIMALS, Jan.-Feb. 1991, at 12. *See also* Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 Sw. L. J. 1473, 1474 (1991).

[58] Sleeper, *supra* note 57, at 12-13; Dickerson, *supra* note 57, at 1474-75.

[59] Dickerson, *supra* note 57, at 1496.

[60] *See infra* part III.A.1.

[61] Houck, *supra* note 6, at 10,212 (emphasis added).

programs in navigable waters.[62] In addition, the EPA can veto any Corps permit that would "adversely affect municipal water supplies, shellfish beds, and fishery areas . . . , wildlife, or recreational areas."[63] This bifurcated structure reflects Congress' compromise between the values of economic well-being (the Corps' primary mission) and environmental protection (the EPA's mission).[64]

The resulting procedural uncertainty is accompanied by substantive ambiguity; section 404 does not clearly define its jurisdictional limits. The statute merely authorizes Corps permits for placement of dredge and fill material in the "waters of the United States."[65] Wetlands are neither defined nor specifically addressed in the CWA; the Act's goal is simply "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[66]

2. *Judicial expansion of section 404 jurisdiction*

Initially, the Corps limited its scope of authority under section 404 to traditional navigable waters.[67] Public interest environmental groups, however, sought greater ecosystem protection. In the landmark decision *National Resources Defense Council v. Callaway*,[68] fulfilled the environmental community's hopes. As a result, the term "navigable waters" under the CWA now encompasses all waters of the United States within the reach of the Commerce Clause.

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[62] *See, e.g.*, Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. §§ 403, 407 (1991); Fish and Wildlife Coordination Act, as amended 1965, 16 U.S.C. § 662 (1991); and Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1413 (1991).

[63] Shannon J. Kilgore, Comment, *EPA's Role in Wetlands Protection, Elaboration in Bersani v. U.S. EPA*, 18 ENVTL. L. REP. 10,479, 10,481 n. 16 and accompanying text (Nov. 1988) (citing S. Rep. No. 1236, 92nd Cong., 2d Sess. 141-42 (1972)).

[64] *Id.* at 10,480. *But see* Benjamin H. Grumbles & Kenneth J. Kopocis, *Water Resources Acts: Developing an Environmental Corps*, 21 ENVTL. L. REP. 10,308 (June 1991). The Water Resources Development Act of 1990, Pub. L. No. 101-640, 104 Stat. 4604, established environmental protection as a primary mission for the Corps. *Id.* at 10,309, 10,314-21. The Wetlands Research Program established by the Corps also indicates increased environmental sensitivity in this agency. *See* U.S. ARMY ENGINEER WATERWAYS EXPERIMENT STATION, THE WETLANDS RESEARCH PROGRAM (1991) (brochure on file with author).

[65] 33 U.S.C. § 1362(7) (1991).

[66] 33 U.S.C. § 1251(a) (1991).

[67] 33 C.F.R. §§ 209-210(d)(1) (1974).

[68] 392 F. Supp. 685 (D.D.C. 1975).

The Corps' regulatory jurisdiction applies to interstate waters (including wetlands), waters affecting interstate or foreign commerce, tributaries thereof, and wetlands adjacent thereto.[69] The crucial element in defining Corps jurisdiction is whether or not a particular saturated area (wetland) is hydrologically connected to a navigable water of the United States. After promulgation of the *Callaway* decision, supporters of the Corps' prior, more limited application of section 404 sought to reinstate the old interpretation through congressional amendment.

3. Congressional reaction

In 1977, Congress rejected efforts to limit the jurisdictional scope of section 404 to traditionally navigable waterways and their adjacent wetlands.[70] Although the House of Representatives passed such a limiting measure,[71] the Senate defeated a parallel amendment.[72] The debate centered on wetland preservation issues.[73]

Proponents of limited jurisdiction argued that the inclusion of non-navigable waters far exceeded congressional intent; opponents asserted that a narrower definition would exclude vast stretches of crucial wetlands to the detriment of wetland ecosystems, water quality, and the aquatic environment generally.[74] The statute, however, exempted certain agricultural, forestry, ranching and other operations.[75] In spite of these clarifications, section 404 still causes uncertainty and confusion.

4. Judicial perpetuation of institutional conflict

The judiciary finally reviewed the bifurcated decisionmaking authority created under section 404 in *Bersani v. Robichaud*.[76] The holding by

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[69] *See supra* note 1 for the Corps' current definition of wetlands.

[70] *See generally* H.R. CONF. REP. No. 95-830, 95th Cong., 1st Sess. 10-11 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4424, 4475-80.

[71] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 136 (1985) (citing H.R. 3199, 95th Cong., 1st Sess., § 16 (1977)).

[72] *Riverside Bayview*, 474 U.S. at 136 (citing S. 1952, 95th Cong., 1st Sess., § 49(b) (1977)).

[73] 123 CONG. REC. H10,426-36, S26,710-29 (1977). *cited in Riverside Bayview*, 474 U.S. at 136.

[74] *Id.*

[75] Dickerson, *supra* note 57, at 1478 (citing 33 U.S.C. § 1344(f)(1)(A) (1988)). *But see* § 1344(f)(2) (prohibiting recapture, or new uses, that affect the reach or circulation of wetlands).

[76] 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

the Court of Appeals for the Second Circuit failed, however, to clarify the law. Although *Bersani* implicitly approved EPA's "practicable alternatives" test[77] over the Corps' "public interest review" test,[78] the Court of Appeals for the Second Circuit found only that EPA's interpretation was reasonable.[79] The court expressly declined to rule that EPA's position was entitled to deference.[80]

According to one commentator,

> [t]his system of permit review is duplicative, cumbersome and inconsistent. The Corps is given the task of serving two masters, while it lacks the tools to fully satisfy either one. Consequently, the Corps' permitting process often times produces unsatisfactory and inconsistent results.[81]

This conclusion is reinforced by observations that the judiciary has yet to provide reliable guidance for the Corps, remanding section 404 permit decisions both for considering and for failing to consider economic factors.[82]

5. Inconsistent agency determinations of wetland jurisdiction

A final example of the uncertainty which existed prior to the "no net loss" standard is revealed by the divergent agency perspectives on how to identify wetlands for jurisdictional purposes. The identification of wetlands is also referred to as delineation, or defining the scope of authority under section 404. The original Corps and EPA delineation manuals were both based on a multiparameter approach.[83] The manuals

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[77] *Bersani*, 850 F.2d at 39. The court determined that the Corps must, during its permit review process, avoid the development of wetland areas if possible, by first considering the economic feasibility of alternative sites regardless of ownership. *Id.*

[78] *Id.* at 39-40. The court balanced the benefits of a proposed development—including economic considerations and the right to reasonable private use—against potential damage to wetland resources, in order to secure both adequate protection and reasonable utilization of environmental resources. *Id.*

[79] *Id.* at 46.

[80] *Id.* at 45 (noting that the court was "not thoroughly persuaded that EPA's interpretation was entitled to deference"); *see also* Kilgore, *supra* note 63, at 10,487-88.

[81] Dickerson, *supra* note 57, at 1486.

[82] *See, e.g.*, Lovely, *supra* note 24, at 668, 673-78 (citing Mall Properties, Inc. v. Marsh, 672 F.Supp. 561 (D.Mass. 1987), *appeal dismissed*, 841 F.2d 440 (1st Cir.), *cert. denied*, 488 U.S. 848 (1988); Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985); Hough v. Marsh, 557 F.Supp. 74 (D.Mass. 1982)).

[83] Thomas A. Sands, Comparison of 1987 Corps Wetland Delineation Manual and the 1989 Federal Manual for Identifying and Delineating Wetlands (1991) (unpublished manuscript on file with the author). According to this paper, Mr. Sands was principal author of the original U.S. Army Corps of Engineers' Wetland Delineation Manual, RECOGNIZING WETLANDS (1987). *Id.* at 1.

emphasized that all three of the following technical criteria must be met for an area to qualify as a wetland: wetland vegetation, hydric soils and hydrology.[84] Again, the crucial element justifying jurisdiction was the hydrologic link to, and potential adverse effect upon, navigable waters of the United States.

Evaluation of the wetland indicators mentioned above involves highly complex processes. Different interpretations led to inconsistent applications by field personnel for the respective federal agencies with wetland responsibilities: the Corps, EPA, Fish & Wildlife Service, and the Department of Agriculture's Soil Conservation Service. The Fish & Wildlife Service applied a significantly different basis for wetland jurisdiction than the other agencies; its 1979 manual required only one of the three wetland criteria.[85] This inconsistency severely impeded efforts to regulate wetlands uniformly[86] and, predictably, heightened tensions between competing interest groups. After fifteen years of continuing conflict and uncertainty, the regulated community marshalled its resources in an effort to revitalize wetland regulation. As Section B explains below, the resulting proposal for resolving regulatory conflicts merely highlighted a fundamental difference of perspective concerning the proper scope of wetland regulation.

E. Going Beyond the No Net Loss Policy

Current elements of the ongoing regulatory controversy are traceable to the aftermath of a compromise that, ironically, appeared to unify previously irreconcilable wetland perspectives. In 1987, a prestigious group of state governors, business and environmental leaders, academicians and developers came together at the National Wetlands Policy

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[84] *Id.* at 1. The term "hydric soil" refers to soil that is "flooded, ponded, and/or saturated long enough during the growing season to produce anaerobic conditions in the upper part" of the soil profile. *Id.* at 5. The term "hydrology" refers to "[a]reas that are inundated or have saturated soils for at least a week during the growing season more often than every other year on the average." *Id.* at 7. *See also* Dickerson, *supra* note 57, at 1482-83.

[85] Sands, *supra* note 83, at 1. *See also* Dickerson, *supra* note 55, at 1482-83 (citing FISH AND WILDLIFE SERVICE, U.S. DEPT. OF THE INTERIOR, FWS/OBS-79/31, CLASSIFICATION OF WETLANDS AND DEEPWATER HABITATS OF THE UNITED STATES (1979)). The Fish & Wildlife Service's 1979 Delineation Manual simply requires one of the three criteria—periodic wetland vegetation, predominantly hydric soil, or saturation—at some time during the growing season. Sands, *supra* note 83, at 3.

[86] Dickerson, *supra* note 55, at 1483.

Forum to recommend a consensus strategy for protecting the nation's wetlands.[87]

In 1988, President George Bush elevated the importance of wetlands protection by adopting the Forum's fundamental goal, no net loss of wetlands. The optimism surrounding the no net loss policy soon dissipated, however. The fragile consensus was torn apart by the following developments: promulgation of a revised wetland delineation manual,[88] EPA's veto of a permit for the popular Two Forks Dam public works project,[89] and mounting controversy over the proper role of mitigation within the permit process.[90] This part of the article demonstrates how the underlying conflict enshrined in section 404 led to a deterioration of the no net loss consensus. Finally, subpart B closes with the observation that unaccountable agency action concerning regulatory policy, whether due to executive influence or overzealous implementation by the Corps or the EPA, is an abuse of basic democratic principles.

1. Conflicting interpretations of "no net loss"

The conflict between economic and ecological interests under section 404 flared once again shortly after the 1987 National Wetland Forum's vague no net loss compromise. Rather than interpreting no net loss as a flexible long term goal,[91] environmentalists pushed for pure protection of wetlands. They urged literal, immediate, and comprehensive application of the CWA to prevent the loss of any wetlands. Landowners

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[87] THE CONSERVATION FOUNDATION, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA, THE FINAL REPORT OF THE NATIONAL WETLANDS POLICY FORUM [hereinafter FORUM REPORT]; Lovely, *supra* note 24, at 648 n.7.

[88] *See* discussion *infra* at subpart III.B.2.a.

[89] *Section 404 Program Critics Call for Reform*, LAND LETTER (W.J. Chandler & Assoc.) [hereinafter Chandler], Mar. 1, 1991, at 1.

[90] *See* discussion *infra* at subpart III.B.2.b.

[91] Long-term goals in certain statutes indicate Congress' desire for a flexible approach to pressing environmental problems where carefully-tailored solutions are currently unavailable, or unwise. The MMPA expresses a long term goal of "insignificant dolphin mortality rates approaching zero" for fishing activities involving the setting of purse-seine nets to catch yellowfin tuna (the nets are intentionally set on dolphins, which are often found swimming above schools of yellow-fin tuna). Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1372 (1991). Similarly, the CWA establishes an unachievable, industry-forcing "goal" of eliminating pollutant discharge by 1985. Clean Water Act, 33 U.S.C. § 1251(a)(1) (1991).

and developers, on the other hand, sought balanced consideration of both economic and ecological factors in section 404 permit decisions.[92]

2. Agency cooperation fails to resolve the conflict

The four principal federal agencies with wetlands responsibilities (the Corps, the EPA, the Fish & Wildlife Service, and the Department of Agriculture's Soil Conservation Service) appeared to reach a consensus on these issues in 1989. Conflicts along the way, however, soon revealed that the debate over wetland regulation was far from settled. The environmental community complained that the agencies' efforts were falling short, and the business community countered that the agencies' agreement represented "a drastic change from the past."[93]

(a) The 1989 federal delineation manual.

Complaints about inconsistent application of wetland identification techniques[94] prompted cooperative agency efforts to produce a joint delineation manual. In January 1989, the four agencies agreed to use the same mandatory definition for identifying wetlands.[95] The agencies implemented this new manual without providing for public review and comment, claiming that "the agreement does not change the way wetlands are defined."[96]

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[92] The Endangered Species Act calls for consideration of both the economic impact caused by proposed critical habitat designation, 16 U.S.C. § 1533(b)(2), and the benefits provided by alternatives consistent with the statutory goals, *Id.* § 1536(h)(1)(A) (1991). The Fishery Conservation and Management Act promotes fisheries utilization that provides the greatest overall benefit to the nation, while taking into account and allowing for regional variations in the resource. 16 U.S.C. §§ 1801-1882 (1991).

[93] Marianne Lavelle, *Wetlands: the new battle cry in Washington*, NAT'L L. J., July 23, 1990, at 24.

[94] Dickerson, *supra* note 57, at 1483-84.

[95] *See generally* U.S. ARMY CORPS OF ENGINEERS, U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. FISH AND WILDLIFE SERVICE, U.S.D.A. SOIL CONSERVATION SERVICE, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1988) [hereinafter FEDERAL DELINEATION MANUAL]. The FEDERAL DELINEATION MANUAL was not formally adopted until 1989. The predecessors of the FEDERAL DELINEATION MANUAL are discussed *supra* in subpart III.A.5. *See also* MEMORANDUM OF AGREEMENT BETWEEN THE ARMY AND EPA CONCERNING THE DETERMINATION OF THE GEOGRAPHIC JURISDICTION OF THE SECTION 404 PROGRAM (Jan. 19, 1989).

[96] Chandler, *supra* note 89, at 1.

Journalists reported that "[i]n 1988 the U.S. Fish and Wildlife Service (USFWS) estimated 100 million acres of wetlands in the continental United States; in 1990, after adoption of the manual, it produced virtually the same estimate."[97] Although technically correct, these reports failed to point out that the USFWS's interpretation did not concur with generally recognized assessments of wetland acreage under the Corps/EPA 1987 Delineation Manual. Misleading and inflammatory statements like this failed to consider the dramatic changes made by the new manual. For example,

> the approximately 7,000 vegetation species used as wetlands indicators also occur with some frequency in *non-wetland* areas, . . . [the 1989 manual] creates thirteen special conditions under which land may be deemed wetland by satisfying *only one or two* of the three required technical criteria, . . . [and the 1989 manual] is replete with *technical flaws* including the failure to recognize significant *regional differences in vegetation and soil* across the country.[98]

(b) The Corps-EPA memorandum of agreement on wetlands mitigation.

Another document illustrating the agencies' efforts to cooperate is the Memorandum of Agreement (MOA) on Wetlands Mitigation between the Corps and the EPA. Prior to this arrangement, the Corps and the EPA disagreed about the validity of mitigation as a consideration during section 404 permitting decisions. In *Bersani v. Robichaud*,[99] the Court of Appeals for the Second Circuit did not address or even acknowledge EPA's general policy that mitigation is not an appropriate means of satisfying the section 404(b)(1) guidelines. The court's holding, however, appeared to favor the EPA's interpretation.[100]

Subsequent consultations between the two agencies led to a revised MOA on Wetlands Mitigation incorporating the EPA's sequencing

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[97] Tim Searchinger and Douglas Rader, *The Condominium Crowd Makes its Move on Wetlands*, L.A. DAILY J., Aug. 21, 1991, at 6. The 1989 Manual apparently incorporated FWS's perspective of wetland indicators. *See supra* subpart III.A.5.

[98] Dickerson, *supra* note 57, at 1484 (emphasis added).

[99] 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989).

[100] *Id.* at 46; *see also* Houck, *supra* note 6, at 10,212 (noting that with time, *Bersani* "might have caused the Corps to cease mitigation-based permitting," however, developments in the Wetlands Forum "subsumed the issue").

approach.[101] The agencies also committed themselves to no net loss by requiring that "[wetlands] mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values)."[102] Although the MOA was originally issued on November 15, 1989, the White House delayed actual implementation of the agreement several times in order to respond to criticisms submitted by the Departments of Energy and Transportation, the oil and gas industry, and Alaskan development interests.[103] As a result, the revised MOA on Wetlands Mitigation allows the Corps to deviate from the otherwise required sequencing approach whenever EPA agrees that a proposed discharge into wetlands is "necessary to avoid environmental harm," will produce "environmental gain or insignificant environmental losses," or whenever the "mitigation measures necessary to meet this goal are not feasible, not practicable" or inconsequential.[104] Reactions to these MOA amendments epitomize the divergence of views concerning section 404

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[101] MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT SECTION 404(B)(1) GUIDELINES (Feb 6, 1990) [hereinafter MOA ON WETLANDS MITIGATION], at 2, 3. The EPA considers whether a proposed discharge should be permitted by applying a sequential procedure (avoidance, mitigation, and compensation), granting a permit only where the agency determines: first, that potential wetland impacts have been avoided to the maximum extent practicable, second, that remaining unavoidable impacts will be mitigated to the extent appropriate and practicable; and finally, that the permit applicant will compensate for aquatic resource values lost or damaged. *Id.* at 3; *see also* 40 C.F.R. § 230.10 (1992) (codifying the EPA's sequencing approach).

"It is important to recognize that there are circumstances where the impacts of a project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed." MOA ON WETLANDS MITIGATION, *supra*, at 3 n.5 (citing 40 C.F.R. § 230.10(c)).

[102] *Id.* at 5. In other words, the MOA defines "no net loss" as meaning that any loss of wetlands must be replaced, either through creation, restoration or modification, with wetlands of at least functionally equivalent value. *See also* William L. Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 ENVTL. L. REP. 10,209, 10,210 (June 1990).

[103] Want, *supra* note 102, at 10,210-11; Royal C. Gardner, *The Army-EPA Mitigation Agreement: No Retreat From Wetlands Protection*, 20 ENVTL. L. REP. 10,337, 10,337 nn 1-5 (Aug. 1990).

[104] MOA ON WETLANDS MITIGATION, *supra* note 101, at 2, 3; Want, *supra* note 102, at 10,210 (noting also that the MOA recognizes that no net loss of wetlands functions and values "may not be achieved in each and every permit action"); Gardner, *supra* note 103, at 10,341.

that continues to polarize conservationists and developers.[105] Although the revised MOA may solve some of the problems associated with section 404, it "does not represent the FUNDAMENTAL RESTRUCTURING [of wetlands regulation] that is necessary."[106]

3. The continuing ambiguity of congressional guidance

Congress is fully aware of the public uncertainty concerning the relationship between economic and environmental factors under section 404. It is also clear that section 404 does not provide comprehensive protection of the nation's wetlands. Our elected representatives continue, however, to address wetlands loss in a piecemeal, inconsistent fashion.[107]

During the 102nd Congress, staff members of the Senate Environment & Public Works Committee suggested that the Committee would not include any significant changes to the section 404 program in its 1992 reauthorization bill.[108] The National Wetlands Coalition and other

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[105] *See id.* at 10,211; Ronald A. Zumbrun, *Wetland Preservation Rule Adopted Without Public Comment*, L.A. DAILY J., May 1, 1991, at 6; Houck, *supra* note 6, at 10,214.

[106] Dickerson, *supra* note 57, at 1488 (emphasis added). A uniform wetland evaluation technique would represent a significant step toward improved regulation of wetland areas.

[107] *See, e.g.*, the Conservation Easements on Wetlands in FmHA Inventory Property Act of 1990, 7 U.S.C. § 1985(g) (1991); the Farms for the Future Act of 1990, 7 U.S.C. § 4201 (note) (1991); the Fish and Wildlife Coordination Act, as amended 1965, 16 U.S.C. § 662 (1991); the Migratory Bird Conservation Fund, as amended 1966, 16 U.S.C. § 715k (1991); the Wetlands Loan Act, as amended 1988, 16 U.S.C. § 715k-3 (1991); the Watershed Protection and Flood Prevention Act, as amended 1990, 16 U.S.C. §§ 1001-09 (1991); the Water Bank Program (WBP), as amended 1980, 16 U.S.C. §§ 1301-11 (1991); the Erodible Lands and Wetland Conservation and Reserve Program, 16 U.S.C. §§ 3801-39d (1991); the Emergency Wetland Resources Act, as amended 1989, 16 U.S.C. §§ 3901-32 (1991); the Coastal Wetlands Planning, Protection and Restoration Act of 1990, 16 U.S.C. §§ 3951-56 (1991); the North American Wetlands Conservation Act of 1989, 16 U.S.C. §§ 4401-13 (1991); (the Land and Water Conservation Fund), 16 U.S.C. §§ 460*l* through 460*l*-22 (1991); and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1413 (1991).

[108] Chandler, *supra* note 89, at 6. *See also The Status of Wetlands Science: hearing before the Subcommittee on Environmental Protection of the Commitee on Environment & Public Works*, S. Hrg. No. 102-69, 102nd Cong., 1st Sess. 1-2 (statement by Senator Max Baucus of Montana), 24 (statement by Senator John Chafee of Rhode Island) (April 9, 1991); *Implementation of Section 404 of the Clean Water Act: hearing before the Subcommitter on Environmental Protection of the Committee on Environment & Public Works*, S. Hrg. No. 102-

interested parties then lobbied members of Congress who were not on the committee. Their vigorous efforts resulted in the introduction of several bills aiming to reform wetlands regulation.[109]

4. Displacing agency decisionmaking responsibility

A growing tide of economic conservatism[110] appeared to convince President George Bush to take preemptive action despite the introduction of these bills. On August 9, 1991, the Bush Administration unveiled a new plan for protecting the nation's wetlands.[111] The effort suggested a return to the vindication of private property rights, previously initiated in 1981 through a Regulatory Reform Task Force led by then-Vice President George Bush.[112] President Bush's Wetlands Protection Plan apparently sought to rein in section 404 by injecting more balance into the permitting process.[113] The potential impact of this plan recognizably diminished with the departure of President Bush and the election of Bill Clinton. Without more explicit congressional guidance, however, section 404's fundamental inconsistencies, conflicts between environmentalists and developers, and further wetland losses,

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450, 102nd Cong., 1st Sess. 172 (letter from the National Governor's Association urging no changes to section 404 until amendments to the 1989 delineation manual have been given an opportunity to improve the program) (June 20, July 10, and Nov. 22, 1991).

[109] H.R. 1330, 102nd Cong., 1st Sess. (sponsored by Rep. Jimmy Hayes, D-La.); S. 1463, 102nd Cong., 1st Sess. (sponsored by Sen. John Breaux, D-La.). Other bills introduced that same session also sought to revise § 404, including: H.R. 251, 102nd Cong., 1st Sess. (sponsored by Rep. Charles Bennett, D-Fla.); H.R. 404, 102nd Cong., 1st Sess. (sponsored by Rep. John Hammerschmidt, R-Ark.); and H.R. 2400, 102nd Cong., 1st Sess. (sponsored by Rep. Lindsay Thomas, D-Ga.). No substantive action was taken on any of these bills.

[110] *See, e.g.*, Michael Satchell, *Any Color But Green*, U.S. NEWS & WORLD REPORT, Oct. 21, 1991, at 74 (reporting that the "wise use" coalition blames poor economic conditions on environmental statutes, which do not sufficiently balance nonenvironmental interests).

[111] *See generally* President Bush's Wetlands Plan, *supra* note 48.

[112] *See* Exec. Order No. 12,291, 48 Fed. Reg. 21,466 (1983) (implementing a policy based on the belief that American businesses are too heavily regulated by the federal government).

[113] The President's Plan was apparently prepared to resolve a controversy between regulatory amendments proposed by the Competitiveness Council. *See generally supra* part I, and note 15. *See also infra* subpart III.B.4.b (discussing the scientific recommendations of the Federal Interagency Committee for Wetland Delineation).

are likely to persist.[114] A quick evaluation of President Bush's Wetlands Plan provides a sense of the business community's interests concerning wetland regulation and reveals several problems associated with unchecked executive oversight.

(a) Streamlining & flexibility.

President Bush's plan attempted to streamline section 404 procedures and introduce greater flexibility in analyzing proposed developments. The President sought to replace consulting agency appeals of individual permits granted by the Corps with appeals based on resources or issues of national significance.[115] The President's interpretation of section 404 under the plan placed increased emphasis on balancing economic and ecological interests.[116] In addition, the plan provided incentives for private restoration or creation of wetlands, including a system of granting mitigation-banking credits where the effects of proposed developments in wetlands areas are mitigated through off-site enhancement projects.[117]

(b) The 1991 federal delineation manual.

The President's plan also sought to revise the Federal Delineation Manual. Pursuant to the Bush Administration's wishes, the EPA promulgated proposed revisions to the Federal Delineation Manual for public comment on August 14, 1991.[118] One of the criteria for delineation, wetlands hydrology, requires inundation for fifteen or more consecutive days, or saturation for twenty-one or more consecutive days.[119] As a result, some areas designated as wetlands under the 1989 delineation manual were not wetlands under the revised manual.[120] The

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[114] Houck, *supra* note 6, at 10,212 nn. 8-13. Houck commented that "[t]he actors and alliances may change . . . but the basic positions remain the same—intractable—and proceeding from entirely different assumptions." *Id.* at 10,212.

[115] *See* President Bush's Wetlands Plan, *supra* note 48, at 4.

[116] *Id.* at 4-5. The President's plan resurrected the Corps' balancing test, which was implicitly rejected by *Bersani* in favor of the EPA's sequencing approach. *See supra* part III.A 5 (discussing the respective tests).

[117] *See, e.g.*, Robert W. Hahn and Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L. Q. 1 (1991).

[118] 56 Fed. Reg. 40,446-40,480 (August 14, 1991).

[119] *Id.*

[120] Robert T. Stewart and Chris M. Amantea, *President's New Policy Shifts Focus*, NAT'L L. J., Feb 10, 1992, at 27. Only areas experiencing seven days of saturation within eighteen inches of the ground surface are designated as wetlands. *Id*

agencies continued to assert, however, that they did not change their wetland definitions.[121]

Executive attention can, and sometimes does, contribute to the development of sound national policy. Where this oversight displaces agency decisionmaking authority, however, executive influence risks conflict with the president's constitutional responsibility to ensure that the laws are faithfully executed.[122] A collision between conservation and business interests apparently led to political tradeoffs and subsequent changes in wetland delineation rules.[123] Soon after this collision, several scientists quit the Federal Interagency Committee for Wetland Delineation in a dramatic protest of undue administrative influence.[124] The "infusion of *politics* into what was initially designed as a *technical* exercise"[125] prompted the following individuals to make statements critical of the Bush Administration: William Sipple, Chief Ecologist EPA Office of Wetlands, stated that he would have engaged in "unethical behavior" by agreeing to the proposed changes without first getting public comment; EPA ecologist Charles Rhodes, Jr., complained of "external pressures" and the redrafting of technical provisions by "others with limited wetlands experience"; and finally, Acting FWS Director Bruce Blanchard sent a letter to EPA refusing to accept its fourteen-day inundation threshold because it was "confusing and technically indefensible."[126]

Whether or not the compromises implemented by the Competitiveness Council would have actually improved the status quo, democratic principles require adherence to the statutory mandate provided under section 404 of the CWA. Typically, Congress intends agencies to apply

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[121] *Id* at 36 (citing 56 Fed. Reg. 65,963 (Dec. 19, 1991), which seeks to portray the proposed addition of a new wetlands regulatory section as a simple description of new identifying characteristics for wetlands).

[122] *See* Gilhooley, *supra* note 42, at 311.

[123] Michael Weisskopf, *Rewriting the Book on Wetlands: Scientists Wash Hands of White House's Definition of Protected Areas*, WASHINGTON POST, May 3, 1991, at A23; Keith Schneider, *3 U.S. Agencies Want to Loosen Wetland Curbs: Draft Proposal Reveals Rifts in Government*, NEW YORK TIMES, May 15, 1991, at A18. *See also* Gilhooley, *supra* note 42, at 311-13 nn. 76-90 (discussing Gilhooley's view that the executive oversight process permits manipulation of agency analysis to fit a predetermined outcome).

[124] Weisskopf, *supra* note 123 (indicating that these scientists quit after political considerations reflecting the interests of the business and development community overrode their scientific recommendations).

[125] *Id* (emphasis added).

[126] *Id*

their expertise rather than simply respond to political choices. When the President's advisors became deadlocked over the "extent of protection to be conferred on the nation's dwindling wetlands," however, they chose to pull the President into the politically sticky issue rather than rely on technical expertise.[127] Even if a plan like President Bush's were viable, that fact would not justify immunity from effective judicial review.

IV. A New Judicial Framework for Deference

With a firm grasp of the regulatory evolution of wetlands protection under section 404 well in hand, it is now appropriate to return to this article's primary concern: the influence of executive oversight on the rulemaking process. Professor Thomas Merrill theorizes that *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[128] has not had the revolutionary impact on judicial review that many commentators assume.[129] Cases applying *Chevron* "have on the whole produced fewer affirmances" than those that do not follow *Chevron*.[130] Furthermore, the United States Supreme Court itself often ignores *Chevron* in cases involving deference questions.[131] The Court's apparent reluctance to

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[127] Michael Weisskopf, *Bush: Arbiter on Wetlands Dispute?*, Washington Post, July 30, 1991, at A13. Weisskopf reported unidentified sources as stating that President Bush was to receive an options paper "asking him to sort out technical matters normally left to his advisers, such as the number of days a parcel of land must be inundated to qualify as a wetland." *Id.* According to Weisskopf, "EPA Administrator Reilly was outnumbered [at a meeting of the Council on Competitiveness] by officials seeking to weaken wetlands safeguards beyond what he ha[d] proposed." *Id.*

[128] 467 U.S. 837 (1984).

[129] Merrill, *supra* note 27, at 970. *Contra* Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984.

[130] Merrill, *supra* note 27, at 984.

[131] *See, e.g.*, National Labor Relations Board v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990)(holding that a NLRB rule is entitled to considerable deference so long as it is rational and consistent with the organic statute, even where the rule represents a departure from the Board's prior policy); Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) (holding that a decision by the Corps to issue a Supplemental Information Report, rather than a second supplemental EIS, in order to review new information affecting a dam project, is entitled to deference provided the agency has made a reasoned decision based on its analysis of those documents); Equal Employment Opportunity Commission v. Commercial Office Prods. Co., 486 U.S. 107 (1988) (holding that EEOC's interpretation of the Civil Rights Act, as permitting immediate EEOC jurisdiction over Civil Rights Act violations prior to

apply *Chevron* is probably linked to that case's apparent all-or-nothing approach. If congressional limits are discernible, the Court exercises purely independent judgment with no consideration of the executive viewpoint; otherwise, the Court gives maximum deference to the executive branch.[132]

Indiscriminate application of *Chevron* can be said to reflect the continuing rivalry between mandatory and discretionary deference models in the judicial branch.[133] As with many aspects of public policy, truth, justice, and equity probably lie somewhere in the middle of these two extremes. Professor Merrill suggests a potentially viable solution that assimilates the judicial deference doctrine into the general juridical practice of following precedent.[134] Under Merrill's executive precedent model, the courts are asked to follow precedent generated by a different branch of government.[135] The courts' decision to defer would "entail a three-part inquiry: (1) Is there an executive precedent? (2) How strong is that precedent? (3) Given the strength of the precedent, does an independent judicial examination of statutory interpretation compel a different result?"[136] Under this model, the courts would affirm agency decisions that present a combination of strong precedent and congruence with congressional intent, and reject those that present a combination of weak precedent and tension with congressional intent.[137]

Professor Merrill's model makes sense because executive interpretations of law are analogous to decisions by courts of coordinate jurisdiction.[138] Executive interpretations "share much in common with judicial precedent."[139] For example, strengths and weaknesses exist on

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expiration of the statutorily required 60 days after termination of State agency proceedings, is entitled to deference where reasonable). There are numerous other cases involving deference questions where the Court has apparently ignored *Chevron*. *See* Merrill, *supra* note 27, at 982 and Appendix.

[132] Merrill, *supra* note 27, at 977.

[133] *Id.* at 1032.

[134] *Id.* at 1003-31.

[135] *Id.* at 1003-12.

[136] *Id.* at 1010.

[137] *Id.* at 1014. Application of this model to recent wetland proposals or to the earlier stages of § 404 implementation is a useful exercise, but is beyond the scope of this comment.

[138] *Id.* at 1004.

[139] *Id.*

both sides of the ledger when comparing courts and agencies. The characteristics of technical expertise, familiarity, and accountability, for example, favor the agencies. The courts, on the other hand, benefit from legal expertise, freedom from time constraints, and insulation from political pressure. Professor Merrill's executive precedent model encourages deference to the judgments of more accountable political actors, but avoids the practical and theoretical failings caused by *Chevron*'s all-or-nothing approach.[140] Whereas the Court's current practice of tempering *Chevron* with ad hoc exceptions lacks internal coherence,[141] the executive precedent model "strikes a more enduring balance between executive, legislative, and judicial perspectives, and between the forces of change and stability."[142]

Many features of the discretionary deference doctrine, which were apparently banished under *Chevron*, "suddenly become explicable once we view the practice of deference as a form of following precedent."[143] Under the executive precedent model, the discretionary deference doctrine's traditional contextual factors— express delegations, agency expertise, longstanding interpretations, well-reasoned decisions, the existence or lack of interagency agreement, contemporaneous interpretations, congressionally-ratified interpretations, the level of statutory ambiguity and independent judicial judgment—are all weighed against each other on a sliding scale.[144] Although Professor Merrill's suggested model "may be complex . . . , it is not unprincipled."[145] The model encourages the courts to provide more revealing, candid reasons for either deferring to or invalidating agency decisions.[146] According to Professor Merrill,

> there are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula.[147]

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[140] *See id.* at 1013-15. *See also supra* notes 129-34 and accompanying text.

[141] Merrill, *supra* note 27, at 1027.

[142] *Id.* at 1028.

[143] *Id.* at 1016-22.

[144] *Id.*

[145] *Id.* at 1026.

[146] *Id.* at 1027.

[147] *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1989) (criticizing mandatory judicial deference as an improper standard of review)).

V. Legislative Responses to the Wetlands Protection Challenge

Legislative action may be more effective than the judicial reform proposed by Professor Merrill, *supra* part IV, especially given the continuing threat to wetlands posed by concern over American competitiveness and economic growth. The length of time and cost involved in mounting effective legal challenges, not to mention the politically charged atmosphere, also support congressional action in favor of judicial reform. If development interests ultimately persuade Congress to incorporate more balance into section 404, the legislative branch could adopt or acquiesce in modifications such as those included in former President Bush's Wetlands Plan.[148] Until that time, however, any effort to limit the protection of wetlands under section 404 will necessarily conflict with long-standing interpretations of the CWA.[149]

A. Disclosure of Regulatory Review Impacts

The infusion of politics into the regulatory review process through executive oversight arguably displaces an agency's obligation to make independent regulatory decisions based on its experience and expertise. The veil protecting the processes of executive oversight could, however, deflect even a "hard look"[150] by the courts into the legitimacy of such action. This problem can be addressed by requiring the disclosure of

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[148] Senators John Chafee (R-RI) and Max Baucus (D-MT) cautioned FWS Director John Turner that "revisions to the manual should not be used to effect policy changes" in § 404, and that if "you believe that changes are needed, we ask that you submit such recommendations to the Congress for its consideration." Letter from Chafee and Baucus to Turner, *cited in* Johnson, *Administration attempts to bend wetlands science*, The Leader, June 1991, at 1.

[149] *See supra* notes 24 and 46 for a discussion of greater congressional concern for environmental protection under the Clean Water Act, as compared to other environmental statutes. *But see supra* notes 49, 54-55 and accompanying text for an argument to the contrary. Suggesting, respectively, that Congress implicitly acknowledged some wetland resources are not subject to regulation, or that the legislative branch cannot rely on its consitutional power under the commerce clause to extend regulatory jurisdiction over all wetland resources. *Id.*

[150] In Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983), the United States Supreme Court applied a "hard look" standard to reject, as arbitary and capricious, a decision by the Secretary of Transportation rescinding passive automobile restraint regulations because the decision was not supported by a reasoned analysis.

administrative policy as it affects agency decisionmaking.[151] This proposal will not reveal the give-and-take of executive and agency communications in reaching a decision. Instead,

> agencies would designate, as both an administration and agency position, any policy adopted to reflect specific oral or written comments of OMB [the Office of Management and Budget] or the White House made during the regulatory review process . . . the agency would also *identify its initial position as a policy alternative it considered and provide reasons for adopting a different position.*[152]

For example, under this proposal the regulatory record for the 1991 Federal Delineation Manual would have to include EPA's earlier proposal for broader wetland protection as a rejected alternative.[153] The agency would also have to explain why a more limited definition was adopted instead of its earlier proposal. According to Environmental Defense Fund biologist Douglas Rader, the fifteen and twenty-one day definitions proposed in former President Bush's now-abandoned Plan "were pulled out of the air," and have "no bearing on ecological reality."[154]

Disclosure is not aimed at insulating agencies from politically responsive influence. It is meant, rather, to reinforce the agencies' ultimate responsibility to ensure that adoption of an administration position is consistent with the agency's statutory mission.[155] Disclosure

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[151] *See generally* Gilhooley, *supra* note 42, at 320-21. *See also id.* at 307 nn. 48-55, 335 nn. 189-92 (criticizing the lack of documentation in the public record concerning the Competitiveness Council's role in the alteration of a proposed EPA rule). Legislation to require disclosure of extra-agency influence was introduced during the 2nd Session of the 102nd Congress. *See* S. 1942, 137 CONG. REC. S16,250 (Nov. 7, 1991) (the Regulatory Review Sunshine Act). For earlier examples, see 128 CONG. REC. 5285-305 (1982) (S. 1080, the Regulatory Reform Act of 1982) and 132 CONG. REC. 572, 574 (1986) (S. 2023 proposing establishment of a public file disclosing any intervention by the Office of Management and Budget into the rule-making process). The latter example is also discussed at 128 CONG. REC. 25,662-63 (1982) and in *Oversight of OMB Regulatory Review and Planning Process: Hearings before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Govt'l Affairs*, 99th Cong., 2d Sess 56, 98 (1986).

[152] Gilhooley, *supra* note 42, at 301-02 (emphasis added).

[153] *See supra* part III.B.4 for discussion of the executive oversight process, and the intervention of President Bush, as displacing the EPA's statutorily-mandated decisionmaking authority.

[154] Stenger, *supra* note 22, at 12-14.

[155] Gilhooley, *supra* note 42, at 303.

will provide greater accountability in the regulatory process, and give courts the information they need to accurately assess compliance with congressional mandates.[156] Professor Margaret Gilhooley, of Seton Hall Law School, confidently dismisses concern that this disclosure requirement may represent an inappropriate intrusion into the deliberative process.[157] Although "[t]he administration has a recognized role in influencing agency decisions," its influence "cannot exceed the statutorily delegated responsibility of the agency."[158]

B. Explicit Section 404 Policy Guidance from Congress

When first enacted, the CWA provided a "new shape for administrative process—one that would avoid the use of expertise as an excuse to inaction and would protect agencies from capture by special interests."[159] The initial evolution of section 404 under CWA's broader policies[160] generally conformed to this procedural design, but developments in recent years suggest that additional legislative guidance is now required.

In his examination of comparable Clean Air Act (CAA)[161] developments, Bruce Ackerman, Professor of Law at Yale University, notes that EPA's failure to make sensible regulatory policy was a symptom of organizational breakdown under the Act.[162] This failure was caused in part by vague formulas for environmental protection that too readily delegated basic value choices to agency experts. Although Congress

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[156] *Id.* at nn. 19-20 and accompanying text (citing Verkuil, *Welcome to the Constantly Evolving Field of Administrative Law*, 42 ADMIN. L. REV. 1, 2 (1990)).

[157] Gilhooley, *supra* note 42, at 350. *See also id.* at 335-48 nn. 193-244 (noting that such intrusions are otherwise prohibited by executive privilege).

[158] *Id.* at 350. *See also Chevron*, 467 U.S. at 865. "[A]n agency to which Congress has delegated policymaking responsibilities may, *within the limits of that delegation*, properly rely upon the incumbent administration's views of wise policy to inform its judgments" provided that accountability to the people is preserved. *Id.* (emphasis added).

[159] BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981), at 1 (discussing general characteristics of the evolving administrative process in the context of the Clean Air Act).

[160] *See supra* subparts III.A.1 through 5.

[161] 42 U.S.C. §§ 7401-7671q (1992).

[162] ACKERMAN, *supra* note 159, at 2, 124.

accorded high priority to scrubbing technology,[163] the agencies could have selected other more ecologically sensible and less costly mechanisms for combatting air pollution instead.[164] In effect, an extraneous interest in applying uniform standards rather than accounting for regional differences subverted the CAA's goal of reducing total air pollution.[165] If Congress had given more explicit guidance on economic and environmental values, this result might have been avoided.

Professor Ackerman advises that "it is imperative . . . that [Congress'] early efforts in agency-forcing be *replaced* by statutory schemes that promise a more fruitful dialogue between politicians and technocrats in the decade[s] ahead."[166] Admittedly, the political compromises that weakened the CAA are different from the proposals for limiting federal wetlands jurisdiction: "[u]nlike many other environmental laws that require a facility or project to attain a certain level of pollution control, wetlands regulation simply determines whether the project will be built in the first place."[167] Persons interested in convincing Congress to reform section 404 of the CWA can rely upon the lessons provided by Professor Ackerman. Although the CWA represents an initially successful utilization of agency-forcing provisions, breakdowns in communication between politicians and agency scientists threaten to exacerbate the statutory conflict between economic and environmental concerns.

Congressional statements of purpose and explicit statutory goals will not necessarily provide precise solutions, but could help the experts resolve internal conflicts.[168] The pursuit of congressionally-formulated

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[163] A technique called "flue gas desulfurization" that reduces the amount of sulfur dioxide particles released into the air as a by-product of industrial production; the process involves a device attached to smokestacks which evokes a chemical reaction attracting sulfur dioxide into a lime solution that is sprayed in the path of exhaust gases—which is later removed, dewatered and extruded in the form of sludge. Ackerman, *supra* note 159, at 15-16.

[164] *See generally* Dale W. Jorgensen & Peter J. Wilcoxen, *Environmental Regulation and Economic Growth*, 21 RAND J. ECON., 314 (1990).

[165] ACKERMAN, *supra* note 159, at 45-47; *see also* Bruce A. Ackerman and William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 Yale L. J. 1466, 1492-96 (1980) [hereinafter *Beyond the New Deal*].

[166] Ackerman, *supra* note 159, at 4 (emphasis added); *see also Beyond the New Deal*, *supra* note 164, at 1470.

[167] William L. Want, *Expanding Wetlands Jurisdiction Affects Property Transactions*, NAT'L L. J., Nov. 13, 1989, at 19. *See also supra* note 149.

[168] *See, e.g.*, Grumbles & Kopocis, *supra* note 64; John Webster Kilborn, *Purchaser*

wetland protection policy takes the lessons of the CAA to heart and applies them to the CWA. To paraphrase Professor Ackerman, Congress must be careful not to mix clean water symbols with the economic self-interest of landowners in a way that invites cynicism about self government.[169] Acquiescence to wetlands regulatory changes like those proposed by former President Bush, a plan that might resurface in subsequent political debates, is tantamount to acting against Professor Ackerman's advice. Whether Congress wishes to clarify its original intention by (a) requiring balanced consideration of economic and environmental interests under the Clean Water Act or (b) expressly prohibiting the agencies from making such comparisons, our elected representatives should take affirmative action. The policy implications inherent in such a choice should be debated and resolved on the floors of the U.S. House of Represenatives and the U.S. Senate, not behind the closed doors of an executive oversight committee meeting, especially if dramatic changes of policy will receive a mere rubber-stamp of approval from the judiciary.

VI. Conclusion

Divergent interpretations of the phrase "no net loss" (a long term goal in the minds of developers; a more immediate mandate for conservationists) reflect the basic policy conflict inherent in section 404 of the Clean Water Act. Advocates for the retrenchment of existing wetland protection policies have legitimate concerns; their focus on the impacts of environmental statutes on local and national economies understandably promotes grass-roots and institutional support for regulatory reform. Environmental regulations have had an undeniable impact on local economic development efforts.[170] Whether or not the current regulatory regime adequately balances economic development with environmental protection is, therefore, a worthwhile topic for debate. The concerns motivati ·g passage of the Clean Water Act in the first place, however, have not dissipated. In fact, improved under-

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Liability for the Restoration of Illegally Filled Wetlands under Section 404 of the Clean Water Act, 18 Envt'l Aff. 319 (1991); William K. McGreevey, Note, *A Public Availability Approach to Section 404(b)(1) Alternatives Analysis: A Practical Definition for Practicable Alternatives*, 59 Geo. Wash. L. Rev. 379 (1991).

[169] *See* Ackerman, *supra* note 159, at 116 (referring to clean *air* symbols); *see also Beyond the New Deal*, *supra* note 164, at 1566.

[170] *See supra* notes 7-13 and accompanying text.

standing of the impacts of human activity on the environment, and continuing losses of vital resources, counsel against retrenchment of existing statutory environmental protections. In either case, we must resolve the apparent tension between these interests in order to ensure the rational conservation and management of national and local wetlands. Any changes to the process should, however, take place in a way that respects democratic principles of accountability.

Expanded executive oversight and broadened judicial deference enabled President Bush's administration to attack longstanding statutory interpretations of the CWA regarding environmental protection.[171] Although President Clinton eliminated the Competitiveness Council,[172] these twin forces of change could resurface. Agency supervision is one of the president's constitutionally-approved executive functions, but agencies also have a legal responsibility to exercise independent judgment. Broad, deferential judicial review of executive influence, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[173] deprives the public of an essential tool for checking alleged excesses in the executive branch.[174] As discussed in Section IV above, the courts should be ready to undertake meaningful judicial review of executive influence, especially where regulatory changes merely reflect responses to political pressure. The public interest is best served when democratic principles of accountability are upheld.

Professor Merrill's executive precedent model encourages judicial deference based on traditional contextual factors.[175] Agency expertise, longstanding statutory interpretations, well-reasoned decisions, the ex-

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[171] *Compare supra* notes 24 (discussing present judicial interpretations of the CWA as favoring environmental protection) and 46 (regarding the distinction between Congress' ambiguous, compromise bifurcation of § 404 administrative authority under the EPA and the Corps, and other environmental statutes) *with supra* notes 45 (cataloging statutorily authorized cost-benefit analysis policies under the Federal Insecticide, Fungicide and Rodenticide Act, the National Environmental Policy Act, and the Resource Conservation and Recovery Act), 91 (noting flexible long term approaches to the resolution of environment-development problems under the Marine Mammal Protection Act and the National Pollutant Discharge Elimination System) and 92 (listing statutorily authorized balancing of environmental and economic factors under the Endangered Species Act and the Fisheries Conservation and Management Act).

[172] *See supra* note 17.

[173] 467 U.S. 837 (1984); *see supra* part II for discussion on the potential application of this case in a challenge to changes in the wetland regulatory scheme.

[174] The Council on Competitiveness also influenced the development of clean air, recycling and hazardous waste policy. Stenger, *supra* note 22, at 13.

[175] *See supra* text accompanying note 144.

istence or lack of interagency agreement, and many other elements can be weighed against each other on a sliding scale. If applied, this model will result in judicial judgments supported by more revealing reasons for deferring to agency decisions. Professor Merrill's model preserves the checks and balances necessary for a smoothly-functioning democratic government.

Required disclosure of changes in agency positions that result from executive oversight can enhance both agency and administrative accountability for regulatory decision-making. Such disclosure can be accomplished through legislative action.[176] Finally, explicit policy guidance from Congress would also help clarify existing ambiguities in the Clean Water Act. Without a response of some kind, it is likely that current tension between economic and ecological interests under section 404 will continue unabated. The necessary result of inaction is continued wetlands loss and heightened dissatisfaction in the regulated community.

David M. Forman*

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[176] *See supra* note 151, for a list of bills submitted to the second session of the 102nd Congress to accomplish this goal.

* William S. Richardson School of Law, University of Hawaii, Class of 1992-1993. The author served as a legislative staff member for U.S. Senator John Breaux during the 1991 legislative session, while on a National Sea Grant Fellowship from the National Oceanic and Atmospheric Administration (NOAA). The views expressed in this article, however, are not necessarily intended to reflect the views of either Senator Breaux or the NOAA.

Aliens, Resident Aliens, and U.S. Citizens in the Never-Never Land of the Immigration and Nationality Act

Luafata, a Samoan citizen, became acquainted with a Samoan-American family in Hawai'i and their son Mufi. After a year Luafata and Mufi married. Mufi petitioned the Immigration and Naturalization Service to have Luafata acquire conditional permanent residence status. Two years later, both Luafata and Mufi petitioned the Service to remove her conditional status. Luafata was looking forward to obtaining full-fledged permanent resident status because she wished to become naturalized. The Service rejected the petition, however, because it decided their marriage was not genuine but was entered into solely to obtain permanent resident status. The Service's reason was that the couple did not have sufficient documents that indicated they were a married couple. Luafata and Mufi essentially live on a cash basis. Mufi's father controls the family finances and all the bank accounts are in his name. They live with Mufi's large extended family in his uncle's house, thus they have no lease or rental agreement in their name. They do not have any pictures which show their courtship because they did not have one, meeting only at family gatherings. Now Luafata is facing a deportation proceeding despite her successful bona fide marriage. Mufi is faced with either losing his wife or being forced to give up his career and move to Samoa to live with her. In Hawai'i, a melting pot of diverse cultures, the problems of Luafata and Mufi are not uncommon.

I. Introduction

Every year the United States admits hundreds of thousands of aliens as permanent residents[1] either as family-sponsored or employment-based immigrants.[2] The Immigration and Nationality Act (INA)[3] provides especially favorable treatment to immediate family members[4]—spouses, children and parents—of U.S. citizens,[5] based on the main policy of U.S. immigration to preserve family unity and promote family

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[1] The terms "permanent resident," "resident alien," and "permanent resident alien" all refer to a non-citizen lawfully admitted for permanent residence under the Immigration and Nationality Act. Immigration and Nationality Act § 101(a)(15), (20), 8 U.S.C. § 1101(a)(15), (20) (Supp. 1990) [hereinafter INA]. For the purpose of this comment, the three terms will be used interchangeably depending on the amount of specificity necessary.

[2] More than 675,000 permanent resident aliens will be allowed to enter the United States each year during fiscal years 1992-1994. INA § 201, 8 U.S.C. § 1151 (Supp. 1990).

[3] 8 U.S.C. (Supp. 1990).

[4] INA § 216(a), 8 U.S.C. § 1186a(a) (Supp. 1990).

[5] INA § 201(b)(2)(A)(i), 8 U.S.C. § 1152(b)(2)(A)(i) (Supp. 1990).

relationships.[6] Immediate relatives of U.S. citizens are subject to neither the annual numerical limitation nor the per country numerical limitation applied to other aliens.[7] The Immigration and Naturalization Service (INS) allows a large number of immediate relatives of U.S. citizens to enter each year.[8] On the other hand, because of the quota restriction imposed on those who are not immediate relatives of U.S. citizens, some aliens[9] may have to wait as long as fifteen years to obtain an immigrant visa.[10]

Some have abused the privilege given to immediate relatives of U.S. citizens by feigning a legitimate marital relationship to evade otherwise applicable immigration law.[11] In order to secure the deportation of aliens who enter into fraudulent marriages, the INS carefully scrutinizes the validity of any marriage between an alien and a citizen of the United States through procedures it has prescribed under the authority delegated to it by Congress.[12]

Although the resident status obtained by the alien spouse upon his or her marriage is technically permanent, conditions are attached. The couple is subject to post marital surveillance by the INS for two years after their first petition and additional scrutiny upon their petition to remove the conditional status. This comment addresses the problems that arise when a married couple, one an alien and the other a U.S. citizen, comes face to face with the INS and its procedures for processing petitions for removal of the alien spouse's conditional permanent resident status under the INA.

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[6] *Fraudulent Marriage and Fiance Arrangements to Obtain Permanent Resident Status: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 6 (1985) [hereinafter *Hearing on Marriage Fraud*] (statement of Alan C. Nelson, INS Commissioner).

[7] INA § 201(b)(2), 8 U.S.C. § 1152(b)(2) (Supp. 1990).

[8] INA § 203(a), 8 U.S.C. § 1153(a) (Supp. 1990). According to the INS, 217,514 aliens were admitted in 1989 as permanent residents under the immediate relative category. U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1989 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE Table 4, at 8-9 (1989).

[9] The term "alien" means any person not a citizen or national of the United States. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (Supp. 1990).

[10] *Visa Preference Numbers for March 1991*, 68 INTERPRETER RELEASES 195 (1991).

[11] If an alien has no family members in the United States in a position to file a visa petition, and if he or she knows no employers in the United States willing to petition for him or her under the employment-based preferences, marriage to a U.S. citizen is possibly the only available option for securing admission as an immigrant.

[12] *See* 8 C.F.R. § 2.1 (1990).

The constitutionality of the INS surveillance has been questioned on the ground that it may unduly intrude upon the couple's marital privacy.[13] The United States Constitution protects the rights of U.S. citizens to marry and to preserve marital privacy,[14] while the INS surveillance subjects the U.S. citizen spouse to the same invasive procedures as the non-citizen spouse. What implicates the constitutionality of the procedure is that the U.S. citizen spouse is also subject to INS scrutiny.[15] Although the constitutionality of the INS procedures has been challenged, to date the INS has prevailed because the United States Supreme Court has virtually abdicated its role of judicial review in immigration cases.[16]

This comment addresses the constitutional and ethical issues raised by the INS's procedures for detecting sham marriages by examining how the government has treated resident aliens in the United States historically, and how the procedures reflect the national government's policy. Then, the comment argues that rather than determining immigration issues from the perspective of the plenary power of the federal government, the government's primary concern should be protecting the rights of citizens and their alien spouses. Additionally, the comment proposes that the Court should incorporate a perspective based on international human rights law into its analyses of the constitutionality of the INS procedures. International law is a better basis from which to determine the extent of aliens' rights because its fundamental purpose is to establish and protect the rights of people who are not protected under domestic laws.

II. INS Procedures And The Right to Privacy

A. The INA Procedures and the Sham Marriage Problem

Marriage to a U.S. citizen can provide aliens with a way to avoid the otherwise applicable quota restrictions on immigration, and ulti-

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[13] Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 Harv. L. Rev. 1239 (1986) [hereinafter *Sham Marriage Investigation*].

[14] Zablocki v. Redhail, 434 U.S. 374 (1978); Griswold v. Connecticut, 381 U.S. 479 (1965).

[15] Kathryn L. Anderson, *Adams v. Howerton: Avoiding Constitutional Challenges to Immigration Policies Through Judicial Deference*, 13 Golden Gate U. L. Rev. 307, 327 (1983).

[16] *See generally* Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984); *Developments in the Law - Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286 (1983) [hereinafter *Developments in the Law*].

mately obtain U.S. citizenship.[17] Although "Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages,"[18] some aliens have abused this obvious opportunity. Marriage fraud is apparently a growth industry; it is an easy way to obtain permanent resident status, and fraud is difficult to prove.[19] The INS has suggested that thirty percent of all immigration visa petitions based on marriage to a U.S. citizen are suspect,[20] although this estimate has been criticized as purely speculative.[21] Marriage fraud in the immigration context includes contractual fraud and one-sided marriage fraud.[22] Often underground organizations known as "marriage fraud rings"[23] bring potential spouses together.[24] Sham marriages are not

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[17] Marriage to a U.S. citizen expedites the naturalization process. For example, the normal five-year residency requirement is reduced to three years. INA §§ 316(a), 319(a), 8 U.S.C. §§ 1427(a), 1430(a) (Supp. 1990).

[18] Lutwak v. United States, 344 U.S. 604, 611 (1953).

[19] *Hearing on Marriage Fraud, supra* note 6, at 30 (statement of Vernon D. Penner, Jr., the Bureau of Consular Affairs).

[20] H.R. Rep. No. 906, 99th Cong, 2d Sess. 6, *reprinted in* 1987 U.S.C.C.A.N. 5978 (1986).

[21] Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 29, 33-34 (1989) (arguing that government statistics supporting restrictive legislation such as the Immigration Marriage Fraud Amendments are often inaccurate, exaggerated, highly publicized, and designed to persuade the public of the necessity of legislation); *Sham Marriage Investigation, supra* note 13, at 1241 (arguing that the INS has an incentive to overestimate incidence of marriage fraud, whereas immigration lawyers defending aliens have an incentive to underestimate incidence); *Hearing on Marriage Fraud, supra* note 6, at 77-78 (statement of Jules E. Coven, President, American Immigration Lawyers Association) (testifying that incidence of marriage fraud is only one or two percent of all petitions for immigration visa based on marriage to a U.S. citizen).

[22] In contractual fraud, a citizen is paid to marry an alien. In one-sided marriage fraud, an alien marries an unsuspecting, innocent U.S. citizen solely to obtain an immigrant visa. After obtaining the visa, the alien divorces the U.S. citizen spouse. *Sham Marriage Investigation, supra* note 13, at 1240.

[23] In a marriage fraud ring, the couple agrees to limit the relationship to immigration matters and stipulates that the marriage will be dissolved as soon as the immigration benefit is accorded. Fees are arranged depending on the agreement. The arrangers carefully coach the participants on how to evade detection and pass INS scrutiny. *Hearing on Marriage Fraud, supra* 6, at 12-14.

[24] *Id.* at 15-16 (statement of Alan C. Nelson, INS Commissioner). Some examples of broken sham marriage rings, from 1985 alone: A Los Angeles attorney convicted and sentenced for arranging sham marriages between Filipinos and U.S. citizens and is believed responsible for over fifty marriages; a New York attorney was disbarred for lying and fabricating addresses in order to process over 360 quick divorces for

always arranged by third parties. In many cases a U.S. citizen agrees to a sham marriage out of sympathy for an alien who has been waiting for a long time to obtain permanent resident status or who is facing deportation.[25]

In order to more effectively deter and detect fraudulent marriages, Congress enacted the Immigration Marriage Fraud Amendments (IMFA) in 1986,[26] dramatically altering the INA provisions governing immigration based on marriage and placing new restrictions on the benefits of marital status. The IMFA provides that alien spouses who acquire admission to the United States on the basis of a marriage will receive permanent residence status on a two-year conditional basis.[27] If at any time during the two-year period the U.S. Attorney General determines that the marriage was entered into for a fee or solely to obtain immigration benefits, he or she may revoke the alien's admission for permanent residence.[28] Within the last ninety days of the two-year period, both spouses must petition the INS to remove the conditional status.[29] The INS will approve the petition if it finds that the marriage is valid and grant full permanent resident status;[30] otherwise the alien spouse is subject to deportation.[31] For the purpose of deterring marriage fraud, Congress also modified several other provisions to strengthen and tighten the requirements and restrictions.[32]

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alien clients desiring to marry U.S. citizens through sham marriages; a Hawai'i attorney was disbarred following conviction for subornation of perjury in connection with the operation of a marriage fraud ring on the islands of Oahu and Maui; in Chicago, eight persons associated with a ring that arranged over 100 sham marriage were convicted and sentenced. *Id.*

[25] Friends, relatives, or business acquaintances are often involved in this type of sham marriage. According to the INS Commissioner, people who profess to believe in "open borders and one world government" have participated because of their resentment of the restrictive INS system. *Id.* at 13 (statement of Alan C. Nelson).

[26] Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 90-639, 100 Stat. 3537 (Nov. 10, 1986), (codified as amended at INA §§ 204(h), 216, 245(e), 8 U.S.C. §§ 1154(h), 1186a, 1255(e) (Supp. 1990)).

[27] INA § 216(a)(1), (c), (d), 8 U.S.C. § 1186a(a)(1), (c), (d) (Supp. 1990).

[28] INA § 216(b)(1), 8 U.S.C. § 1186a(b)(1) (Supp. 1990).

[29] INA § 216(d)(2)(A), 8 U.S.C. § 1186a(d)(2)(A) (Supp. 1990).

The INS reported that during Fiscal Year 1989 (October 1, 1988 to September 30, 1989) it adjudicated 133,082 joint petitions to remove conditional status. From this group, it approved 79,551 (60% of total petitions) and denied 5,590 (4%), with the remainder still pending. *INS Responds to Marriage Fraud Questions*, 67 INTERPRETER RELEASES 314, 314 (1990).

[30] INA § 216(c)(3)(B), 8 U.S.C. § 1186a(c)(3)(B) (Supp. 1990).

[31] INA § 241(a)(1)(D), 8 U.S.C. § 1251(a)(1)(D) (Supp. 1990).

[32] INA § 204(a)(2), 8 U.S.C. § 1154(a)(2) (Supp. 1990) (making it more difficult

B. *Determination of Valid Marriage*

At the time of the petition to remove conditional status, the INA requires a couple to prove that the marriage was: (1) lawfully entered into; (2) not later annulled; and (3) not entered into for the purpose of procuring the alien's entry into the United States.[33] These provisions are only statutory guidelines by which the INS officials may determine the validity of the marriage. In addition, the INA requires a personal interview with an INS officer,[34] although the U.S. Attorney General may waive this at his or her discretion.[35] The marriages are scrutinized to determine a couple's "intent to establish a life together at the time they were married"[36] which is evaluated based on their testimony at the interview and on their conduct as a married couple since their marriage.

The couple is interviewed at length, often separately, concerning intimate details of their married life.[37] The INS officer often inquires whether the alien spouse's name appears on insurance policies, leases,

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for a person who immigrated on the basis of a first marriage to bring in a second spouse following divorce from the first); INA § 204(c), 8 U.S.C. § 1154(c) (Supp. 1990) (strengthening the restrictions on future immigration of persons who have ever been involved in marriage fraud); INA §§ 214(d), 245(d), 8 U.S.C. §§ 1184(b), 1255(d) (Supp. 1990) (tightening the requirements for the non-immigrant category for fiancees and fiances); INA § 275(b), 8 U.S.C. § 1325(b) (Supp. 1990) (establishing criminal sanctions for involvement in marriage fraud, with penalties of up to five years imprisonment and a fine of $250,000).

[33] INA § 216(d)(1)(A), 8 U.S.C. § 1186a(d)(1)(A) (Supp. 1990).

[34] INA § 216(c), 8 U.S.C. § 1186a(c) (Supp. 1990).

[35] INA § 216(d)(3), 8 U.S.C. § 1186a(d)(3) (Supp. 1990).

To date, the INS has waived the interview in the majority of cases, depending on the sufficiency of the evidence submitted. Charles Wheeler, *Until INS Do Us Part: A Guide to IMFA*, 90-93 IMMIGRATION BRIEFINGS 1, 13 (1990).

Some examples of suggested evidence are: photographs that show both spouses together throughout their relationship; copies of joint income tax returns; evidence of joint ownership of property or joint checking or savings accounts; credit cards for both spouses; evidence of correspondence between the spouses, including letters, cards, and telephone calls addressed to the spouses; photo identification cards of both spouses with a new card for the wife showing her married name; a letter from an employer showing a change in records to reflect the spouse's new marital status. *Id.* at 27.

[36] Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975).

[37] Maurice A. Roberts, *Sex and the Immigration Law*, 14 SAN DIEGO L. REV. 9, 40 (1976); Mark W. Anthony, *Defense of Sham Marriage Deportations*, 8 U.C.D. L. REV. 309, 315-16 (1975).

income tax forms, or bank accounts.[38] The INS may ask questions about the couple's "courtship, their wedding ceremony, the decor of their residence, the division of household chores, or what they had for breakfast on the morning of the interview."[39] Questions about a couple's sex life before and after their marriage are not uncommon.[40] If the INS officials become skeptical of the marriage, they acquire information about the couple from their friends, neighbors, and landlord.[41] It seems that if a couple does not live together, this is conclusive evidence that the marriage is a sham.[42] The INS seems to believe that only those couples who can give consistent responses to all the questions do in fact live together, and had intent to establish a life together at the time of their marriage. Thus, discrepancies are considered indications of marriage fraud.[43]

Facing the ambiguous standards for valid marriages in *Whetstone v. INS*,[44] the United States Court of Appeals for the Ninth Circuit took the clear position that a valid marriage is one that was lawfully entered into according to state law. The court stated that marriage "is not a federal problem, but one for the individual states to regulate."[45] In fact, congressional omission of a viability requirement is one sign that Congress does not intend to encroach on an area traditionally left to the states,[46] and the INS should not overstep its authority by operating in the field of domestic relations. The Ninth Circuit, however, subsequently abandoned this position in *Adams v. Howerton*[47] when it confronted the constitutionality of the INA provision excluding homosexual marriage. The court stated that the intent of Congress governs the conferral of spousal status[48] and held that the term "spouse" in the

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[38] *Sham Marriage Investigation*, *supra* note 13, at 1252.

[39] *Id.*

[40] *Id.* at 1243.

[41] Ali v. INS, 661 F. Supp 1234, 1239 (D. Mass. 1986).

[42] Pena-Urrutia v. INS, 640 F.2d. 242 (9th Cir. 1981) (upholding a INS's decision of marriage fraud which was established by clear and unequivocal evidence that the couple did not live together).

[43] David Moyce, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF. L. REV. 1747, 1751 (1986).

[44] 561 F.2d 1303 (9th Cir. 1977).

[45] *Id.* at 1306.

[46] Note, *Immigration Marriage Fraud Act of 1986: Locking In by Locking Out?*, 27 J. FAM. L. 733, 752 (1988-89).

[47] 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

[48] *Id.* at 1039.

INA only applies to parties in a heterosexual marriage because the pre-1990 INA excludes homosexuals from admission.[49]

Although the procedure for applying for permanent residency has changed since 1986, the IMFA has not changed the standard for a bona fide marriage.[50] One commentator, however, stated that the IMFA has caused great confusion in defining what constitutes a bona fide marriage relationship.[51] Debate and controversy continue over the proper interpretation of several provisions of the IMFA.[52] The INA requires an investigation of the facts in each case,[53] but does not provide specificity or guidelines. Lacking guidance, INS officers make ad hoc determinations based on their own subjective views of a valid marriage.[54] Furthermore, the conduct of immigration officials is relatively unconstrained by the INA which confers "exceedingly broad discretion upon the INS."[55] As a result, decisions by the INS are inescapably inconsistent.[56]

C. Fundamental Right to Marry and Marital Privacy

Because of the intensely personal nature of the marital relationship, the United States Supreme Court has recognized a constitutionally protected zone of marital and familial privacy, upon which the government cannot intrude without a compelling justification.[57] Despite this, the INS imposes a burden on a U.S. citizen and his or her alien spouse in two ways—through imposing an unreasonable standard for

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[49] *Id.* at 1040.

[50] Terry J. Helbush, *Immigration Marriage Fraud Amendments: Selected Problems*, *in* 22nd ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 79, 83 (Austin T. Fragomen, Jr ed., 1989).

[51] Lourdes Santiago, *Immigration Marriage Fraud Amendments 1986*, *in* 22nd ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 71, 73 (Austin T. Fragomen, Jr. ed., 1989).

[52] Wheeler, *supra* note 35, at 2 (arguing that no area of immigration law is in greater need of clarification and modification than the IMFA provisions).

[53] INA § 204(b), 8 U.S.C. § 1154(b) (Supp. 1990).

[54] Eileen P. Lynskey, *Immigration Marriage Fraud Amendments of 1986: Till Congress Do Us Part*, 41 U. MIAMI L. REV. 1087, 1093 (1987).

[55] Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE L. & POL'Y REV. 1, 6 (1989).

[56] Moyce, *supra* note 43, at 1757-58.

[57] Zablocki v. Redhail, 434 U.S. 374, 383-84 (1978); Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

an acceptable marriage, and through invasion of privacy during the interview process.

The couple must conform to the INS standards for married life during the two-year period that their marriage is subject to INS surveillance. The INS will terminate the alien spouse's permanent resident status if they think the marriage is a sham, and he or she may face a deportation proceeding.[58] Whenever the couple does not conform to the INS standard of a proper marriage, the INS considers the marriage a fraud. In practice, the standard is determined by such things as the amount of time spent together, sexual behavior, and the decision on whether to have children.[59] By subjecting the couple to this intrusive surveillance, the INS interferes with highly personal matters, and in effect, imposes upon the couples a normative standard of what constitutes a marriage.

Many alien spouses will eventually become members of the national community. They will acquire U.S. citizenship and, consequently, voting power. By participating in the legislative process, they will influence the balance of political forces in their local communities. They will freely affirm their tradition, values, and languages. Although taking pride in the communal identity as a nation of immigration, some U.S. citizens, like many people throughout the world and history, perceive aliens as threats to their traditional and cherished values.[60] Although the preservation of traditional cultural values is important, the fear of a less cohesive national identity does not justify imposing a traditional standard of marriage on international couples. As suggested in *Bark v. INS*,[61] we should not require aliens to have "more conventional or more successful marriages than citizens."[62]

Although a traditional family or marriage relationship is rapidly becoming an anachronism in the United States, the definition of "spouse" and "family" in many legal contexts still encompasses only families which fit this ideal.[63] As a result, non-traditional families are

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[58] INA § 241(a)(1)(D), 8 U.S.C. § 1251(a)(1)(D) (Supp. 1990).

[59] *See supra* part II.B.

[60] Schuck, *supra* note 55, at 7.

[61] 511 F.2d 1200 (9th Cir. 1975) (reversing the Board of Immigration Appeals decision that petitioners' marriage was sham because of their separation after marriage).

[62] *Id.* at 1201-02.

[63] Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1640 (1991) [hereinafter *Family Resemblance*].

often denied important benefits associated with legal marriage and family status. One of the liberties the United States Constitution protects is the freedom of personal choice in matters of marriage and family life, but only when the relationships are those which the government feels are "deeply rooted in this Nation's history and tradition."[64] The right to determine one's own marital life is legally recognized only when it reflects a tradition founded in "the history and culture of Western civilization."[65]

Early in this century, marriage to a foreigner was an expatriating act in the United States. In *Mackenzie v. Hare*,[66] a woman who lost her U.S. citizenship after she married a foreigner challenged the statute that a female U.S. citizen who marries a foreign national takes the nationality of her husband.[67] The Court upheld the power of Congress to expatriate because it felt such action was a necessary and proper implementation of the inherent power of sovereignty.[68] Both the Court and the INS have treated marriage between U.S. citizens and aliens as suspect.[69] This bias probably rests on the proposition that international marriages are not traditionally accepted relationships.

Even though international marriages are not deeply rooted in the tradition of the United States, the courts should not deny legal recognition to a nontraditional relationship because the relationship fails to incorporate one or more of the features associated with the traditional married couple. The INS's culture-based approach is problematic because many international marriages involve different cultural values, languages, and customs foreign to the traditional models and notions

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[64] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); *see also* Bowers v. Hardwick, 478 U.S. 186 (1986).

[65] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[66] 239 U.S. 299 (1915) (despite her continuous residence in the United States, a female U.S. citizen lost her citizenship because of her marriage to a British man who was a permanent resident of the United States).

[67] *Id.* at 306. In 1907, Congress enacted a statute [34 Stat. at L. 1228, ch. 2534, Comp. Stat. 1913, § 3960] providing that "any American woman who marries a foreigner shall take the nationality of her husband. At the termination of marital relations she may resume her American citizenship." *Id.* at 307.

Congress subsequently eliminated marriage to a foreigner as an expatriating act. Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1022. Act of March 3, 1931, ch. 442, §§ 4(a), (b), 46 Stat. 1511.

[68] *Mackenzie*, 239 U.S. at 312.

[69] *See* Comment, *Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts the Marriage Fraud Act*, 15 PEPPERDINE L. REV. 181, 188 (1988).

of the United States.[70] This culture-based approach is especially problematic in Hawai'i where sixty-five percent of the population is comprised of ethnic minorities.[71] Although they are U.S. citizens, many of them observe their own cultural values along with American culture. When a couple comprised of a U.S. citizen of an ethnic minority and an alien face the INS, the cultural differences may cause serious misjudgment by the INS officers.

In some cultures, it is not customary to accumulate documents such as bank accounts, lease agreements, and credit cards even among couples living stable lives. In effect, the INS penalizes them for preserving their cultural heritage by not allowing them to benefit from the INS provisions[72] just because they lack such superficial features of Western culture. Treating couples in nontraditional relationships differently not only deprives them of privileges and benefits, but also symbolically marginalizes them and reinforces the notion that traditional families are the norm while other relationships are abnormal or aberrational.[73]

The INS interview process requires disclosure of the private aspects of a couple's marital life, thus abridging their privacy rights. By asking a variety of questions about the marital relationship, an INS officer attempts to determine whether the marriage is valid or not. The INS invades a couple's privacy to the extent that it elicits responses to unduly intrusive questions about intimate matters. Although INS officials are advised against doing so,[74] some petitioners have claimed that the questioning often becomes intrusive and sometimes coercive.[75] The petitioners have been asked to divulge details of their sexual history and conduct, including how and when the marriage was con-

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[70] *See, e.g.*, Stokes v. INS, 393 F.Supp. 24 (S.D.N.Y. 1975) (a couple did not live together until they completed a special Indian religious ceremony).

[71] Economic Development and Tourism, Department of Business, The State of Hawaii Data Book: A Statistical Abstract 40 (1991).

[72] *See* INA § 216(d)(3), 8 U.S.C. § 1186a(c) (Supp. 1990). If the evidence submitted by the couple is insufficient, the U.S. Attorney General does not exercise his discretion of waiving an interview. The recommended evidence is, for example, joint ownership of property, checking and/or saving accounts, and credit cards for both spouses. Wheeler, *supra* note 35, at 27.

[73] *Family Resemblance*, *supra* note 63, at 1655.

[74] *See* U.S. Immigration and Naturalization Service, Examinations Handbook III-14 (stating that INS examiners "must avoid any highly personal areas such as sexual relations").

[75] Moyce, *supra* note 43, at 1752.

summated and whether either spouse has had extramarital sexual relations.[76] Petitioners have also claimed that INS officers have accused them of lying and threatened them with imprisonment unless they withdrew their petitions.[77] Highly offensive and humiliating questioning may create a coercive atmosphere that leads petitioners to give confused or erroneous responses.[78]

The crucial issue in determining the legitimacy of a marriage is the spouses' intent at the time of the marriage, and not the couple's way of life within the marriage.[79] To the extent that INS questions assume particular norms for what constitutes a valid marriage, such questions may actually result in an incorrect determination.[80] Surprisingly, neither the INA nor applicable INS regulations require INS officials to make a transcript of the interview, to advise the petitioners that they are entitled to representation by counsel, or to make clear that any statement the petitioners make may be used against them in a subsequent proceeding.[81]

The United States Supreme Court has permitted the government to intrude in citizens' personal lives in non-immigration cases as well. In *Wyman v. James*,[82] for example, the Court upheld a New York statute that conditioned the receipt of welfare benefits on the parent permitting periodic home visits by a case worker. Although the Court acknowledged that it was protective of the privacy of one's home,[83] it upheld the statute because of the important governmental purpose of ensuring that the needs of the dependent child were met.[84] The Court focused on the benign purpose of promoting the recipient's financial rehabilitation and her child's welfare—a direct benefit to the recipient.[85] In an INS marriage interview, however, no such benign consideration toward the recipient of immigration benefits exists. Instead, the INS pursues its objective of screening out sham marriages at the expense

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[76] *Id.*

[77] *See, e.g.*, Elbez v. INS, 767 F.2d 1313, 1314 (9th Cir. 1985); Stokes v. INS, 393 F. Supp. 24, 27 (S.D.N.Y. 1975).

[78] *Sham Marriage Investigation*, *supra* note 13, at 1250.

[79] Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975).

[80] *Sham Marriage Investigation*, *supra* note 13, at 1249.

[81] *Id.* at 1243.

[82] 400 U.S. 309 (1971).

[83] *Id.* at 316.

[84] *Id.* at 318-24.

[85] *Id.*

of the fundamental rights of innocent and legitimate international couples.

The Court in *Zablocki v. Redhail*[86] held that the right to marry is a fundamental right protected by the due process clause.[87] It clarified, however, that any state regulation that "relates in any way to the incidents of or prerequisites for marriage" will not be reviewed strictly.[88] The Court observed that it will strictly scrutinize only those regulations that have a direct and substantial impact on the right to marry.[89] Thus the INS could assert that its regulation is not subject to strict scrutiny because it does not directly regulate marriage or family association in that neither U.S. citizens nor alien spouses are forbidden to marry by the regulation. But this assertion loses its strength when the limited range of choices available to the couple to cope with the regulation is considered.

If the couple wants to try to preserve their marital privacy from the INS investigation, they could choose one of two alternatives, although neither is constitutionally adequate. First, the petitioners may choose not to submit to these procedures, but a refusal to answer may be as damaging as an inconsistent response.[90] Furthermore, this choice is, in effect, relinquishing the right to marry because the alien spouse risks deportation. Second, the U.S. citizen spouse may emigrate from the United States with his or her alien spouse, effectively relinquishing the right to live in the United States. Either choice clearly shows significant interference with the citizens' constitutional rights by the INS. The United States Court of Appeals for the Sixth Circuit in *Almario v. Attorney General*[91] held that notwithstanding a fundamental right to marry, a citizen possesses no fundamental right to reside with his or her alien spouse in the United States.[92] The court, however, acknowledged that the INA imposed a heavy burden on the U.S. citizen who had to choose between separating from his or her spouse and leaving the country.[93] No one should be coerced into relinquishing a consti-

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[86] 434 U.S. 374 (1978) (invalidating a Wisconsin statute that a male resident, obligated to support his child who is not in his custody, from marrying without court approval).

[87] *Id* at 383.

[88] *Id* at 386.

[89] *Id.* at 387.

[90] Manarolakis v. Coomey, 416 F. Supp. 532, 534 (D. Mass. 1976) (denying petition because petitioners refused to answer questions and thus failed to prove their marriage was valid).

[91] 872 F.2d 147 (6th Cir. 1989). In *Almario*, the INS summarily and extra-judicially

tutional right or, conversely, coerced into sacrificing a benefit to which he or she would otherwise be entitled.[94]

The INS may justify its infringement on the fundamental rights of citizens and their spouses based on the *Maher v. Roe*[95] proposition that its procedure "places no obstacles —absolute or otherwise" in their exercise of the rights to marry and to preserve marital privacy.[96] In *Califano v. Jobst*,[97] the challenged condition offered the claimant a choice between exercising the constitutional freedom of personal choice of marriage and family life or receiving certain Social Security benefits.[98] The Court stated that a regulation "is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby."[99]

The claimants in *Maher* and *Jobst* asked for enforcement of both their constitutional right and welfare benefits because they could not exercise their right without the financial support. But the Constitution does not require the government to financially support citizens' exercise of their constitutional rights. In petitioning for removal of INS conditional status, on the other hand, all the couple asks is preservation of their marriage and marital privacy. Yet if they insist on their rights to the point of resisting the intrusion of the INS into their personal lives, the alien spouse is subject to a deportation proceeding. Deportation is "a drastic measure and at times the equivalent of banishment or exile,"

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subjected a Philippine citizen, who was residing in the United States and subject to deportation, to compulsory exile for two years when he married a U.S. citizen. *Id.* at 148-49.

The provision was eliminated and now an "11th hour" marriage is recognized if entered into in good faith. INA § 245(e)(3), 8 U.S.C. § 1255(e)(3) (Supp. 1990).

[92] *Almario*, 872 F.2d at 151.

[93] *Id.*

[94] *See generally* Lynn A. Baker, *The Prices of Rights: Toward A Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1213 (1990).

[95] 432 U.S. 464 (1977) (holding that Connecticut could constitutionally refuse to give Medicaid financing for non-therapeutic abortions, even though it gave Medicaid financing for childbirth because the statute places no obstacles in the pregnant woman's path to an abortion).

[96] *Id.* at 474.

[97] 434 U.S. 47 (1977).

[98] *Id.* at 52-54 (sustaining the provision of the Social Security Act that arguably burdened the claimant's constitutional right to marry insofar as it provided him or her a financial incentive not to exercise that right).

[99] *Id.* at 54.

and it may deprive a person of "all that makes life worth living."[100] This harsh consequence of exercising one's constitutional rights goes beyond mere interference or burden, and the courts should closely examine the constitutionality of the INS procedure.

In *Smith v. INS*,[101] a couple, one of whom was an alien, contended that the appropriate standard of review for the alien spouse's deportation proceeding was heightened scrutiny because the INS burdened not only him but also his U.S. citizen spouse's fundamental right to marry.[102] The District Court for the District of Massachusetts employed a rational basis standard and deferred to the extraordinarily broad power of Congress over immigration, without mentioning the right of the U.S. citizen spouse at all.[103]

The astonishing aspect of immigration cases relating to international marriages is that the courts almost never discuss the issue of a U.S. citizen's fundamental rights of marriage and marital privacy when they justify the INS restrictions,[104] although they recognize that marriage to a U.S. citizen is a major factor to consider.[105] What sort of objectives can justify such an extraordinary burden on U.S. citizens? When the conditional status was proposed, the INS Commissioner stated only that "a two year conditional residency requirement for all spouses will best serve to deter fraud."[106] The deterrence against sham marriages and the difficulties present when attempting to identify fraudulent relationships are important considerations, but they are not compelling enough to justify the provisions of the INA, especially when INS procedures abridge a U.S. citizen's fundamental rights. All the cases upon which the courts have relied to justify deference to Congress on immigration matter are simply inapplicable when the rights of U.S. citizens are at stake.[107]

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[100] Calvan v. Press, 347 U.S. 522, 530 (1954).

[101] 684 F.Supp. 1113 (D. Mass. 1988).

[102] *Id.* at 1116-17.

[103] *Id.*

[104] *See id.*; Ali v. INS, 661 F.Supp. 1234, 1245-46 (D. Mass. 1986).

[105] *See, e.g.*, Isreal v. INS, 785 F.2d 738, 741 (9th Cir. 1986) (stating that marriage to a U.S. citizen is a sufficient equity that warrants reopening the case); Matter of Ibrahim, 18 I. & N. Dec. 55 (BIA 1981) (stating that marriage to a citizen is a special weighty equity accorded most favorable status by Congress); Matter of Cavazos, 17 I. & N. Dec. 215 (BIA 1980) (stating that the alien's marriage to a citizen outweighed the adverse factor of having entered the United States with a preconceived intent to remain).

[106] *Hearing on Marriage Fraud*, *supra* note 6, at 18.

[107] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 782 (1972) (Marshall, J., dissenting); *see infra* note 178.

The U.S. citizen spouse files the initial petition for admission of an alien spouse based on marriage. The petition is granted so that the alien spouse can receive the benefit of marriage to the U.S. citizen. It should not be assumed that "Congress gave with a bountiful hand but allowed its bounty arbitrarily to be taken away."[108] The Court should carefully review the problem of whether Congress, having extended the benefits not only for the aliens but also for their U.S. citizen spouses, "left wide open the opportunity to ruthlessly take away what it gave."[109]

D. Aliens and the National Community

Justice Frankfurter stated in *Galvan v. Press*[110] that "[w]e are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors,"[111] and therefore the Court should defer to Congress on the formation of immigration policies.[112] Yet, this statement fails to provide a wholly convincing justification for the Court's extraordinary deference to Congress especially when, in the very same term, the Court decided its landmark case, *Brown v. Board of Education*.[113] In *Brown*, without hesitation, the Court did deem itself wiser and more sensitive to human rights than its predecessors.[114] Moreover, the Court expanded the scope of constitutional protections in almost every context during the 1950s,[115] except in immigration. In immigration matters, the Court is still bound by the *Chinese Exclusion* proposition.[116] Referring to the *Chinese Exclusion* case, one commentator remarked that, "its very name is an embarrassment [and it] must go."[117]

The Court has consistently been guided by the concept that aliens, regardless of their residency status or social ties to the United States,

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[108] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 549 (1950) (Frankfurter, J., dissenting).

[109] *Id.*

[110] 347 U.S. 522 (1954).

[111] *Id.* at 531.

[112] *Id.*

[113] 347 U.S. 483 (1954).

[114] Moyce, *supra* note 43, at 1767.

[115] Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 861 (1987).

[116] Chae Chan Ping v. United States, 130 U.S. 581 (1889). A Chinese who left for a visit to China with a certificate of re-entry after having lived in the United States from 1875 to 1887 was excluded upon his return pursuant to the 1888 Act. *Id.* at 582.

[117] Henkin, *supra* note 115, at 863; *see also infra* text accompanying notes 138-40.

are fundamentally outsiders to U.S. society. This notion helps to explain why the Court has stubbornly and uniquely refused to involve itself in the policies on alien issues of the political branches of the federal government.[118] Although this rationale is seldom explicitly stated by the recent Court, as early as 1904 the Court in *United States ex rel. Turner v. Williams* candidly said, "[t]hose who are excluded cannot assert the rights in general obtain[ed] in a land to which they do not belong as citizens or otherwise."[119] The traditional legal thinking about immigration law may be explained by the notion that aliens do not belong to the national community. In his dissenting opinion in *Sugarmart v. Dougall*,[120] Justice Rehnquist rigorously differentiated between citizens and resident aliens. He stated that the majority in *Sugarman* would disturb native-born citizens and especially naturalized citizens,[121] because the naturalized citizens demonstrated "the willingness and ability to integrate into our social system"[122] and they proved that they have "become like a native-born citizen in ways that aliens, as a class, could be presumed not to be."[123] His opinion indicated that resident aliens are thought of as outsiders who do not belong to the national community.

Yet resident aliens are potential members of the national community in the sense that many of them will eventually become naturalized citizens. The very nature of immigration law, i.e., the determination of whom to admit to permanent residence and whom to exclude, is a part of the process of defining the national community.[124] The line between insiders and outsiders is, however, not as easily drawn as Justice Rehnquist argued. The Court itself attempted to affirm the line drawn between "those who are most like citizens" and "[t]hose who are less like citizens" in *Mathews v. Diaz*.[125] "Those who are most like citizens" referred to resident aliens who lived in the United States

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[118] Schuck, *supra* note 16, at 17.

[119] 194 U.S. 279, 292 (1904).

[120] 413 U.S. 634 (1973) (invalidating a New York statute prohibiting aliens from civil service positions).

[121] *Id.* at 658 (Rehnquist, J., dissenting).

[122] *Id.* at 661 (Rehnquist, J., dissenting).

[123] *Id.*

[124] Schuck, *supra* note 16, at 17; *see generally* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

[125] 426 U.S. 67, 83-84 (1976) (resident aliens unsuccessfully challenged the Social Security Act provision that imposed a five year residence requirement on aliens).

more than five years.[126] The Court suggested that those who established significant ties to the national community were entitled to greater solicitude for their rights.[127] In *Plyler v. Doe*,[128] which required the State of Texas to provide free public education to the children of illegal aliens,[129] the Court acknowledged that even illegal aliens' rights may increase with greater ties to the community. Although it is possible to rationalize the holding of this case under the federal preemption principle, it is nevertheless remarkable that the Court did recognize that illegal aliens had begun to establish ties to their community.

What could make these ties stronger than marriage itself? Throughout history, society has recognized marriage as "the most important relation in life," and "the foundation of the family and of society, without which there would be neither civilization nor progress."[130] The Court in *Landon v. Plasencia*[131] recognized that a permanent resident's interest in rejoining her husband and children in the United States was "a right that ranks high among the interests of the individual."[132] Importantly, Congress acknowledges that an alien's marital tie to a U.S. citizen is important and strong enough that the INA should afford preferential treatment for an alien spouse.

The fundamental rights of both spouses are at stake because both spouses file the petition for removal of conditional status. Therefore, the petition should trigger greater judicial solicitude of the couple's rights. To justify the intrusion by the INS into the couple's fundamental rights of marital privacy, the government should have to prove a compelling interest in preventing sham marriage and narrowly tailor its means to serve the objective.[133] Intrusive questions about highly personal aspects of marital life are unnecessary when other effective means of acquiring information to detect a sham marriage are available that are less destructive of the petitioners' privacy. For example, officials can easily determine that a particular marriage is a sham by asking a

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[126] *Id.*

[127] *Id.*

[128] 457 U.S. 202 (1982); *see also infra* text accompanying notes 228-32.

[129] *Id.* at 230.

[130] Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting Maynard v. Hill, 125 U.S. 190, 205, 211 (1888)).

[131] 459 U.S. 21 (1982).

[132] *Id.* at 34 (the INS detained Plasencia, a permanent resident, upon her return from a brief trip to Mexico).

[133] Zablocki v. Redhail, 434 U.S. 374, 383 (1978); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-20 (2d ed. 1988).

sufficient number of non-intrusive questions. The INS's interest in preventing and screening out marriage fraud is not jeopardized by requiring the government to respect the marital privacy rights of the petitioners.

The Court's deferential position is simply inappropriate in the context of the petition for removal of conditional status. The Court is capable of balancing interests in this area just as it does regularly in other areas of law. Also, it has indicated that the lower courts as well can weigh an alien's interests against governmental interests.[134]

III. The Plenary Power of the Federal Government

The broad power of the federal government to regulate the exclusion, deportation, and naturalization of aliens has its roots in the early history of the United States.[135] Throughout the history of the United States, the United States Supreme Court has upheld all manners of federal statutes regulating immigration and resident aliens.[136] Modern statutes, court decisions, and federal agency regulations attest to the plenary nature of this power.[137]

A. Early Immigration Law

The Chinese Exclusion Case[138] was the first case in which the United States Supreme Court held that the federal power to exclude aliens is "an incident of national sovereignty."[139] The Court reasoned that every national government possesses the inherent power to protect its national public interest. Immigration is a matter of vital national concern, and so it is the role of the federal government to oversee it. The Court directed its concern at the federal government's power under the U.S. Constitution.[140] In *Nishimura Ekiu v. United States*,[141] the Court expanded the notion of plenary power by applying it to Congress's procedures for enforcing immigration laws, including procedures

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[134] *Plasencia*, 459 U.S. at 37; *see also infra* text accompanying notes 167-73.

[135] *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L. Rev. 545 (1990).

[136] Ray D. Gardner, *Due Process and Deportation: A Critical Examination of the Plenary Power and the Fundamental Fairness Doctrine*, 8 Hastings Const. L. Q. 397, 400-05 (1981).

[137] Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 321-22 (1977).

[138] 130 U.S. 581 (1889); *see also supra* note 116.

[139] *Id.* at 609.

[140] *Id.* at 604.

[141] 142 U.S. 651 (1892).

that entrusted final decision making power to agency officials.[142] Without any hesitation, the Court in *Fong Yue Ting v. United States*[143] declined to distinguish between the power to deport and the power to exclude, and read into the exclusion power the plenary power to deport,[144] despite the dissents' argument that such a power was found nowhere in the Constitution.[145]

In early cases, the Court cited specific constitutional provisions to support the inference that the federal government possesses complete power over aliens.[146] Later cases made clear, however, that these constitutional provisions are not the source of an implied power of the federal government to regulate aliens, but only support the contention that the federal government is the national government and therefore the possessor of the inherent sovereign power to regulate international affairs.[147]

B. *Early Modern Plenary Power*

Although the Due Process Clause of the Fourteenth Amendment is not limited to U.S. citizens,[148] and the text of the Fifth Amendment,[149]

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[142] *Id.* at 660 (holding that the decision of an immigration inspector is final and conclusive).

[143] 149 U.S. 698 (1893) (three Chinese were deported for not having certificates of residence).

[144] *Id.* at 713-14.

[145] *Id.* at 737-38 (Brewer, J., dissenting); at 757-58 (Field, J., dissenting); at 761-63 (Fuller, J., dissenting).

[146] *See, e.g.*, Head Money Cases, 112 U.S. 580 (1884) (upholding federal tax on arriving aliens); People v. Compagnie Generale Transatlantique, 107 U.S. (17 Otto) 59 (1883) (striking down New York tax on immigrants); The Passenger Cases, 48 U.S. (7 How.) 283 (1849) (invalidating taxes imposed on immigrants by New York and Massachusetts). Among the constitutional provisions cited are the commerce power, U.S. CONST. art. I, § 8, cl. 3, the power to establish a uniform rule of naturalization, U.S. CONST. art. I, § 8, cl. 4, the migration and importation power, U.S CONST. art. I, § 9, cl. 11, and the war power, U.S. CONST. art. I, § 8, cl. 11.

[147] *See generally Developments in the Law*, *supra* note 16.

[148] U.S. CONST. amend. XIV states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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 (emphasis added). Contrasted with "citizens" in the Privileges and Immunities Clause, "any person" in the Due Process and Equal

analogously restricting the federal government's power, is also consistent with such an interpretation, the Court has not approved such an expansive reading of the Due Process Clause. In *United States ex rel. Knauff v. Shaughnessy*,[150] the Court flatly stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[151] The Court held that the power to exclude aliens, even the spouse of a citizen, is fundamental to sovereignty, and unless Congress provides otherwise, that power is beyond judicial review.[152] Although sharply criticized for this decision,[153] the Court has consistently refused even to consider weighing the interests of aliens against those of the government.[154] Surprisingly, long-time permanent residents are treated no less harshly than people entering the country for the first time.[155] For example, in *Shaughnessy v. United States ex rel. Mezei*,[156] a permanent resident of twenty-five years returning from a trip to Europe to visit his dying mother, was unable to enter the United States without a hearing.[157]

While *Knauff* and *Mezei* make it clear that if an alien leaves the United States it puts him or her in a very precarious constitutional position, *Harisiades v. Shaughnessy*[158] demonstrated that physical presence in the country would not necessarily facilitate substantive claims either.[159] In *Harisiades*, the Court rejected arguments rooted in the Fifth

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Protection Clauses suggests that the protected rights apply not only to U.S. citizens but also to other persons regardless of their citizenship. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915).

[149] "[Nor] shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[150] 338 U.S. 537 (1950) (upholding permanent exclusion of a German native who married a U.S. citizen because her admission was prejudicial to the interests of the United States).

[151] *Id.* at 544.

[152] *Id.* at 542-43.

[153] *See, e.g.*, Schuck, *supra* note 16, at 20-21 (finding that the rule encourages and legitimizes "deplorable governmental conduct toward both aliens and U.S. citizens"); *Developments in the Law*, *supra* note 16, at 1322-24 (criticizing the *Knauff* decision as "anomalous," and "no longer tenable").

[154] *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 762-67 (1972).

[155] *See, e.g.*, Christopher R. Yukins, *The Measure of a Nation: Granting Excludable Aliens Fundamental Protections of Due Process*, 73 VA. L. REV. 1501 (1987).

[156] 345 U.S. 206 (1953).

[157] *Id.* at 208-09.

[158] 342 U.S. 580 (1952).

[159] *Id.* at 591 (upholding the deportations of Harisiades and two other resident aliens for having once belonged to the U.S. Communist Party, even though they were no longer members when that ground for deportation became law).

Amendment Due Process Clause that aliens, once admitted to permanent residence status, have a vested right to remain.[160] Likewise it rejected the idea that any deportation grounds for permanent residents must be reasonable.[161] The Court's language suggested little, if any, judicial role in immigration matters.[162]

Immigration procedures are within the plenary power of Congress, subject only to the most limited judicial review and shielded from many of the constitutional restraints now taken for granted in other areas of the law.[163] Thus, Congress has frequently imposed conditions upon aliens that would not withstand constitutional scrutiny if applied to citizens.[164]

Through the INA, this unusual judicial deference is also imposed on a U.S. citizen who marries an alien and then tries to assist him or her to acquire permanent residence status. This situation, however, no longer involves only the rights of aliens, but also those of citizens of the United States, and therefore clearly becomes the Court's concern. As Justice Brennan stated in *Baker v. Carr*,[165] "[i]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[166]

C. Contemporary Plenary Power

1. Immigration law

Although the United States Supreme Court in *Landon v. Plasencia*[167] recognized that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes,"[168] it acknowledged the power of Congress over immigration and squarely applied the INA provision. Plasencia was detained when she tried to reenter the country, despite the fact that she was a permanent resident. The court ruled that she was excludable rather than deportable. Justice O'Connor reaffirmed the *Knauff* proposition that "an alien seeking initial admission to the United

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[160] *Id.* at 586-87.

[161] *Id.*

[162] *Id.* at 588-89.

[163] *See* TRIBE, *supra* note 133, § 5-16.

[164] *Id.*

[165] 369 U.S. 186 (1962).

[166] *Id.* at 211.

[167] 459 U.S. 21 (1982); *see also supra* text accompanying notes 131-32.

[168] *Id.* at 32.

States . . . has no constitutional rights regarding his application."[169] The Court refused to draw the line, and a permanent resident who had developed considerable ties to the United States was treated the same way as an alien who sought initial admission.

Although reaffirming its earlier holding, the Court showed unusual concern for the rights of an alien in the exclusion context. It identified Plasencia's home, work, and immediate family as her ties to the United States.[170] The Court suggested these ties are important factors to weigh against the governmental interest.[171] The Court reversed the lower court's holding that had favored Plasencia,[172] but it remanded the case to explore "whether Plasencia was accorded due process under all of the circumstances."[173] The Court, in effect, directed the lower court to conduct a balancing test.

If courts are competent to weigh resident aliens' interests in re-entering the country against the government's interests, they should also afford this balancing test to U.S. citizens and resident aliens' claims of privacy rights. If an alien spouse has lived in the United States for two years and has presumably established considerable ties to the United States, the courts should accord him or her greater solicitude and should not subject him or her to the INS's second intensive scrutiny two years later.

In *Kleindienst v. Mandel*,[174] the U.S. Supreme Court stated that Congress's power to exclude aliens on whatever basis it chooses is plenary and immune from judicial intervention,[175] and declined to weigh the U.S. citizens' asserted First Amendment interest against governmental interests. When the plenary power of Congress is exercised on the basis of a "facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests . . . ."[176] Without weighing U.S. citizens' constitutional rights, the

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[169] *Id.*

[170] *Id.* at 34.

[171] *Id.* at 37.

[172] *Id.* at 34-35.

[173] *Id.* at 37.

[174] 408 U.S. 753 (1972). In *Mandel*, U.S. scholars claimed their First Amendment rights were violated when the U.S. Attorney General declined to waive the excludability of Mandel, a revolutionary Marxist. *Id.*

[175] *Id.* at 765-67.

[176] *Id.* at 770.

Court stipulated that congressional power over immigration is so broad and absolute that its delegates' determinations are final.[177]

The *Mandel* decision and the treatment of the First Amendment claims of U.S. citizens remains controversial.[178] Thus, this case does not necessarily indicate that all challenges to the immigration power of Congress must fail. The *Mandel* case is distinguishable from cases in which aliens and U.S. citizen spouses are involved. The First Amendment claim in *Mandel* was based on a relationship between the excluded alien, who himself did not have any constitutional rights, and an ill-defined group identified as those who wished to associate with an excluded person. In the context of immigration, the right to associate may require more particularized ties between the aliens and the U.S. citizens. If so, the right of a U.S. citizen and his or her alien spouse to marital privacy invokes an existing interest particular to the couple. This existing relationship is so fundamental and intimate that it should be sufficient to support greater judicial solicitude than is customarily applied.

In *Fiallo v. Bell*,[179] a case in which U.S. citizens were burdened in an immigration context, an unwed natural father who was a U.S. citizen and his illegitimate child sought a special immigration preference based on their parent-child relationship.[180] The Court upheld a provision of the pre-1990 INA that allowed illegitimate alien children of U.S. citizen mothers to immigrate, yet denied admission to illegitimate children of U.S. citizen fathers.[181] Congress has placed so much emphasis on the goal of family reunification at the expense of all others that U.S. immigration policy appears to reflect a "national policy of nepotism."[182] Nonetheless, neither the illegitimate child nor the father can receive or give a preferential immigration status merely by virtue

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[177] *Id.* at 765-70.

[178] Justice Marshall in his dissenting opinion in *Mandel* stated that all the immigration cases cited by the majority were inapplicable to this case because none involved U.S. citizens' constitutional rights, and "when the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute," and the courts should not blindly defer to other branches. *Id.* at 782.

[179] 430 U.S. 787 (1977).

[180] *Id.* at 790-91.

[181] *Id.* at 799-800.

[182] Rosberg, *supra* note 137, at 318 (quoting North & Houstoun, *The Characteristics and Role of Aliens in the U.S. Labor Market* at 8 (U.S. Dep't of Labor Research and Development Contract No. 20-11-74-21, 1976)).

of their parent-child relationship.[183] Mothers and fathers of illegitimate children are not necessarily similarly situated,[184] but if the class of citizens is defined on the basis of two traditionally disfavored classifications, gender and legitimacy, the Court should apply more rigorous review to the classification.[185] Especially here, all the claimants desire is to unite and support their immediate family, which is the very objective of U.S. immigration policy.[186]

Although the Court has repeatedly described the power to regulate immigration as plenary, the Court has also repeatedly limited the powers that the Constitution has bestowed on the government. For example, the Court held that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."[187] Likewise, the Court has described the President's "plenary and exclusive power . . . the sole organ of the federal government in the field of international relations" as a power that "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[188] Perhaps, in the never-never land of immigration, plain words may not always mean what they say.[189]

In a number of cases, the Court has emphasized the political nature of immigration policy questions, conveying the impression that the constitutional challenge to immigration policy might be nonjusticiable under the political question doctrine.[190] If determination of the admis-

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[183] Congress amended the definition of "child" after the *Fiallo* decision so that either parent can now receive the benefit. INA § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (Supp. 1990).

[184] Parham v. Hughes, 441 U.S. 347, 355 (1979) (upholding a Georgia statute permitting the mother but not the father of an illegitimate child to sue for the wrongful death of the child).

[185] *Fiallo*, 430 U.S. at 813-15 (Marshall, J., dissenting) (suggesting that the Court can apply more rigorous constitutional review without necessarily having to apply such scrutiny in most other immigration cases).

[186] H.R. Rep. No. 906, 99th Cong, 2d Sess. 6, *reprinted in* 1987 U.S.C.C.A.N. 5978 (1986).

[187] United States v. Darby, 312 U.S. 100, 115 (1941).

[188] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[189] Yuen Sang Low v. Attorney General, 479 F.2d 820, 821 (9th Cir. 1973).

[190] Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is . . . exclusively entrusted to the political branches of government."); Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government.")

The political question doctrine suggests that federal courts cannot review a class of

sibility of aliens is political in nature, it can be argued that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review" of immigration decisions.[191] Yet the Court has never provided any reasons for its blanket refusal to scrutinize cases in which such considerations as foreign relations or political determinations are insignificant or absent.[192]

As suggested in *Baker v. Carr*,[193] the Court should emphasize a case-by-case determination in reviewing immigration decisions, rather than automatically deferring to the INS for vague reasons of national sovereignty or political conduct.[194] A case-by-case determination would allow the Court to defer to the political branch of the federal government when genuine foreign policy is involved and at the same time open the door to some petitioners whose claims do not present such concerns. Clearly, in a vast majority of cases the case of a petition for removal of conditional status of an alien spouse involves no such policy challenge.

The Court has also offered the rights-privilege doctrine to explain aliens' precarious constitutional positions. The Court stated that "[a]dmission . . . to the United States is a privilege . . . granted to an alien only upon such terms as the United States shall prescribe."[195] The Court in *Graham v. Richardson*[196] expressly rejected this doctrine,[197] and some commentators suggest that mainstream constitutional jurisprudence has essentially abandoned it.[198] Unfortunately, the doctrine is still strong in the immigration context.[199]

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constitutional cases because the subjects are political. The subjects are political when they are committed by the Constitution to another branch of the federal government. The non-justiciability of the political question is primarily a function of the separation of powers. *See* TRIBE, *supra* note 133 § 3-13.

[191] Mathews v. Diaz, 426 U.S. 67, 81-82 (1976).

[192] Schuck, *supra* note 16, at 17; Rosberg, *supra* note 137, at 328.

[193] 369 U.S. 186 (1962).

[194] *Id.* at 210-13.

[195] United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

The rights-privilege doctrine suggests that an alien who tries to obtain permanent resident status is seeking a privilege that the government is not obliged to offer at all, so the privilege of admission could be summarily withdrawn, or any condition could be imposed on the privilege. *See* Moyce, *supra* note 43, at 1765-66.

[196] 403 U.S. 365 (1971).

[197] *Id.* at 374 (rejecting the concept that constitutional rights turn upon whether a governmental benefit is characterized as a right or as a privilege).

[198] *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[199] In *Plasencia*, Justice O'Connor reaffirmed that an alien who seeks admission to

To say that an alien has only a privilege to enter does not necessarily lead to the conclusion that an alien may not subsequently enjoy the rights of marriage and privacy after entry.[200] Because aliens must come within the territory of the United States in order to enjoy certain constitutional rights,[201] the right-privilege distinction in the admission process does not apply to resident aliens already in the United States. Moreover, even if certain factors justifiably require differentiation between aliens' rights and privileges, in the context of a petition for removal of conditional status the privilege belongs as much to the U.S. citizen spouse as to the alien.

Thus far, the Court has largely resisted prodding by scholars and litigants to place some limits on federal power over immigration. Some federal courts have shown greater willingness to review INS decisions,[202] but the United States Supreme Court has not shown any such inclination.[203] Federal immigration power thus appears limitless, as evidenced by the Court's comment that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."[204]

2. Beyond immigration law

The United States Supreme Court in *Graham v. Richardson*[205] declared that aliens were an inherently suspect class under the equal protection

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the United States is requesting a privilege. 459 U.S. 21, 32 (1982). *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989) ("News of the death of the right/privilege distinction has not reached immigration law"); *see also* Gerald M. Kouri, Jr., *Getting Back In: The Plasencia Decision and the Permanent Resident Alien's Right to Procedural Due Process*, 36 U. MIAMI L. REV. 969, 981-84 (1982).

[200] Yukins, *supra* note 155, at 1523.

[201] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Bridges v. Wixon, 326 U.S. 135, 161 (1945).

[202] *See, e.g.*, Allende v. Shultz, 845 F.2d 1111 (1st Cir. 1988) (reviewing a case in which the government impermissibly denied a visa to a widow of a former Chilean president invited to speak in the United States on the basis of general harm to foreign policy created by her presence); Hill v. INS, 714 F.2d 1470 (9th Cir. 1983) (stating that although the power of Congress is plenary, exclusion of homosexuals is improper); *see also* Whetstone v. INS, 561 F.2d 1303 (9th Cir. 1977); Moon Ho Kim v. INS, 514 F.2d 179 (D.C. Cir. 1975); Chan v. Bell, 464 F.Supp. 125 (D.D.C. 1978).

[203] *See, e.g.*, Jean v. Nelson, 472 U.S. 846 (1985); INS v. Jong Ha Wang, 450 U.S. 139 (1981); Fiallo v. Bell, 430 U.S. 787 (1977); Lutwak v. United States, 344 U.S. 604 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[204] *See* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 323 (1909).

[205] 403 U.S. 365 (1971) (holding that a state statute that denied welfare benefits to

clause.[206] Aliens as a class are a "prime example," of the "discrete and insular minority,"[207] that should obtain the benefit of heightened judicial solicitude, because they require "extraordinary protection from the majoritarian political process."[208] Most state classifications based on alienage are constitutionally suspect and warrant strict scrutiny.[209]

The United States Supreme Court has never held that federal classifications based on alienage are suspect or irrelevant to any permissible federal objective. Identification of a suspect classification is determined by particular characteristics that a person or a group possesses.[210] Exclusion from suffrage and the resultant exclusion from the political process is the most critical characteristic making alienage classification suspect. The Court has long recognized that the right to vote is a "fundamental political right, because [it is] preservative of all rights."[211] This complete exclusion from the political process must make the alienage classification suspect.[212]

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resident aliens who have not resided in the United States for a specified number of years violated the Equal Protection Clause).

[206] *Id.* at 372.

[207] *Id.* (quoting United States v. Carolene Product Co., 304 U.S. 144, 152-53 n.4 (1938)).

[208] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

[209] *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating the New York statute prohibiting aliens from civil service positions); *In re* Griffiths, 413 U.S. 717 (1973) (invalidating the state court rule restricting admission to the bar to citizens of the United States).

Yet in recent cases the Court has tried to limit the implications of its decision in *Graham*. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978) (upholding the New York statute prohibiting aliens from serving on the state police force); Ambach v. Norwick, 441 U.S. 68 (1979) (upholding the New York statute requiring citizenship for public school teachers); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (upholding the California statute requiring probation officers to be citizens); *see also* David F. Levi, *The Equal Treatment of Aliens: Preemption or Equal Protection*, 31 STAN. L. REV. 1069, 1075-79 (1979).

[210] TRIBE, *supra* note 133, § 16-23 (considering such factors as political powerlessness, the history of discrimination, immutable characteristics, and relevancy between classification and governmental purpose).

[211] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[212] Rosberg, *supra* note 137, at 1105-06. Rosberg argues that since presumption of constitutionality rests on the expectation that all groups potentially affected by the legislation have had an opportunity to express their view and pursue their interest in the legislative forum, the presumption cannot stand when a group is excluded from the process, and thus the courts must scrutinize legislation that disadvantages groups with unusual strictness. *Id.*

The Court in *Hampton v. Mow Sun Wong*[213] stated that alienage is an "identifiable class of persons who . . . are already subject to disadvantages."[214] It recognized that alienage is a discrete and insular minority[215] which requires "some judicial scrutiny" and that only "overriding" governmental interests could justify the use of such a classification.[216] Clearly then, this characteristic does not change merely because aliens assert a claim against the federal government; if alienage is a suspect classification in relation to state regulation, it should be equally suspect in relation to the federal government.[217]

Even accepting Congress's enormous power over immigration does not help in understanding its power to regulate the rights and lives of resident aliens once they are lawfully admitted to reside in the United States. When resident aliens seek their rights in areas unrelated to immigration, their claims should be outside the purview of congressional immigration power.

In *Mathews v. Diaz*,[218] permanent resident aliens sought to obtain medicare benefits, an issue unrelated to immigration.[219] Nonetheless, the Court relied on the power of Congress over immigration, and then stated that disparate treatment of aliens by Congress is not necessarily invidious.[220] The Court indicated, without any elaboration, that once an alien is involved it is the business of the political branches of the federal government.[221] The Court, although not explicitly, applied rational basis scrutiny and in effect rejected its own earlier holding that aliens were a suspect category.[222] The analogy to *Graham* is so powerful that the Court's heavy reliance on the unique nature of federal authority over immigration sounds wholly irrational.

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[213] 426 U.S. 88 (1976) (invalidating a Civil Service Commission policy that excluded aliens from most civil service jobs).

[214] *Id.* at 102.

[215] *Id.* at 102, n.22.

[216] *Id.* at 103.

[217] Rosberg, *supra* note 137, at 293-316 (arguing that since the Equal Protection argument is not logically dependent on the Supremacy Clause argument, its rationale must be as fully applicable to the federal government as it is to the state). *But see* Frederick 1. Miller & Thomas H. Steele, *Aliens and the Federal Government: A New Equal Protection*, 8 U. C. DAVIS L. REV. 1 (1975) (arguing that the application of strict judicial scrutiny to the federal government's regulation of aliens is unworkable).

[218] 426 U.S. 67 (1976).

[219] *Id.* at 69.

[220] *Id.* at 80.

[221] *Id.* at 85.

[222] *Id.* at 84-87.

At least one lower court clearly drew a distinction between Congress's power over immigration and its limited power over resident aliens. In *Hampton v. Mow Sun Wong*,[223] the United States Court of Appeals for the Ninth Circuit stated that federal power over immigration applies only to the admission and exclusion of aliens, and not to their regulation after entry because of constitutional limitations on how the government can treat aliens.[224] It held that the United States Civil Service Commission regulation barring all aliens from civil service positions violated due process.[225] Although the United States Supreme Court affirmed the holding, it did not endorse the Ninth Circuit's reasoning.[226] The Court never explained why congressional immigration power extends to the rejection of federal employment simply because the applicants are resident aliens.

Although this case seems to show some progress in terms of aliens' rights against federal government discrimination, it suggested that if Congress or the President had expressly mandated the regulation,[227] the Court would have decided in favor of the federal government. This argument implies that congressionally mandated regulations can legitimately regulate not only aliens in immigration matters but also resident aliens in non-immigration matters.

In 1982, the United States Supreme Court decided an interesting yet controversial case involving illegal aliens. Although this case dealt with a state statute rather than federal immigration law, it is noteworthy because of the Court's willingness to recognize the constitutional claims of illegal aliens. In *Plyler v. Doe*,[228] the Court invalidated a Texas statute that excluded aliens from public education who were not legally admitted into the United States.[229] The Court conceded that illegal aliens

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[223] 500 F.2d 1031 (9th Cir. 1974).

[224] *Id.* at 1036 n.10.

[225] *Id.* at 1040-41.

[226] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). The Court first rejected application of Sugarman v. Dougall, 413 U.S. 634 (1973), and *In re* Griffiths, 413 U.S. 717 (1973), because the Fourteenth Amendment's restriction on state power is not applicable to the federal government. Then it stated that two protections (the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment) are "not coextensive. Not only does the language of the two Amendments differ, but more importantly . . . overriding national interests . . . justify selective federal legislation that would be unacceptable for an individual state." *Id.*

[227] *Id.* at 105.

[228] 457 U.S. 202 (1982); *see also supra* text accompanying notes 128-29.

[229] *Id.* at 230.

are not considered a suspect class, and that the right to education is not a fundamental right.[230] However, it applied an intermediate level of judicial scrutiny.[231] The Court's application of intermediate scrutiny has been severely criticized,[232] and the validity of its holding is unclear. The combination of a disadvantaged group and an important interest triggered intermediate scrutiny whereas one factor by itself might have been insufficient to evoke the higher standard. Nonetheless, the Court clearly indicated a solicitude for the rights of illegal aliens whose very presence in the United States is a federal crime. The Court showed that their constitutional claim was arguably more substantial than that of non-resident aliens who present themselves to the INS seeking legitimate immigrant status.

Resident aliens, once lawfully admitted to the United States, are members of the national community, and they share the obligations and benefits of membership. The Court must establish and then distinguish between congressional power over claims regarding immigration matters and claims of rights and privileges made by aliens after their lawful admission to the United States.

IV. International Law

A. Comparative Immigration Law

In analyzing the constitutional issues in cases relating to aliens, the United States Supreme Court does not start with the text of the Constitution and ask how the power to regulate immigration might be inferred and how extensive the power is. Instead the Court approaches the plenary power of the Congress from the perspective of foreign affairs.[233] Just as the United States must possess the power to defend itself against foreign invasion, it must also protect itself against "vast hordes of [a foreign] people crowding in upon us."[234] Because aliens, after all, are citizens of foreign countries, and everyone is an alien in

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[230] *Id.* at 223.

[231] *Id.*

[232] Scott D. Livingstone, *Plyler v. Doe: Illegal Aliens and the Misguided Search for Equal Protection*, 11 Hastings Const. L. Q. 599 (1984).

[233] Aleinikoff, *supra* note 199, at 83.

[234] Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 606 (1889).

terms of the laws of other countries, defining the government's power over aliens without considering how other countries treat aliens may run the risk of leaving the United States isolated in the international community.

Unlike the United States, Japan has not experienced a great deal of immigration. Therefore, comparing the two countries will present an interesting contrast in how a nation's immigration policies are reflected and implemented in its immigration laws and treatment of aliens. The prevailing myth in Japan of a "homogeneous" nation reveals a low level of awareness and concern about resident aliens in Japan and helps to explain Japan's shortcoming in the treatment of aliens.[235] The most notorious illustration of mistreatment of resident aliens in Japan is the discrimination against the Korean minority[236] of which more than eighty percent are either the second or the third generation born, raised, and educated in Japan.[237] Most of them have never seen Korea, nor do many speak Korean, yet legally, they are aliens, not Japanese.[238] The striking aspect of Japan's Alien Registration Law[239] is that it equates second and third generation Korean permanent residents with foreigners who intend to stay in Japan for only a couple of years.[240]

In 1988, a Korean born in Japan in 1923 was denied the benefit of the National Annuity,[241] despite having made payments for sixteen years, on the ground that the National Annuity Law does not recognize the eligibility of a resident alien who was born before 1925.[242] The

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[235] Yasuhiro Okudaira, *Forty Years of the Constitution and its Various Influences: Japanese, American, and European*, 53 LAW & CONTEMP. PROBS. 17, 29 (Winter 1990).

[236] Lawrence Repeta, *The International Covenant on Civil and Political Rights and Human Rights Law in Japan*, 20 LAW IN JAPAN 1, 7 (1987) (discussing the discrimination against the population of approximately 680,000 Korean residents).

[237] *Id.* Unlike the United States Constitution (specifically the Fourteenth Amendment), neither the Constitution of Japan nor any other Japanese laws recognize *jus soli* (citizenship based on birth in the national territory). *See* Kokuseki Ho [Nationality Act], Art. 2.

[238] Yukio Shimada, *Nyukanhosei no Rekishiteki Keii to Gaiyo [History and Summary of Immigration-Control and the Refugee-Recognition Act]*, 877 JURISUTO 26, 31 (1987) (stating that the U.S. naturalization system - in which a person who wishes to become a U.S. citizen can do so if he or she satisfies certain qualifications - is unimaginable in Japan).

[239] Gaikokujin Toroku Ho [Alien Registration Law], Law No. 125 (1952) [hereinafter ARL].

[240] *Id.*

[241] The National Annuity is similar to the U.S. Social Security benefit.

[242] Kin Ko Jun v. Tokyo Metropolitan Welfare Department, 1269 HANJI 71 (Tokyo Dist. Feb. 25, 1988).

Tokyo District Court affirmed the denial by the Tokyo Metropolitan Welfare Department by stating that the denial is completely within the power of the Legislative Branch.[243] The decision was later criticized on the grounds that Article Twenty Five[244] applies not only to citizens but also aliens, especially permanent resident aliens.[245] This case shows an interesting contrast to *Graham v. Richardson*,[246] in which the United States Supreme Court established that resident aliens in the United States are entitled to state welfare benefits.[247] Even in the case of *Mathews v. Diaz*,[248] resident aliens were deemed eligible for medicare after living in the United States for five years.[249] In Japan, however, notwithstanding that country's express promulgation of the right to maintain the minimum standards of living, the government denied this right to a life-time resident alien.[250]

Resident aliens in Japan are subject not only to the broad power of the Legislative Branch but also subject to the even broader power of the Administrative Branch.[251] Both entering and resident aliens, regardless of their visa status, are subject to the Status of Residence.[252] The longest period that an alien is permitted to stay in Japan under

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[243] *Id.*

[244] Article 25 states: "All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health." JAPAN CONST. Art. 25

[245] Koichi Aoyagi, *Gaikokujin to Shakaihoshohojo no kenri [Rights of Foreigners under Laws of Social Benefits]*, 2 KENPO JURISUTO 10, 11 (1990).

[246] 403 U.S. 365 (1971); *see also supra* notes 205-07 and accompanying text.

[247] *Id.* at 376.

[248] 426 U.S. 67 (1976); *see also supra* notes 125-27, 218-22 and accompanying text.

[249] *Id.* at 70.

[250] Despite the Japanese government's recognition that Chapter III of the Constitution of Japan (fundamental human rights) protects citizens as well as aliens, in practice the rights given to aliens are considered privileges. YOSHIO HAGINO, KOKUSEKI SHUTSU-NYUKOKU TO KENPO [NATIONALITY, IMMIGRATION, AND CONSTITUTION] 417 (1982).

[251] Discretion by the Minister of Justice is considered "free discretion" rather than "legal discretion." *Id.* at 146.

[252] Shutsu-NyuKoku Kanri oyobi Nanmin Nintei Ho [Immigration-Control and Refugee-Recognition Act] (Cabinet Order No. 319 of 1951) Art. 9, Paragraph 3 [hereafter Immigration Act]. Aliens residing in Japan are authorized to engage in the activities that fall under their status of residence granted, and they are permitted to stay in Japan within the period determined according to their status of residence. *Id.* Art. 19.

the Status of Residence is three years.[253] The spouse of a Japanese citizen is also subject to this regulation.[254] The criteria for permitting permanent residence are generally strict because the general policy of Japanese immigration is not to accept immigrants.[255] Aliens are given permanent residence status only when they have established a permanent basis of livelihood and when their permanent residence will be in accord with the interests of Japan.[256] All aliens, including permanent resident aliens and spouses of Japanese citizens, are required to register at the municipal office of the city or town in which they reside[257] and carry their registration certificate with them at all times. All aliens over the age of sixteen who are staying in Japan for more than one year are required to have their fingerprints taken.[258]

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[253] KOKUSAI KEKKON O KANGAERU KAI [INTERNATIONAL MARRIAGE ASSOCIATION], KOKUSAI KEKKON HANDOBUKKU [INTERNATIONAL MARRIAGE HANDBOOK] 96 (2d ed. 1991) [hereinafter INTERNATIONAL MARRIAGE].

[254] When an alien desires to remain in Japan beyond his or her authorized period of stay, he or she may apply for an extension of period of stay. Immigration Act, Art. 13.

The Minister of Justice may give permission only when he deems that reasonable grounds exist to accept the extension of the period of stay on the strength of interests asserted by the applicant. Immigration Act, Art. 21, Paragraph 3.

[255] *Zadankai: Nyukoku-Kanri no Genjyo to Gaikokujin no Shuromondai* [*Symposium: Problems of Current Immigration Control and Employment of Foreigners*], 877 JURISUTO, 6, 16 (1987) [hereinafter *Zadankai*] (stating that two basic policies of Japanese immigration are non-acceptance of immigration, and preservation of smooth international relationships).

[256] In fact, no specific rule on the length of residence exists, however, a five-year residence is usually counted in practice. This residence requirement is not applicable for a spouse of a Japanese citizen, but the Act does not specify a fixed period for an alien spouse. RYOICHI YAMADA & TADAMASA KUROKI, WAKARIYASUI NYUKANHO [COMPREHENSIVE IMMIGRATION-CONTROL ACT] 56-58 (1990).

[257] ARL Art. 3. Twenty items including name, date of birth, gender, nationality, occupation, passport number, status of residence, period of stay, address, and name of work place are registered at the municipal office. *Id.* Art. 4.

Any changes of registered matters must be reported to the municipal office within fourteen days of the change. *Id.* Art. 8, 9.

[258] *Id.* Art. 14.

Until recently, a provision in the ARL required the taking of fingerprints every five years. The government amended the law and deleted the five year requirement. Law No. 107 (1987).

Some Korean permanent residents refused to have their fingerprints taken and were prosecuted. The protesters took the legal position that the fingerprint requirement violated their right to privacy, and alternatively, that it discriminated against foreigners, particularly Korean residents. Okudaira, *supra* note 235, at 46.

In February 1989, the Cabinet announced a general amnesty order by which all

As we have seen in the stance of the United States Supreme Court in cases in which an alien is involved, the Japanese Supreme Court has shown the same or even greater deference to the Legislative and Administrative Branches.[259] Some commentators estimated that eighty-five percent of Japanese governance remains, in practice, beyond the law, and in reality, ordinary citizens simply cannot bring the bureaucracy into court for statutory or constitutional review of administrative actions.[260] The position of all courts, including the Japanese Supreme Court, is weak in the presence of the politically powerful bureaucracy that continues to operate by way of so-called "administrative guidance" with little basis in law.[261]

In *McLean v. Japan*,[262] a U.S. citizen residing in Japan was denied a one-year extension of his residency visa on the ground that he participated in assemblies and demonstrations in opposition to the United States' involvement in the Vietnam War and to Japan's involvement in American Far East defense policy.[263] Although the Court recognized that fundamental rights of political expression apply equally to aliens and Japanese citizens, it held that the Minister of Justice was free to deny the requested visa extension.[264] The Court went as far as saying:

> Even when the conduct of aliens during their stay in Japan is in accord with the Constitution and is lawful, if the Minister of Justice determines

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prosecutions against persons refusing to obey the fingerprint law were dropped. Cabinet Order No. 27 (1989).

[259] Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System*, 53 LAW & CONTEMP. PROBS., 135, 154 (Winter 1990) (stating that the district court judges have repeatedly held laws and government actions unconstitutional and have been subsequently overruled by a high court or the Japanese Supreme Court).

[260] Dan Fenno Henderson, *Comment*, 53 LAW & CONTEMP. PROBS., 89, 90 (Winter 1990) (arguing that the Japanese legal system is an entrenched carry-over from the prewar days when the imperial bureaucracy was responsible only to the Emperor).

[261] This broad administrative authority is rooted in the history of Japan. "[U]nder the Meiji Constitution, the Emperor was the source of supreme power. In other words, the pre-eminent position of the administrative branch was recognized, and the Imperial Diet as the legislative branch was merely a rubber stamp." Shigeki Miyazaki, *The Political Rights of Aliens in Japan and Compulsory Deportation*, 12 LAW IN JAPAN 82, 83 (1979). "[T]he administrative branch could exercise its authority according to its own free discretion." *Id.* at 84.

[262] 32 MINSHU 1223 (Sup. Ct., Oct. 4, 1978). An English translation of the Japanese Supreme Court opinion appears in *The McLean Decision*, 12 LAW IN JAPAN 92 (1979).

[263] *Id.* at 92-93.

[264] *Id.* at 95-98.

> that the conduct of an alien is undesirable for Japan from the perspective of propriety, or if it is inferred from the conduct that there is a danger that in the future the alien will behave in such a way as to harm the interests of Japan, this does not amount to depriving the alien of constitutional protection.[265]

The danger of these rather dubious standards is that the government may act in an arbitrary and capricious manner in its immigration practices.[266] This is especially likely since the government delegated the actual decision to grant an extension of the period of stay to the official in the Immigration Bureau of the Ministry of Justice (IB). The IB officials' idiosyncratic beliefs and reactions to the applicant may also influence their decisions.[267] Therefore, despite the Court's statement in *McLean* that under the Constitution the guarantees of fundamental human rights[268] extend to aliens and that the freedoms of political activities[269] are also sanctioned for aliens, such rights are illusory. In fact, critics maintain that even the fundamental rights of Japanese citizens have not received adequate judicial protection.[270] Lack of judicial protection for citizens does not, however, justify governmental mistreatment of resident aliens in Japan. The *McLean* decision deserves serious consideration as it had and will continue to have a significant affect on the treatment of aliens in Japan.

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[265] *Id.* at 97.

[266] Miyazaki, *supra* note 261, at 89-91 (arguing that the *McLean* standards may lead to abuse of discretion by the Immigration Bureau of the Ministry of Justice officials who would themselves suffer no negative legal consequences).

[267] Indeed, the power of the IB expanded to indirectly control Japanese language schools for foreigners by specifying that such schools must meet certain qualifications in order to receive approval of visa petitions for students. 1990 Homusho Kokuji Dai 145-go [Ministry of Justice, Administrative Guidance No. 145]

The intent of the Ministry of Justice is to prevent the entry of illegal workers under student visas. Keiji Yonezawa, *Nihongo Gakko* [Japanese Language Schools], 931 JURISUTO 10 (1989).

[268] JAPAN CONST. Chapter III.

[269] *Id.* Article 21.

[270] Repeta, *supra* note 236, at 26 (stating with amazement that fundamental human rights as proclaimed in the Constitution of Japan, are accorded "virtually no protection against violation under color of government authority"); *see generally* Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, 53 LAW & CONTEMP. PROBS., 39 (Percy R. Luney, Jr. ed., Spring 1990). *But see* Okudaira *supra* note 235, at 43 ("political freedom is greatly safeguarded and subjected to almost no direct restraint by the government").

Some scholars have criticized the Japanese government for considering recourses to problems only after strong social and media protest or international pressures.[271] The government finally amended the law that governs international marriages in 1990 in response to sharp criticism and to ameliorate serious problems.[272] According to the old law, the law of the husband's country governed the international marriage, thus Japanese men married to aliens enjoyed all the protections of Japanese laws, while Japanese women married to aliens were confronted with serious problems.[273]

Gender discrimination in immigration is found in many countries. Since the early 1960's, however, most of those countries amended their applicable law to reflect gender neutral.[274] In the United States, the Court in *Fiallo v. Bell*[275] upheld a then-existing INA provision that significantly burdened a U.S. male citizen's right to preserve his family.[276] In Japan, for decades the provision of the Immigration Control Act impinged on the marriage rights of Japanese female citizens. Although their sources of power over immigration are different (the United States' plenary power and Japan's deeply rooted tradition of government by bureaucracy rather than law), the courts' extreme

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[271] Repeta, *supra* note 236, at 3 (stating that pressure from outside Japan plays a role in numerous revisions of law and administrative practice).

For example, in order to observe the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (18 Dec. 1979), *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, 112-25 (United Nations 1988) (effective 1985 in Japan), the Nationality Act was finally amended in 1985. Law No. 45 (1985). Under the old law, a child of a Japanese mother and a foreign father could not acquire Japanese citizenship although a child of a Japanese father and a foreign mother could acquire citizenship. A law equalizing the working conditions of women was also enacted. Law No. 45 (1985).

[272] Horei [International Private Law Regulation], Law No. 10, 1898 (amended in 1989, Law No. 27, effective 1990).

[273] INTERNATIONAL MARRIAGE, *supra* note 253, at 207. In the case of divorce, for example, a Japanese man married to a Filipino woman could file for divorce, but a Japanese woman married to a Filipino man could not. *See* Toshifumi Minami, *Horei no Ichibu Kaisei ni tsuite [Amendment of Horei]*, 943 JURISUTO 38 (1989); *Zadankai: Horei Kaisei o meguru Shomondai to Kongo no Kadai [Symposium: Future Problems and Issues regarding Amendment of Horei]*, 943 JURISUTO 16 (1989) [hereinafter *Symposium*].

[274] *Symposium*, *supra* note 273, at 18. For example in Europe, Czechoslovakia, Poland, Portugal, Spain, former East Germany, Austria, Hungary, Yugoslavia, and former West Germany amended their immigration laws to make the laws gender neutral in the context of international marriage. *Id.*

[275] 430 U.S. 787 (1977); *see also supra* text accompanying notes 179-86.

[276] *Id.* at 799-800.

deference to other branches are the same in both countries even when their own citizens' rights are involved.

The legislative Branch of the Japanese government is seriously reconsidering its treatment of aliens, especially permanent resident aliens. In May, 1992, after years of controversies, the government finally amended the notorious provision of the Alien Registration Law that required fingerprinting of aliens.[277] By 1993, permanent residents in Japan will no longer submit their fingerprints for alien registration. This amendment is only a small recourse for decades of harsh treatment, and is possibly motivated only by external pressure.[278] However, it is a significant historic step toward amelioration of alienage discrimination in Japan.

B. International Human Rights Law

The United States General Accounting Office conducted a survey of other countries' procedures for prevention of immigration marriage fraud in 1985, and concluded that most countries surveyed control immigration marriage fraud more strictly than the United States.[279]

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[277] Law No. 66, effective May, 1993 (1992).

[278] Convention for Legal Status and Treatment of Koreans Who Reside in Japan, Jan. 10, 1991, Japan-Korea, art. 2.

[279] General Accounting Office, *Immigration Marriage Fraud: Controls in Most Countries Surveyed Stronger than in U.S.*, G.A.O. Doc. No. GA.1.13: GAO/GGD-86-104BR (1986) [hereinafter *Controls in Most Countries*]. Five countries do not impose any residence requirement at all. *Id.* at 8-9 (Australia, Canada, Mexico, Spain, and Switzerland).

The Federal Republic of Germany, for example, in order to combat its "great problem" of marriage fraud, imposes an eight year conditional residency period before granting permanent resident status to an alien spouse. *Id.* at 8. Aliens who marry citizens of Germany must fulfill a three year conditional residency period before receiving a permanent resident permit. *Id.* Five years after receiving this permit, the alien spouse may apply for the "right," as opposed to permission, to reside in Germany. *Id.* This right to reside corresponds to "immigrant status" in the United States. *Id.* at 17. Instead of a personal interview, a case worker makes a confidential field investigation if he or she suspects a fraudulent marriage. *Id.*

France, which is reported to have "a moderate problem" with marriage fraud, has seemingly relaxed control over immigration marriage fraud and now requires nothing more than a three month residence. *Id.* at 8, 19.

In Japan, which was reported to have "some problem" by the General Accounting Office, the sham marriage problem surfaced in the early 1980's. The available statistics show relatively few cases, but indicates a rapid increase in numbers every year. The Immigration Bureau reported 16 cases in 1984, 54 in 1985, and 38 in the first half of 1986. IMMIGRATION BUREAU OF THE MINISTRY OF JUSTICE, SHUTSU-NYUKOKU KANRI [IMMIGRATION CONTROL] 110 (1986).

Attempting to justify and modify U.S. immigration regulations relative to those of other countries implies that the government is interested in setting standards that do not deviate from the international norm. Regardless of nationality, governments should treat people with respect wherever they live, and the treatment of aliens certainly invokes international law concerns.[280] The United States will benefit by effectively infusing into its constitutional and statutory standards sufficient safeguards for the rights of aliens and international human rights law.[281] International law provides nation-neutral authority,[282] and is therefore more responsive than domestic laws to the rights of aliens who typically have no representatives in the legislature of their country of residence.[283]

Over the years, a number of federal and state courts have referred explicitly to the United Nations Charter and other international human rights instruments[284] to determine the various rights guaranteed by

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[280] Kristi J. Spiering, *Irrebuttable Exile Under the Immigration Marriage Fraud Amendments: A Perspective from the Eighth Amendment and International Human Rights Law*, 58 U. CIN. L. REV. 1397, 1420 (1990).

[281] Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 859 (1989).

[282] Spiering, *supra* note 280, at 1420.

[283] Resident aliens are not entitled to vote in the United States. Currently, however, several cities and towns permit non-citizens to vote in local elections (e.g. Takoma Park, Md. and Somerset, Md.). Jamin B. Raskin, *Perspective on Democracy: Votes for All, Citizens or Not*, L.A. TIMES, November 13, 1991, at B7. In Germany, two states allowed resident aliens who met certain conditions (durational residence requirement, etc.) to vote in 1989. However, this was declared unconstitutional in the following year. Atsushi Takata, *Gaikokujin no Senkyoken: Doitsu [Foreigners' Voting Right: Germany]*, 64 HORUTSU-JIHO 83 (1991). In 1989, a permanent resident in Japan of British nationality unsuccessfully challenged the constitutionality of Article Nine of the Koshoku Senkyo Ho [Government Officials Election Law] which permits only Japanese citizens to vote. *Gaikokujin no Jiyu [Liberty of Foreigners]*, 978 JURISUTO 120 (1991).

[284] Universal Declaration of Human Rights, U.N.G.A. Res. 217A(III), 3 U.N. GAPR, U.N. Doc. A/810 (10 Dec. 1948), *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 1-7 (United Nations 1988); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 18-38 (United Nations 1988); Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 144, 40 U.N. GAOR Supp. (No. 53) U.N. Doc. A/RES/40/144 (13 Dec. 1985), *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 322-25 (United Nations 1988); *see generally* Thomas Buergenthal, *Human Rights Law and Institution: Accomplishments and Prospects*, 63 INT'L HUM. RTS. L. 1 (1988).

U.S. laws.[285] International law, however, appears to have made little impression on the attitude of the judiciary.[286] Numerous attempts to invoke international legal instruments in the U.S. courts over the years realized little success.[287] The same phenomena is also seen in Japan, where, although the government and the courts have consistently taken the position that, once ratified by Japan, international law has validity,[288] it has largely disregarded the International Covenant on Civil and Political Rights (ratified and in effect in Japan since 1979).[289]

Both the United States and Japanese Supreme Courts are extremely sensitive to foreign policy considerations and invoke a variety of techniques to bypass determination of the substantive issues presented to them. If the United States and Japanese Supreme Courts are truly sensitive to such matters, they should rethink their traditional attitudes

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[285] *See* Harisiades v. Shaughnessy, 342 U.S. 580, 585 (1952) (stating that an alien may invoke dual protection of United States and international law); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388, 1390 (10th Cir. 1981) (stating that arbitrary detention of an alien is a violation of international law, notwithstanding that such detention would not violate the U.S. Constitution); Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir. 1980) (stating that infliction of torture on an alien is a contravention of international law of human rights).

[286] Lillich, *supra* note 281, at 861. Professor Lillich stated that although the Court acknowledged the relevance of the views of the international community in determining U.S. constitutional issues, "the Court's decisions for the most part reveal no rush to use such sources." *Id.* He demonstrated the Court's disregard of outside sources by citing Bowers v. Hardwick, 478 U.S. 186 (1986) and stating that the Court never mentioned Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1982), in which the European Court of Human Rights decided that adult male homosexuals had private rights protected by Article Eight of the European Convention. He concluded that the majority opinion in *Bowers* placed the United States well behind Europe in the area of the right to privacy. *Id.*

See also Gordon A. Christenson, *Using Human Rights Law to Inform Due Process an Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 5 (1983) (questioning why the U.S. courts shun external sources of law including contemporary decisions of foreign and international courts and international human rights law); Louise Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-67 (1984) (arguing that customary international law may supersede prior inconsistent federal statutes).

[287] Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153, 153-54 (1978).

[288] Kentaro Serita, *Nihon ni okeru Gaikokujin no Kokusaihojo no Kenri to Gimu [Rights and Duties of Aliens in Japan from the Perspective of International Law]*, 877 JURISUTO 32, 38 (1987); Yasuhiko Saito, *Japan and Human Rights Covenants*, 2 HUM. RTS. L. J. 79, 107 (1981) (suggesting that the ratification of the instruments is a logical consequence of the sincere desire of the Japanese people and government).

[289] Repeta, *supra* note 236, at 2-6.

and adopt an international human rights approach.[290] Instead of analyzing the constitutional issues from the perspective of plenary power and then blindly deferring to the political branches of the federal government, the United States Supreme Court should begin its analysis by recognizing the fundamental human rights that an alien possesses along with the international norms of human rights which should be observed, and the extent to which the Constitution protects those rights. A nation's immigration law and policy reveal the type of society to which its citizens aspire.[291] The current policy of absolute deference presents not only serious constitutional problems but also runs the risk of violating international human rights law and thereby embarrassing the nation.

In *Thompson v. Oklahoma*,[292] the plurality and the concurring opinions demonstrated that the Court does take instruments such as international law into account in determining constitutional standards.[293] The Court's approach was possibly an "indirect incorporation of both conventional and customary international human rights law."[294] It is unrealistic to ignore the influence of international law and the views of the international community in resolving constitutional issues, especially in cases that involve foreign affairs. Although one cannot expect that a transformation of traditional judicial attitudes will happen overnight, the "indirect incorporation approach" will warrant more attention and use in the future.

V. Conclusion

The constitutionality of the INS procedures for petition based upon marriage has been criticized as problematic and questionable, given the potential for intrusion upon protected marital privacy. Whatever justification might exist for allowing the INS virtually unfettered discretion in dealing with aliens, none exists for infringing on the ac-

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[290] Lillich, *supra* note 287, at 154.

[291] Schuck, *supra* note 55, at 19.

[292] 487 U.S. 815 (1988).

[293] *Id.* at 831 n.34 (plurality opinion); at 851-52 (O'Connor, J., concurring).

The plurality opinion affirms "the relevance of the views of the international community." *Id.* at 830 n.31. Justice Scalia, in dissent joined by Chief Justice Rehnquist and Justice White, disagreed, arguing that "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Id.* at 868 n.4.

[294] Lillich, *supra* note 281, at 859-60.

knowledged rights of U.S. citizens. The long line of decisions that the Court cites in support of its abdication of constitutional scrutiny of immigration decisions simply does not justify a similar response in the context of the INA petition based on marriage.

Nor do the rationales advanced by the Court justify its blanket refusal to subject immigration decisions to judicial scrutiny, except insofar as they are legitimized by the notion of the exclusive power of Congress to exclude outsiders who do not belong to the national community. A person who has married a U.S. citizen is not an outsider. Marriage is as fundamental and essential a bond as any recognized in the Court's jurisprudence. Such fundamental ties to the community enhance a person's constitutional rights; permanent resident spouses are virtually full-fledged members of the U.S. community, sharing the obligations of membership as well as the benefits.

Plainly stated, the power of Congress over immigration matters is plenary and absolute, and the federal government's power in dealing with resident aliens is broader than that of the states. It does not, however, follow that any federal statute dealing with resident aliens is constitutional. Congress should draw a line between immigration matters specifically relating to aliens physically entering into the country and immigration matters relating to aliens already in the country. The Court should not recognize the power of Congress over immigration as a power over resident aliens in the United States without careful examination of the extent of that power and the nature of the rights asserted by resident aliens. The difficulty of drawing the line is no reason to abandon the effort altogether.

When Congress acts against resident aliens pursuant to its immigration power, it must act in compliance with the standards of the Constitution just as when it acts against them pursuant to any other constitutional source of authority. Even when Congress exercises its unfettered power to establish immigration policy and determine whom to admit to the United States, it must still confine its power within constitutional limits. Furthermore, to provide a more global context for determining the constitutionality of legislation, such as the INA or administrative actions that impact politically unprotected aliens, the Court should consider international human rights norms established by traditional external sources of customary and conventional international law. The Court should avoid creating any gap or conflict between the domestic standards determined under the plenary power of the political branches of the federal government and the universal standards of the international community.

A truly effective and humane immigration policy would attempt to identify fraud early in the administrative process rather than later. Delaying the investigative process permits an alien spouse's marital, familial, and societal interests to intensify and thereby increases the hardships resulting from any subsequent deportation. Even if Congress has no immediate intention to repeal these laws, it should enact certain ameliorative amendments to improve them. Remedies of the problem balance the two competing interests: protecting the constitutional rights of affected U.S. citizens and their alien spouses, and deterring the use of marriage purely as a device for obtaining permanent residence in the United States.

The laws should stop INS officials from inquiring into highly personal aspects of married life and asking questions about intimate personal matters. Many other less onerous means of screening for sham marriages are available to the INS. Congress should also implement procedural safeguards, and formalize the interview process by requiring the INS to keep transcripts of the interview. A verbatim record is essential to ensure that the INS investigation conforms to constitutionally permissible methods, and to facilitate administrative and judicial review of INS findings and proceedings.

Clearly, micro-level amelioration will be ineffective without macro-level judicial transformation. The Court must develop true recognition of the fundamental rights of marriage and marital privacy of U.S. citizens and their resident alien spouses drawn from the perspective of international human rights norms. As has been the case in the past, the nation is strengthened by international marriages, especially in that they weaken ethnocentric and xenophobic attitudes. The Court and Congress should take the attitude of protecting, not deterring, such marriages and ensure the human rights of citizens and aliens alike.

Kikuyo Matsumoto-Power

Avoiding Liability: A Real Property Purchaser's Roadmap to the Dangers of Superfund Law

I. Introduction

Why worry about Superfund? Consider the following hypothetical. Henry decides to retire after twenty years in the auto repair business. He sells his Kalihi auto shop along with the title to the property to Sam who continues the business. Ten years later, Sam, too, decides to leave the business and sells the property to Pacific Investors (Pacific) whose parent-corporation, Davis Group Inc. (Davis) plans to tear down the auto shop and build an apartment complex. Once the land is cleared, the State's Department of Health (DOH) conducts routine inspections and discovers that the soil beneath the auto shop is contaminated with lead and other automotive chemicals. To make matters worse, the DOH has determined that the chemicals have seeped through the soil and contaminated an adjoining stream. The DOH orders Pacific to clean up the soil and stream in accordance with Hawai'i's recently amended Superfund law.[1] Pacific complies with the order at a cost of $500,000. Pacific sues Sam to recover the clean up costs, and Sam in turn sues Henry. Who will pay? Under Hawai'i's Superfund law, (Chapter 128D)[2] and the Federal Superfund law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[3] all of the above parties are jointly and severally liable for the clean up costs.[4] However, if Sam and Henry are insolvent, Pacific will be forced to carry the full burden. Due to the high costs of hazardous waste clean up, the burden may be unusually harsh. The cost of

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[1] Haw. Rev. Stat. § 128D-4(a)(1) (Supp. 1991).

[2] Haw. Rev. Stat. § 128D (Supp. 1991).

[3] 42 U.S.C. §§ 9601-9675 (1988).

[4] *See* Haw. Rev. Stat. § 128D-18 (Supp. 1991); *see infra* note 23.

cleaning up a contaminated property can routinely run into the hundreds of thousands or even into the millions of dollars,[5] and can drastically raise the overall price of obtaining a piece of property.

Because of the danger of increased costs, Superfund liability is a major concern of purchasers of real property and their attorneys. Those who are unfamiliar with the basic Superfund principles may unsuspectingly find themselves liable for costly environmental clean ups. For example, if Henry is unaware of the Superfund laws, he probably doesn't suspect anything is wrong with the release of automotive chemicals from his shop into the ground.[6] Regardless of whether he is aware of his liability, under the Superfund laws, Henry is strictly liable for clean up costs associated with the release of his automotive chemicals.[7] Purchasers who are aware of the risks of Superfund liability are better able to take steps to decrease their chances of liability, or to pre-arrange for previous owners to bear the burden of clean up. For example, if Sam is aware of his Superfund liability, he knows that he should determine, before he acquires the property, whether a prior release of a hazardous substance has occurred. If a release is discovered, Sam knows to pre-arrange to have Henry compensate him for the costs of clean up or to take steps to qualify himself for the third party exemption from liability provided for in the Superfund laws.[8] If Pacific is aware of its Superfund liability, it knows to arrange for Sam to clean up the property before sale, or to pre-arrange to have Sam

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[5] Sonni Efron, *Some Companies Are Cleaning Up With Pollution-Devouring Bacteria*, L.A. TIMES, Oct. 13, 1991, at D3. The commonly used clean up methods of bioremediation (bacterial treatment) and excavation/incineration can cost from $10 to $80 and $122 to $810 per cubic yard of contaminated soil respectively. *Id. See also* Walter Wright, *Firm To Fight EPA Penalty of $25,000*, HONOLULU ADVERTISER, Feb. 28, 1991, at A7 (reporting that the Waterpark Towers condominium apartment site in Kakaako incurred more than $600,000 in costs for the clean up of chlorinated hydrocarbons which are commonly used in hydraulic and heat transfer systems).

[6] Unaware of the Superfund laws, Henry would probably assume that the release of automotive chemicals into the ground is not wrong. Several factors lead to this erroneous assumption. First, chemicals dispersed in the ground are usually invisible and odorless. This creates an illusion that they have disappeared, making them easy to forget. Second, common automotive chemicals are not typically considered as dangerous to human health as other substances like radioactive waste. Third, many automotive chemicals, which homeowners frequently handle, are readily available in retail stores.

[7] *See infra* note 23 for a discussion of the strict liability standard in the Superfund laws.

[8] *See infra* part III.C for a discussion of the innocent purchaser defense.

compensate Pacific for clean up costs. If Sam refuses to cooperate, Pacific knows to calculate whether the increased cost of the property[9] will still allow a reasonable profit on its investment.

As illustrated above, knowledge of the Superfund liability schemes is an essential part of evaluating potential liability from a proposed purchase of land.[10] The purpose of this comment is to alert the reader

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[9] The cost of a property is increased by the amount needed to clean it up.

[10] The Superfund laws are only a single part of the legal scheme governing hazardous waste law in Hawai'i. The following is a listing of other relevant laws which are beyond the scope of this comment. HAW. REV. STAT. § 342L (Supp. 1991) (underground storage tanks); HAW. REV. STAT. § 342J (Supp. 1991) (hazardous waste); HAW. REV. STAT. § 342I (Supp. 1991) (lead acid battery recycling); HAW. REV. STAT. § 342P (Supp. 1991) (asbestos); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1988); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1378 (1988); Clean Air Act, 42 U.S.C. §§ 7401-7671 (1988); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1988). *See also* HAW. REV. STAT. § 128D-1 (Supp. 1991) (defining hazardous substance to include other hazardous substances specified under certain provisions in the above federal statutes).

A brief discussion of the Resource Conservation and Recovery Act (RCRA) and Chapter 342L (underground storage tanks) might interest the reader. Prior to the passage of CERCLA, the Environmental Protection Agency (EPA) relied on RCRA for its authority to address hazardous waste problems. RCRA explicitly addressed the problems of existing, operating waste disposal facilities. As such, RCRA only addressed those releases which were created by or at an established, recognized disposal site where disposal was to continue. Chemicals dumped haphazardly or accidentally onto the land were, therefore, not covered in RCRA. RCRA's failure to provide the EPA with sufficient authority to deal with accidental spills, abandoned disposal sites or casual dumping sites was a major reason for the drafting of CERCLA. Elizabeth Ann Glass, *The Modern Snake in the Grass: An Examination of Real Estate and Commercial Liability Under Superfund and SARA and Suggested Guidelines for the Practitioner*, 14 B.C. ENVTL. AFF. L. REV. 381, 382 (1987). Though the Superfund laws are the most common focus of environmental liability for real estate purchasers, RCRA may still apply in some instances. *See generally* SHELDON M. NOVICK, LAW OF ENVIRONMENTAL PROTECTION § 13 (Jul. 1991).

Also of interest to many landowners in Hawai'i is HAW. REV. STAT. § 342L (underground storage tanks [USTs]). Chapter 342L pertains solely to the problems associated with USTs (leaks, tank deterioration), but it employs many of the same features found in the Superfund laws such as notification requirements, priority listings, compliance orders and substantial penalties for non-compliance. The possibility of existing USTs should be taken very seriously since the only remedy to a leaky tank is a very expensive upgrade and/or clean up where the property owner bears the cost of both soil clean up and tank replacement. Also, the prospective buyer should be aware that USTs are often completely buried and forgotten after their use is discontinued. Because burial makes detection by sight impossible, the purchaser should always ask the seller if an UST was ever located on the property. *See* HAW. REV. STAT. § 342L (Supp. 1991).

to legal principles under which an unsuspecting corporate purchaser might incur costly Superfund liability.[11] Part II provides an overview of the Hawai'i and federal Superfund statutory schemes. Part III discusses which substances and which parties fall within the authority of the Superfund laws. Part IV discusses some of the legal grounds upon which an unsuspecting party may be held liable and the defenses to liability codified in the laws.

II. The Superfund Statutory Schemes - An Overview

Although the federal and state Superfund laws share the goal of protecting the environment from releases of hazardous waste,[12] careful review reveals distinct scopes and purposes.

A. CERCLA (Federal Superfund Law)

Due to growing public discontent over environmental catastrophes such as the one at Love Canal,[13] Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[14] CERCLA has the long term purpose of protecting the envi-

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[11] Superfund liability for land purchasers centers around the issue of who is a potentially responsible party (PRP) (the party responsible for the release of hazardous substance). Much of the case law involving PRPs is focused on the corporate entity because of attempts to use the traditional principle of limited corporate liability to avoid liability altogether. *See infra* parts IV.A-D.

[12] *See* Haw. Rev. Stat. § 128D (Supp. 1991); 42 U.S.C. §§ 9601-75 (1988).

[13] *See* Susan J. Buck, Understanding Environmental Administration and Law 107 (1991). Therein, Ms. Buck noted:

> In 1978 Love Canal, a housing development near the city of Niagara Falls, New York, was declared to be in a state of emergency because long-buried chemicals were seeping into the basements of the public school and several houses. A high incidence of health problems triggered an investigation that unveiled the presence of 21,900 tons of chemical wastes buried in fifty-five gallon drums. The publicity surrounding Love Canal led to the discovery of thousands of similar dump sites.

Id.

[14] Congress passed the initial CERCLA Act in 1980. Pub. L. No. 96-510, 94 Stat. 2767 (1980). In 1986, Congress reauthorized and amended CERCLA. Pub. L. No. 99-499, § 101(35), 100 Stat. 1613, 1616-17 (1986)(codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). The new Act was entitled "Superfund Amendments and Reauthorization Act of 1986" (SARA). "CERCLA" shall hereinafter refer to the combined CERCLA and SARA acts. For general information regarding CERCLA, see The Environmental Law Reporter, Superfund Desk Book (1990).

ronment from unwanted releases of hazardous waste which could contaminate groundwater and eventually drinking water supplies.[15] Under CERCLA, the Environmental Protection Agency (EPA) has the authority to clean up hazardous waste sites and to recover clean up costs from those responsible for the generation or discharge of hazardous substances.[16] An important CERCLA tool given to the EPA is the use of a revolving fund (known as the Superfund) to implement clean ups in case of emergencies or when polluters are either untraceable, or insolvent.[17] For this reason, CERCLA is commonly referred to as the Superfund law. Because of the complexity of CERCLA's statutory scheme,[18] a discussion of CERCLA's framework precedes an analysis of the liability scheme.

The CERCLA statutory scheme is triggered by the release or threatened release of a hazardous substance.[19] A party who causes the release of a hazardous substance must notify the EPA or face fines or imprisonment for non-compliance.[20] Parties who are potentially responsible for a release of a hazardous substance are liable either for the actual clean up, or for the costs of clean up.[21] CERCLA defines liable parties as: (1) owners or operators of facilities generating releases, or (2) transporters or disposers of the hazardous substances.[22] Liability under CERCLA is strict, joint and several.[23] However, CERCLA does provide four specific statutory defenses.[24]

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[15] SHELDON M. NOVICK, LAW OF ENVIRONMENTAL PROTECTION § 13-24 (July 1991)(indicating that "[t]he successive amendments made it plain that the hazardous waste laws were groundwater protection statutes.").

[16] 42 U.S.C. §§ 9604(a), 9612(c) (1988).

[17] 42 U.S.C. § 9611 (1988).

[18] *See, e.g.*, 42 U.S.C. §§ 9601-9675 (1988).

[19] 42 U.S.C. § 9601(14) (1988); *see infra* part III.A.

[20] 42 U.S.C. § 9603(a),(b) (1988).

[21] 42 U.S.C. § 9607(4)(A)-(D) (1988); *see infra* part III.B.

[22] 42 U.S.C. § 9607(a) (1988); *see infra* part III.B.

[23] 42 U.S.C. § 9607 (1988). CERCLA's express language mandates strict, joint and several liability despite the absence of these terms. *Id.* Courts confronting the scope of liability issue have consistently held that CERCLA provides for strict, joint and several liability based on clear congressional intent. *See* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). In *Shore Realty*, the United States Court of Appeals for the Second Circuit explained the generally accepted interpretation of CERCLA liability:

> Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise. Section 9601(32) provides that "liability" under CERCLA "shall be construed

To ensure uniform and effective clean ups, CERCLA requires the EPA to formulate a national contingency plan (NCP) to provide guidelines and standards[25] for clean up actions.[26] CERCLA also requires

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to be the standard of liability" under section 311 of the Clean Water Act, 33 U.S.C. § 1321, which courts have held to be strict liability, *see, e.g., Stewart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir.1979), and which Congress understood to impose such liability, *see* S.Rep. No. 848, 96th Cong., 2d Sess. 34 (1980). . . . Moreover, the sponsors of the compromise expressly stated that section 9607 provides for strict liability. *See* 126 Cong.Rec. 30,964 (statement of Sen. Randolph)[.]

Id. at 1042 n.11.

The court revealed further evidence of strict, joint and several liability when it stated:

> Both the earlier House and Senate versions contained language providing for strict, joint and several liability. *See* S.1480, 96th Cong,. 2d Sess. § 4(a), 126 Cong.Rec. 30,908. . . ; H.R. 7020, 96th Cong,. 2d Sess. § 3071(a)(1)(D), 126 Cong.Rec. 26,779. . . . As part of the compromise, the sponsors removed this language, inserted the reference to liability under the Clean Water Act and indicated that the joint and several liability question should be addressed by the courts and interpreted in light of the common law. *See* 126 Cong.Rec. 30,932 (statement of Sen. Randolph). . . . Moreover, while we need not address the question, commentators have noted that joint and several liability is consistent with the contribution language of 42 U.S.C. § 9607 (e)(2).

Id. at 1042 n.13.

See also United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810-11 (S.D. Ohio 1983)(denying defendants' claim that the court could not hold them jointly and severally liable for clean up costs at a treatment facility because CERCLA does not expressly provide for joint and several liability); Bulk Distribution Ctrs., Inc. v. Mansanto Co., 589 F. Supp. 1437, 1443 n.15 (S.D. Fla. 1984)(stating that "[a]lthough the term 'strict liability' is not used in [CERCLA] section 9607(a), section 9601(32) of the Act incorporates the strict liability standard set forth in section 311 of the Clean Water Act."); Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1982).

> [CERCLA] does not specify under what circumstances liability will be imposed upon 'responsible persons.' Rather, it incorporates the standard of liability set forth in section 311 of the Clean Water Act. . . . Section 311 has been construed as imposing strict liability upon certain designated parties, subject only to defenses specifically enumerated in the statute.

Id. at 1140 n.4; Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1571 (E.D. Pa. 1988)(holding that CERCLA mandates strict, joint and several liability). *See generally* Lewis M. Barr, Comment, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 Bus. Law. 923, 977 n.367 (1990)(discussing joint and several liability under CERCLA); 42 U.S.C. § 9607(a)(4) (1988).

[25] *See* 42 U.S.C. §§ 9607(b), 9601(35)(A),(B) (1988); see *infra* part III.C.

[26] How clean is clean? CERCLA and the national contingency plan provide vague

the EPA to maintain a national priorities list of the sites in greatest need of response from which the EPA selects the sites it will target for clean up and liability enforcement.[27]

CERCLA provides three main mechanisms of liability enforcement.[28] First, the EPA may clean a target site itself and recover the full costs from the potentially responsible parties (PRP).[29] Second, the EPA may issue an order to the potentially responsible party to clean the site at the party's expense.[30] Third, PRPs may clean the site themselves and sue other responsible parties for the costs.[31] To allow the EPA to conduct immediate response actions, CERCLA authorizes the use of the Superfund for initial clean up costs.[32] The Superfund, originally funded by Congress, is replenished by cost recovery and fines paid by parties found liable.[33] The EPA may also employ civil fines of up to $25,000 per day for non-compliance with a clean up order.[34] To further ensure adequate enforcement of the law, CERCLA allows citizens to

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definitions. CERCLA § 121(d)(1),(2) states that the degree of clean up must, at a minimum, "assure the protection of human environment and health". 42 U.S.C. § 9621(d)(1),(2) (1988). Similarly vague, the national contingency plan states that clean up actions are mandatory when "any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare", or when "a public health or environmental emergency" exists. 40 C.F.R. § 300.400(a)(2),(b) (1992). The vague definitions found in CERCLA and the national contingency plan do not provide toxicity standards to specify how clean a property must be to avoid violation of CERCLA. 40 C.F.R. § 300-Appendix D (1992). However, 40 C.F.R. § 302.4 (1992) does provide a list of hazardous substances with levels of concentration. If a PRP discovers the release of a listed substance at or above the concentration level specified, it must report the release to the EPA. Since reporting triggers the national contingency plan clean up process, (EPA does not know a release exists until it is reported), the level of a hazardous substance after clean up cannot exceed the reporting level listed in 40 C.F.R. § 302.4 (1992) (or the most recent version). Since the national contingency plan does not provide absolute safety level standards, interested persons should contact the EPA directly for the determination of such standards (the full national contingency plan and amended regional plans (regional versions of the national contingency plan) are on file at all EPA offices, 40 C.F.R. § 300.210 (1992)).

[27] 4 U.S.C. § 9605 (1988).

[28] 4 U.S.C. § 9605(g)(2),(c)(1) (1988).

[29] 42 U.S.C. § 9604(a)(1-2) (1988).

[30] 42 U.S.C. §§ 9604(a)(1-2), 9611(a)(1) (1988).

[31] 42 U.S.C. § 9604(a)(1) (1988).

[32] 42 U.S.C. § 9607(a)(4)(B) (1988).

[33] 42 U.S.C. § 9611(e) (1988).

[34] *Id.*

[35] 42 U S.C. § 9606(b) (1988).

sue any party (including the federal government) who violates any provision of the Act.[35] Finally, to help avoid legal delays, CERCLA prohibits pre-enforcement review of the EPA's compliance orders.[36] If CERCLA were to allow pre-enforcement review of compliance orders, PRPs could delay complying with a clean up order until the lengthy review process was complete.[37]

The previous discussion provides a basic overview of CERCLA's statutory framework. The next section describes and contrasts CERCLA with Hawai'i's Superfund law.

B. Chapter 128D-Emergency Response Law (Hawai'i's Superfund Law)

Despite Congress' good intentions, CERCLA is not a panacea for effective hazardous waste clean up. Two practical inadequacies plague the EPA's enforcement of CERCLA. First, an overwhelming number of release sites has forced the EPA to limit the number of sites it targets for clean up.[38] As a result, many contaminated sites are effectively left without CERCLA protection. Second, the EPA lacks sufficient resources to respond with the promptness required to effectively handle local emergency spills.[39] For example, if an emergency spill occurs in Hawai'i, the EPA cannot respond promptly because its closest emergency response facility is located in San Francisco.[40] Furthermore,

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[35] *See* 42 U.S.C. § 9659(a) (1988).

[36] *See* 42 U.S.C. § 9613(h) (1988).

[37] *See* 42 U.S.C. § 9613(h) (1988); *see also* David K. Frankel, Comment, *An Analysis of Hawai'i's Superfund Bill, 1990*, 13 U. HAW. L. REV. 301, 309 (1991)[hereinafter Frankel].

[38] Frankel, *supra* note 37, at 303 n.14 (author notes that in February of 1991, the EPA dropped six contaminated O'ahu wells from contention for CERCLA clean up). *See also* Sam Atwood, *Superfund: Boon or Bust? Debate Rages On*, USA TODAY, Apr. 22, 1991, at 9E (reporting that a Congressional Office of Technology Assessment study found that 1,189 sites are currently on the NPL and that up to 9,000 more may actually require clean up).

[39] Frankel, *supra* note 37, at 302. ("[T]he Alaska Oil Spill Commission concluded that the state's resources and expertise are more readily accessible in the crucial early hour of a spill than those of the federal government.").

[40] *Id.* at 303. *See also* 1990 HAW. SENATE J., at 606-07 (statement of Hawaii State Senator Donna Ikeda addressing her colleagues on the senate floor). Senator Ikeda stated that CERCLA did not delegate responsibility for local implementation of the law to individual states and noted that an EPA emergency response to an environmental release of hazardous substances would have to be mobilized from the EPA's Region 9 Office in San Francisco. *Id.*

unlike other federal environmental statutes that provide states with the authority to enforce federal provisions, CERCLA fails to delegate the legal authority necessary for individual states to implement the law.[41]

To help remedy these concerns, the Hawai'i State legislature passed Hawai'i's Superfund law, Chapter 128D.[42] Chapter 128D is modeled

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[41] Comments of Hawaii State Senator Donna Ikeda addressing her colleagues on the senate floor. 1990 HAW. SENATE J. 606-07. Senator Ikeda stated:

> I have also since learned that there is no provision in the federal Comprehensive Environmental Response Compensation and Liability Act . . . to delegate responsibility for local implementation of the law to individual states. This is in contrast to other federal environmental statutes such as the Clean Water Act or the Clean Air Act which have such provisions.

Id.

[42] Beginning in 1988, the Hawai'i State Legislature passed a series of bills which after several amendments became Hawai'i's own version of the Superfund law, HAW. REV. STAT. § 128D, Environmental Response Law. Frankel, *supra* note 37, at 303-08. The passage of these laws was not without debate. Favoring the 1990 version (on final reading) of Hawai'i's Superfund law, Senator Donna Ikeda remarked: "Since this legislation was first heard, the parties involved have had many opportunities to discuss their differences and have made several attempts to reach a consensus. Unfortunately, all attempts have failed." 1990 HAW. SENATE J. 606 (senate floor debate on Senate Bill No. 3109, S.D. 1, H.D. 1). "Testimony came from participants such as the International Longshoremen's and Warehousemen's Union, the Estate of James Campbell, the Hawaiian Electric Company, Chevron USA, Pacific Resources Inc., Amfac, the Hawaii Rainbow Coalition, the Sierra Club and the Environmental Community Group." H.R. STAND. COMM. REP. No. 1258, *reprinted in* 1991 HOUSE JOURNAL, 1301 (detailing the House Judiciary Committee's comments to Senate Bill No. 1756 which proposed amendments to Chapter 128D. The report addressed, among other things, the issue of joint and several liability).

The legislature considered several difficult policy arguments for and against the Superfund provisions. 1990 HAW. SENATE J. 606-07. For example, the legislature struggled with the issue of pre-enforcement review. Senator Ikeda explained the policy conflict surrounding pre-enforcement review of DOH cleanup orders:

> The major disagreement centers on the pre-enforcement provisions in the bill which would permit the Department of Health to order cleanup without an appeal process. [Under the 1990 bill,] [the cleanup enforcement] order [issued by the DOH] is reviewed only if the cleanup is completed or if someone is in violation of the order. Violation, of course, triggers the penalty provision of a fine of $25,000 per day. It was this provision above all others, which troubled me because it granted the Department of Health broad powers which had the potential for abuse and I didn't feel comfortable giving the department such authority. I felt that power used indiscriminately could wreak havoc in certain situations. . . . I was [also] troubled by the point that Dr. Lewin made in that very same news article and I quote, 'The alternative is to leave it' (meaning cleanup) 'to the discretion of industry as to whether a spill needs to be cleaned

very closely after CERCLA and its long term goals are the same.[43] However, Chapter 128D's immediate purpose is to provide state government with the authority and resources to respond to local emergency releases.[44] Chapter 128D is also meant to address those sites in need of clean up that are either not covered by CERCLA, or covered by CERCLA but not actively addressed by the EPA.[45] Chapter 128D provides the DOH with the authority to respond promptly to local releases without having to wait for the EPA to take action.[46]

Several significant differences exist between CERCLA and Chapter 128D. First, Chapter 128D's definition of hazardous substance specifically includes oil and trichloropropane.[47] Second, Chapter 128D's Superfund is limited to a $3,000,000 maximum which severely limits the number and magnitude of cleanups the fund can afford at any given time.[48] Third, Chapter 128D allows for pre-enforcement review

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up or not. Should a pipeline explode or pollutants leak into a wetland or into drinking water supplies, we would have some serious legal difficulties,' Lewin said. . . . In reviewing the different drafts and differences that the Department of Health and the industry have on this bill, I concluded that agreement was possible in most areas of concern. However, the major difference, which centers on the question of pre-enforcement powers, is a basic philosophical difference which will never be resolved between the parties. In a letter to me dated April, 20 Dr. Lewin wrote, 'As you know, we have had discussions over the last several weeks with representatives of various groups interested in the bill. Representatives of industrial and agricultural groups felt strongly that there should be pre-enforcement review of Department actions. We have considered their position. We also have analyzed the experience of the federal government in using its Superfund Act which precludes pre-enforcement review. We feel more strongly than ever that to provide pre-enforcement review of Department actions would cripple our ability to use the bill effectively.'

1990 HAW. SENATE J. 606-07. Senator Ikeda presented her final conclusion: "Under the circumstances . . . I have therefore concluded that if we are to err on this issue, let it be on the side of protecting the environment." *Id.* at 607.

[43] Frankel, *supra* note 37. During testimony before the House Committee on the Judiciary and the House Committee on Planning, Energy and Environmental Protection on Feb. 27, 1990, State Department of Health Director, Dr. John Lewin testified that the administration patterned Chapter 128D after CERCLA. *Id.*

[44] *See supra* note 40.

[45] *Id.*

[46] *See* HAW. REV. STAT. § 128D-4(a)(1),(2) (Supp. 1991).

[47] HAW. REV. STAT. § 128D-1 "Hazardous Substance" (Supp. 1991) (The inclusion of oil as a hazardous substance in Chapter 128D provides the DOH with the power to override the oil and gas exemption in CERCLA, 42 U.S.C. § 9601(14) (1988)).

[48] HAW. REV. STAT. § 128D-2 (Supp. 1991) (transferring response fund monies

of clean up orders if the PRP is proceeding in full compliance with the order.[49] CERCLA does not provide for such review.[50] Fourth, the DOH must conduct all clean ups by order of Chapter 128D according to the state contingency plan.[51]

III. The Superfund Schemes - Liability

To impose federal or state Superfund liability after discovery of a hazardous release, the government must first show that the substance released was a hazardous substance as properly adopted under the Superfund laws. Even if a hazardous substance is properly established, the government may only impose liability on PRPs. Finally, if both a hazardous substance and a PRP are established, the government may still need to overcome one or more statutory defenses to liability in the Superfund laws. The following discussion provides an overview of these key elements of Superfund liability.

A. What is a Hazardous Substance?

The release of a hazardous substance triggers the CERCLA liability scheme.[52] Currently, the EPA includes more than 1000 substances in its definition of hazardous substance.[53] However, three commonly

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accumulated in excess of $3,000,000 to the state's general fund). The $3,000,000 maximum is relatively low because a single cleanup could cost more than $3,000,000. *See supra* note 5.

[49] Full compliance means that the PRP is complying with the terms of the order. It does not necessarily mean that clean up must be completed. Haw. Rev. Stat. § 128D-17(a) (Supp. 1991). *See also supra* note 42 (Chapter 128D and pre-enforcement review).

[50] Haw. Rev. Stat. § 128D-17(a) (Supp. 1991). *See also* 42 U.S.C. § 9613(h), (h)(2),(h)(5) (1988) (detailing that a PRP may not initiate pre-enforcement review of clean up orders unless the clean up is complete, or unless the EPA initiates a suit).

[51] *See* Haw. Rev. Stat. § 128D-7(e) (Supp. 1991). Since, as of this writing, the DOH has not yet adopted a state contingency plan, DOH is bound to follow CERCLA's national contingency plan. *Id.*

[52] 42 U.S.C. §§ 9604, 9607 (1988).

[53] *See* 40 C.F.R. § 302.4, table 302.4 (1991) (requiring the EPA to include in the national contingency plan a list of hazardous substances designated under CERCLA, 42 U.S.C. § 9602(a) (1988)). The term hazardous substance is defined in CERCLA as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33 [the Federal Water Pollution Control Act], (B) any element, compound, mixture,

released substances, petroleum, oil and natural gas products, are specifically exempted.[54] Releases due to the normal application of pesticides covered under the Federal Insecticide, Fungicide and Rodenticide Act[55] and releases due to the normal application of fertilizer are exempted from CERCLA's liability provisions.[56] Pesticides, however, are still subject to response actions.[57] The EPA is allowed to make revisions by adding or subtracting substances from the national contingency plan's list of hazardous substances.[58] Furthermore, even if a substance is not a hazardous substance, the President of the United States may respond to the release of a pollutant or contaminant[59] when such a release

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solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act, (D) any toxic pollutant listed under [the Federal Water Pollution Control Act], (E) any hazardous air pollutant listed under section 112 of the Clean Air Act, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

42 U.S.C. § 9601(14) (1988).

[54] 42 U.S.C. § 9601(14) (1988). In its definition of hazardous substance, CERCLA § 101(14) states,

the term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id. But see HAW. REV. STAT. § 128D-1 "Hazardous Substance" (Supp 1991) (including oil and trichloropropane).

[55] 7 U.S.C. § 136a, a-1, c (1988).

[56] 42 U.S.C. § 9607(i) (1988).

[57] 42 U.S.C. § 9604(a)(1)(B) (1988). Though specifically excluded from the liability provision, the EPA may respond to a pesticide as a pollutant or contaminant under the Response Authorities § 9604(a)(1)(b). Since § 9604(a) is triggered by a release, the normal application of fertilizer is exempted from § 9604 response authorities because it is not a release under § 9601(22)(D)). 42 U.S.C. § 9601(22)(D) (1988).

[58] 42 U.S.C. § 9602 (1988).

[59] 42 U.S.C. § 9601(33) (1988). Both the definitions of "pollutants or contaminants" and "hazardous substances" exclude oil and natural gas products. *Id.* CERCLA § 101(33) states:

The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation,

presents an imminent and substantial danger to public health or welfare.[60]

As previously stated, Chapter 128D follows CERCLA's definition of "hazardous substance", except that it specifically includes oil and trichloropropane.[61] Like CERCLA § 102, Chapter 128D authorizes the DOH to add substances to the hazardous substance list through rulemaking.[62] Also like CERCLA § 104(a)(1)(B),[63] Chapter 128D broadens the DOH's authority to respond to releases of "pollutants or contaminants" that present a substantial danger to human health, welfare, or the environment.[64]

A comparison of CERCLA and Chapter 128D shows that each contains a pollutant or contaminant response provision. The provisions differ in several ways. First, CERCLA § 104(a)(1)(B) requires the resulting danger from a pollutant or contaminant to be imminent[65] whereas the Chapter 128D clause does not.[66] Second, the federal clause does not authorize response to a release of a pollutant or contaminant solely because it presents an imminent and substantial danger to the environment,[67] whereas the state clause does.[68] Intuitively, the inclusion

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physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(33) (1988).

[60] 42 U.S.C. § 9604(a)(1)(B) (1988).

[61] HAW. REV. STAT. § 128D-1 "Hazardous Substance" (Supp. 1991).

[62] *See* HAW. REV. STAT. § 128D-1 "Hazardous Substance" (Supp. 1991). Chapter 128D-1 hazardous substance states that the DOH may add to the list of hazardous substances through rulemaking if the substances "[c]ause or significantly contribute to an increase in serious irreversible or incapacitating reversible illnesses", or if the substances "[p]ose a substantial present or potential hazard to human health, to property, or to the environment when improperly stored, transported, released, or otherwise managed." HAW. REV. STAT. § 128D-1 "Hazardous Substance" (Supp. 1991).

[63] 42 U.S.C. § 9604(a)(1)(B) (1988).

[64] HAW. REV. STAT. § 128D-4(a) (Supp. 1991).

[65] 42 U.S.C. § 9604(a)(1)(B) (1988).

[66] HAW. REV. STAT. 128D-4(a) (Supp. 1991).

[67] 42 U.S.C. § 9604(a)(1)(B) (1988) states:

Whenever . . . there is a release or substantial threat of release into the

of the word "imminent" restricts the types of scenarios the EPA can respond to under the federal clause. Likewise, the exclusion of the term "substantial danger to the environment" also restricts the number of scenarios by not allowing environmental dangers to trigger the federal clause. Consequently, Chapter 128D's pollutant or contaminant response clause allows the DOH to address a wider variety of dangers than the federal clause allows the EPA.

Even if the EPA or DOH determines that a release of a hazardous substance or pollutant or contaminant occurred, only certain parties are potentially liable. The next section discusses several theories under which a party may be held liable.

B. Who is Liable?

Chapter 128D nearly mirrors CERCLA's language on the question of who is liable.[69] Both laws hold potentially responsible parties (PRPs) liable for costs of investigation, removal, remediation, natural resource damages, damage assessments, and required human health assessments associated with a facility from which there is a release, or a threatened release of a hazardous substance that incurs response costs.[70] Both laws also define four types of PRPs as: 1) the present owner or operator of a facility; 2) the owner or operator of a facility at the time of disposal of a hazardous substance; 3) any person who arranged for disposal or treatment, or who arranged with a transporter for transport or disposal or treatment of hazardous substances at a facility; and 4) any person who accepted hazardous substances for transport to disposal or treatment facilities selected by that person.[71] The practical effect of the PRP definitions is that anyone in the chain of ownership or operation of

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> environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare . . . the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time[.]

Id.

[69] HAW. REV. STAT. § 128D-4(a) (Supp. 1991) (authorizing the DOH to respond to releases of a "pollutant or contaminant that may present a substantial danger to the public health, welfare, or the environment").

[70] *See* 42 U.S.C. 9607(a) (1988); HAW. REV. STAT. § 128D-6(a) (Supp. 1991).

[71] 42 U.S.C. § 9607(a) (1988); HAW. REV. STAT. § 128D-6(a) (Supp. 1991).

[71] *See* 42 U.S.C. § 9607(a) (1988); HAW. REV. STAT. § 128D-6(a) (1991).

the property at or after the time of the release[72] faces possible liability. These broad definitions of PRPs increase the likelihood of finding deep pockets to bear the burden of clean up even to the extent of holding parties liable for releases they did not commit.[73]

C. Statutory Defenses to Liability

The broad scope of liability might appear unfair. CERCLA and Chapter 128D do, however, provide for several statutory defenses[74] that make Superfund liability slightly less of a witch hunt than it might seem at first glance. CERCLA provides that no party can incur liability solely for: 1) an act of God; 2) an act of war; 3) an act or omission by a third party other than an employee of the defendant, or one in a direct or indirect contractual relationship with the defendant; and 4) a purchase made by a purchaser covered under the "innocent purchaser defense".[75] The third defense requires careful reading because it specifically prevents those involved in direct or indirect contractual relationships from escaping liability.[76] Furthermore, Congress and the

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[72] See discussion *infra* part III.C. A subsequent purchaser of contaminated property may be able to exempt himself from liability through the innocent purchaser defense. *Id.*

[73] *See* United States v. Kayser-Roth, Inc., 910 F.2d 24 (1st Cir. 1990) (finding a parent corporation liable for releases committed by a subsidiary); New York v. Shore Realty Corp, 759 F.2d 1032 (2d Cir. 1985) (holding purchaser liable for clean up costs of hazardous substances existing prior to purchase); Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986) (holding parent liable for releases by a subsidiary); United States v. Maryland Bank and Trust Co., 632 F. Supp. 573 (D. Md. 1986) (finding lender liable for clean up of a foreclosed property).

[74] Although the language of Hawai'i's law is not completely identical to CERCLA's, Chapter 128D's codified defenses to liability closely follow the CERCLA defenses. The legislature appears to have rearranged the defenses to put them in the same provision for easy reference, whereas the federal defenses are divided into different provisions. *See* HAW. REV. STAT. § 128D-6 (c)-(j) (Supp. 1991) and *infra* notes 75-82. Though no major substantive differences exist between the two sets of defenses, note that 128D-6(j) contains an effective date provision where "[n]o person other than a government entity may recover costs or damages under this chapter [128D] arising from a release which occurred *before July 1, 1990.*" HAW. REV. STAT. § 128D-6(j) (Supp. 1991) (emphasis added). *See* 42 U.S.C. § 9607(b) (1988); HAW. REV. STAT. § 128D-6(c) (Supp. 1991).

[75] *See* 42 U.S.C. §§ 9601(35)(A), (B), 9607(b)(1)-(3) (1988); HAW. REV. STAT. § 128D-6(c), -6(d) (Supp. 1991).

[76] 42 U.S.C. §§ 9601(35)(A), 9607(b)(3) (1988); HAW. REV. STAT. §§ 128D-1, -6(c)(3), -6(d) (Supp. 1991).

Legislature drafted the term "contractual relationships"[77] to include all land contracts, except in the case of a qualified innocent purchaser defense.[78] Thus, with the exception of a qualified third party innocent purchaser defense, the first three codified defenses provide little protection for a buyer who purchases a property after a release has occurred.

The innocent purchaser defense provides a possible remedy to purchasers who make good faith efforts to discover releases, but are unable to find the releases until after a purchase is made.[79] For a purchaser of contaminated property to employ this defense, the following conditions must exist: 1) the purchaser must have purchased the land after the release occurred, and the purchaser must not have known nor have had reason to know that any release or threat of release existed, or in the alternative, 2) the defendant must have acquired the property by inheritance or bequest.[80] Note that to satisfy condition one, a purchaser must show that all appropriate inquiry was made into the condition of the property.[81] In determining whether the all appropriate inquiry condition was satisfied, CERCLA and Chapter 128D list the following factors to be considered: specialized knowledge or experience of the purchaser, consistency of the purchase price with the actual value of the property, commonly known or reasonably accepted assumptions on the land, and the ability to discover the hazard by inspection of the land.[82] Where or how specialized knowledge is obtained is immaterial; as long as the purchaser has any prior knowledge of a release or potential release, the innocent purchaser defense does not apply.[83]

As explained above, the Superfund liability provisions are strict and their defenses few. Combined with the public's heightened sense of

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[77] 42 U.S.C. § 9601(35)(A) (1988); HAW. REV. STAT. § 128D-1 (Supp. 1991).

[78] 42 U.S.C. §§ 9607(b)(3), 9601(35)(A), (B) (1988); HAW. REV. STAT. §§ 128D-1, 6(d) (Supp. 1991).

[79] 42 U.S.C. § 9601(35)(A), (B) (1988).

[80] 42 U.S.C. § 9601(35)(a) (1988); HAW. REV. STAT. § 128D-6(d) (Supp. 1991).

[81] 42 U.S.C. § 9601(35)(B) (1988); HAW. REV. STAT. § 128D-6(d)(3)(1) (Supp. 1991).

[82] *See* 42 U.S.C. § 9601(35)(B) (1988); HAW. REV. STAT. § 128D-6(d)(3)(1) (Supp. 1991). *See also* AMERICAN BAR ASSOCIATION, ENVIRONMENTAL LITIGATION 13 (1991); United States v. Serafini, 711 F. Supp. 197 (M.D. Pa. 1988) (holding that "site inspection before purchase" was customary or good commercial practice in 1969, found to be genuine issue of material fact necessary to invoke the innocent landowner defense, § 107(b)(3), 42 U.S.C. § 9607(b)(3) (1988)).

[83] *See supra* note 78.

environmental awareness, Superfund litigation has become common in courts across the country.[84] The next section discusses some principles of Superfund law that federal and other state courts have used to successfully impose liability on PRPs.

IV. The Superfund Schemes - Potentially Responsible Parties

Although CERCLA establishes four types of PRPs,[85] the vast majority of Superfund litigation involves the threshold question of who is an owner and operator.[86] Often, the owner or operator responsible for a release is an insolvent corporation whose officers, directors, shareholders, parent-corporations, or successor corporations are responsible for causing the release but are shielded by the traditional corporate law principle of limited liability.[87] Just as often, an insolvent corporation is held liable, and the only associated parties able to afford the liability costs are the lenders for the property, or another corporation who purchases the assets of the insolvent corporation.[88]

This section outlines the major issues involved in federal and state courts' determinations of whether a party is a PRP, or whether it is shielded by limited corporate liability. Unfortunately, very few Superfund cases have reached the United States Supreme Court, and lower courts have not fully agreed on standard liability guidelines.[89] The following review of Superfund cases involving the threshold issue of the scope of the term "owner or operator" reveals that the issue is still open to new interpretations on a case-by-case basis.

A. Parent-Subsidiary Liability

Often a party seeking to file a tort claim against an insolvent corporation will instead file the claim against the parent corporation. The injured party reasons that the parent corporation is not completely separate from the subsidiary corporation and, as such, is liable for the

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[84] Inside EPA Weekly Report (Nov. 3, 1989). In 1989, the Office of Technology Assessment estimated that forty-four percent of the money Congress allotted to the Superfund program is spent on CERCLA litigation. *Id.*

[85] *See supra* note 71.

[86] 42 U.S.C. § 9601(20)(A) (1988).

[87] Harry G. Henn & John R. Alexander, Laws of Corporations 130 (1986). *See infra* part IV.A-C.

[88] *See infra* part IV.B, D.

[89] *See infra* part IV A-D.

torts of its insolvent subsidiary.[90] Attorneys file suit against parent corporations because parent corporations often have deep pockets, especially if the parent is a large conglomerate. According to traditional corporate law principles, parent corporations or owners are not normally liable for the debts and obligations of subsidiary corporations.[91] However, where it is shown that a parent exercised substantial control over its subsidiary, resulting in a subsidiary that was a mere alter ego of the parent, courts have held that the subsidiary was a sham and the parent or owners of the subsidiary were liable.[92]

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[90] United States v. Kayser-Roth, Inc., 910 F.2d 24 (1st Cir. 1990). In *Kayser-Roth*, the government successfully claimed that a parent corporation was liable for the spill of hazardous substance by a defunct subsidiary textile company. *Id.* at 25. In Joslyn Manufacturing Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990), a corporation purchased a creosoting company and later discovered that substantial releases had occurred. The purchaser brought suit against a former parent corporation claiming the former parent was liable for releases committed by the creosoting company because the parent owned some of the company's stock and several of the parent's employees served as directors on the company's board. *Id.* at 81. *See also, e.g.*, United States v. Nicolet, Inc., 712 F. Supp. 1193 (E.D. Pa. 1989) described *infra* at text accompanying n.100; Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986)(State of Idaho uses parent-subsidiary liability to hold Gulf Corporation responsible for releases by a company controlled by Gulf); State Dep't of Environmental Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983)(Corporation held liable for the releases of its wholly-owned subsidiary).

[91] State Dep't of Environmental Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983). In *Ventron*, the court stated, "[E]ven in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated. *Mueller v Seaboard Commercial Corp.*, 73 A.2d 905 (N.J. 1950)." 468 A.2d 150 at 164. In Bartle v. Home Owners Coop. 127 N.E.2d 832 (N.Y. 1955) the court disallowed creditors of a bankrupt subsidiary from compelling the parent corporation to pay the subsidiary's debts absent a finding of fraud, misrepresentation or illegality of subsidiary incorporation or operation. The court further stated "[t]he law permits the incorporation of a business for the very purpose of escaping personal liability." *Id.* at 833. *See also* Brunswick Corp. v. Waxman, 599 F.2d 34 (2d Cir. 1979) (upholding creation of dummy corporations to avoid liability).

[92] *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986). In *Bunker Hill*, the court imposed CERCLA liability on a parent corporation for violations committed by a subsidiary where the parent was intimately familiar with hazardous waste disposal and releases of subsidiary facility, had the capacity to control such disposal and releases, and had the capacity, if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate damage caused by disposal and releases of hazardous wastes. *Id.* at 667, 672; Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209 (E.D. Pa. 1982) (age discrimination suit). The court

For example, in *United States v. Nicolet, Inc.*[93] the federal government sued a parent corporation under CERCLA for recovery costs[94] of a clean up at a Pennsylvania site.[95] The parent corporation filed for summary judgment on the grounds that it was a separate corporation and not liable for the conduct of its subsidiary.[96] The United States District Court for the Eastern District of Pennsylvania denied the motion, finding disputed issues of fact concerning the parent's control of the subsidiary.[97] The parent had purchased all of the subsidiary's shares, decided the subsidiary's policies, strongly influenced the subsidiary's finances, and actively participated in the subsidiary's management.[98] Most importantly, the court found that releases occurred during the time the parent was participating in management and the parent was in a position to stop the releases.[99] The court formulated the following general rule to determine when parent corporations could fall under the scope of owner or operator in a CERCLA case:

> Where a subsidiary is or was at the relevant time a member of one of the classes or persons potentially liable under CERCLA; and the parent

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stated:

> Under the alter ego test, a court may disregard a parent corporation's separate existence when one corporation is merely the alter ego of another and where such disregard of the corporate form is necessary to "prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime." *Publicker Industries v. Roman Ceramics*, 603 F.2d 1065 (3rd Cir. 1979), *quoting Zubik v. Zubik*, 384 F.2d 267, 272 (3rd Cir. 1967).

541 F. Supp. 1209 at 1214; State Dep't of Envtl. Protection v. Ventron Corp., 468 A.2d 150 (N.J. 1983). The court discussing when it might pierce the corporate veil stated:

> Under certain circumstances, courts may pierce the corporate veil by finding that a subsidiary was 'a mere instrumentality of the parent corporation.' Application of this principle depends on a finding that the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent. 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 41.1 (perm. ed. 1974 rev.); *see* R.A. Horton, Annot., "Corporations-Torts of a Subsidiary," 7 A.L.R.3d 1343, 1355 (1966).

468 A.2d 150 at 164.

[93] 712 F. Supp. 1193 (E.D. Pa. 1989).

[94] Recovery costs means costs of clean up recovered from a PRP.

[95] *Id.* at 1195.

[96] *Id.* at 1200.

[97] *Id.* at 1202.

[98] *Id.* at 1203.

[99] *Id* at 1203-04.

> had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.[100]

As in *Nicolet*, other courts have held parent corporations liable for recovery costs incurred by subsidiaries based upon the degree of control the parent exercised or could have exercised over the subsidiary's operations.[101] Review of several parent-subsidiary Superfund cases revealed the following social policy:

> In actuality, the justification for the liability, whether or not articulated by the court, appears to be that where the parent corporation has benefitted from its subsidiary's activities, holding the parent liable is preferred to forcing innocent taxpayers to foot the government's cleanup costs. Thus, the corporate form is disregarded in the interests of public convenience, fairness, and equity.[102]

Not every court has adopted the social policy articulated above. In *Joslyn Manufacturing Co. v. T.L. James & Co.*,[103] the United States Court of Appeals for the Fifth Circuit followed traditional corporate law instead of the environmental social policy articulated above.[104] The court reasoned that if Congress wanted to hold parent corporations liable for the environmental torts of subsidiaries, Congress would have written it into CERCLA.[105] Absent a specific statutory mandate to the contrary, the court found no reason to abandon traditional corporate law principles of protecting parent corporations from the liabilities of

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[100] *Id.* at 1202.

[101] United States v. Kayser-Roth, Inc., 910 F.2d 24, 27-28 (1st Cir. 1990); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986). *Cf.* State Department of Environmental Protection v. Ventron Corp., 468 A.2d 150, 152 (N.J. 1983)(holding that a parent corporation's creation of a subsidiary for the sole purpose of acquiring and operating an existing mercury processing business and the fact that parent's personnel, directors and officers were constantly involved in the day-to-day business of the subsidiary were not sufficient to support the conclusion that intrusion of a parent into a subsidiary's affairs reached the point of dominance sufficient to pierce the subsidiary's corporate veil by applying traditional common-law doctrine). *See* AMERICAN BAR ASSOCIATION, ENVIRONMENTAL LITIGATION 8 (1991).

[102] Articulated by Perellis and Doohan, contributing authors to AMERICAN BAR ASSOCIATION, ENVIRONMENTAL LITIGATION 8 (1991).

[103] 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

[104] *Id.* at 82-83.

[105] *Id.* at 83. *See also* 42 U.S.C. § 9607 (1988) (CERCLA makes no specific allowance for liability of parent corporations).

their subsidiaries. As such, the court held that absent a showing that a subsidiary corporation is a sham, the parent corporation is not responsible for the environmental liabilities of its subsidiary.[106]

As shown from the two distinct examples above, the federal courts[107] have not developed a consistent rule to determine parent liability, although parental control over a subsidiary corporation is a strong factor. If the federal courts continue such inconsistency, either Congress or the United States Supreme Court must resolve the environmental parent-subsidiary issue.

B. Corporate Successor Liability

What happens when the corporation responsible for a release ceases to exist? This issue is called corporate successor liability. Corporate successor liability is created when: 1) two corporations merge to form a single new corporation; 2) one corporation purchases all the assets of another; 3) a corporation simply dissolves and is sued for liability many years after it is dissolved; or 4) a purchasing corporation expressly or impliedly accepts liability.[108]

Where two merging corporations satisfy all corporate laws, the newly formed corporation must assume the liabilities of the old corporations.[109] In *Smith Land & Improvement Corp. v. Celotex Corp.*,[110] the United States Court of Appeals for the Third Circuit held that Congress authorized

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[106] *Joslyn*, 893 F.2d at 83. *Cf.* Krivo v. Industrial Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir. 1973). Discussing the possibilities of misuse of the corporate form, the court stated:

> [C]ourts may decline to recognize corporate existence whenever recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes and [would] produce injustices or inequitable consequences.' Forest Hill Corp. v. Latter & Blum, Inc.

Id. at 1106. *See* United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985) (providing a laundry list of factors to determine whether a subsidiary is an alter ego of the parent).

[107] The United States Court of Appeals for the Ninth Circuit has yet to address the CERCLA parent-subsidiary liability issue.

[108] Memorandum from Courtney Price, EPA Assistant Administrator for Enforcement and Compliance Monitoring, Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under CERCLA 11 (June 13, 1984)(internal EPA memorandum addressing liability of successor corporations).

[109] Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988), *cert. denied* 488 U.S. 1029 (1989).

[110] 851 F.2d 86 (3d Cir. 1988), *cert. denied* 488 U.S. 1029 (1989).

the courts to formulate a federal common law to supplement CERCLA.[111] The court realized that, notwithstanding a valid merger leaving no responsible corporation, someone should bear responsibility for the clean up.[112] The court found it important to determine whether Congress intended for the taxpayer or the successor corporation to carry the burden.[113] It held that the burden rested with those responsible for the release, not the taxpayers:

> Expenses can be borne by two sources: the entities which had a specific role in the production or continuation of the hazardous condition, or the taxpayers through federal funds. CERCLA leaves no doubt that Congress intended the burden to fall on the latter only when the responsible parties lacked the wherewithal to meet their obligations.
>
> Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost. Benefits from use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective stockholders and accrued only indirectly, if at all, to the general public. We believe it in line with the thrust of the legislation to permit-if not require-successor liability under traditional concepts.[114]

Several courts followed the *Smith* rule requiring successor corporations to assume the environmental liabilities of their former corporations in the case of mergers.[115]

When a corporation purchases all of the assets of another corporation rather than merging with it, the law is not as clear. Traditional corporate common law holds that when an asset is purchased, the purchaser is not responsible for liabilities previously incurred by the

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[111] *Id.* at 91 (court's holding based on legislative history of CERCLA).

[112] *Id.*

[113] *Id.* at 92.

[114] *Id.*

[115] *See* Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991) (reversing of summary judgment which would have relieved a successor (by merger) corporation of CERCLA liability); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (following *Smith* rule but concluding plaintiff had not met its burden to impose liability on the defendant based on the rule); United States v. Distler, 741 F. Supp. 637, 640, 642 (W.D. Ky. 1990) (holding key employees of a metal manufacturing business, who formed a corporation to purchase and continue the business, liable for environmental violations incurred prior to purchase despite absence of such liabilities in the purchasing contract).

seller.[116] A purchaser may, however, assume the seller's previously incurred liability under four well-recognized equitable scenarios.[117] The purchaser of an asset is liable for the torts of the seller if: 1) the successor implicitly assumes the liabilities of the seller,[118] 2) the successor is a continuation of the seller,[119] 3) the transaction is a fraudulent effort to avoid liability of the seller,[120] or 4) the transaction amounts to a de facto merger[121] between the purchaser and seller corporations.[122] Therefore, intuitively, when employing traditional corporate law to address environmental liability from the sale of assets, the successor corporation is subject to liability only if it voluntarily accepts the liability or engages in a buy-out for purposes other than to merely acquire the assets.[123]

Some courts have applied the above principles to Superfund liability cases. For example, in *United States v. Vertac Chemical Corp.*,[124] Vertac entered into an agreement with the EPA to improve waste control at its agricultural chemical plant.[125] Due to the financial burden of exten-

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[116] *See, e.g.*, Dayton v. Peck, Stow and Wilcox Co., 739 F.2d 690, 692 (1st Cir. 1984)(cash purchase alone insufficient to constitute a merger for liability purposes); Tucker v. Paxson Machine Co., 645 F.2d 620, 622 (8th Cir. 1981)(tort liability).

[117] *See, e.g.*, Dayton v. Peck, Stow and Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984)(cash purchase alone insufficient to constitute a merger for liability purposes); Leannais v. Cincinnati, Inc., 565 F.2d 437, 439 (7th Cir. 1977)(tort action). *See* 15 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7123 (perm. ed. rev. vol. 1990); AMERICAN BAR ASSOCIATION, ENVIRONMENTAL LITIGATION 8 (1991).

[118] *See supra* note 124.

[119] *See supra* note 124.

[120] *See supra* note 124.

[121] United States v. Vertac Chemical Corp., 671 F. Supp. 595, 615 (E.D. Ark. 1987) (holding that "a de facto merger occurs where one corporation is absorbed by another but without compliance with the statutory requirements for a merger").

[122] Dayton v. Peck, Stow and Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984); Leannais v. Cincinnati, Inc., 565 F.2d 437, 439 (7th Cir. 1977); 15 WILLIAM M. FLETCHER, FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7123 (perm. ed. rev. vol. 1990); AMERICAN BAR ASSOCIATION, ENVIRONMENTAL LITIGATION 8 (1991).

[123] *See supra* note 124.

[124] 671 F. Supp. 595 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988). Though vacated on other grounds, *Vertac* demonstrates sound rationale that any court might use when deciding a CERCLA successor liability issue. *See* United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1039 (E.D.N.C. 1989)(transformer company tries to avoid environmental liability in same manner as *Vertac* with same result, except judgment wasn't vacated).

[125] *Id.* at 603-04.

sive clean up operations on Vertac's property, Vertac transferred all of its profitable operations into a new company in order to avoid depleting those resources.[126] The United States District Court for the Eastern District of Arkansas found that Vertac had fraudulently transferred its operations to the new company simply to avoid liability.[127] It ruled that the new company was a mere continuation of Vertac because it had the same directors, owners, employees, and physical plant.[128] The court held the new successor corporation liable for the EPA agreement since it was a mere continuation of Vertac.[129]

In *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*,[130] Belleville Industries (Belleville) entered an agreement to acquire the assets, property, rights of any kind, and debts of Aerovox Corp.'s Electrical Products Division.[131] Belleville, however, specifically disclaimed any liability for Aerovox's prior use of the hazardous substance polychlorinated biphenyls (PCBs).[132] The United States District Court for the Eastern District of Massachusetts held that Belleville's agreement with Aerovox was indistinguishable from a de facto merger because Belleville intended to continue Aerovox's business.[133] The court further reasoned that Belleville assumed liability through the de facto merger scenario and could not use the limited liability doctrine associated with the mere purchase of assets.[134] Thus, the court held that Belleville could not acquire Aerovox's assets and debts without acquiring environmental liability for prior PCB releases into the Acushnet River.[135] The court stated that even though the purchase of the assets was legal, and traditional corporate law might have protected Aerovox, allowing Aerovox to contract away the liability for the pollution of the river was a manifest injustice.[136]

Thus, although the transaction may be legal and plainly visible, courts may grant deference to the goals of CERCLA by imposing

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[126] *Id.* at 604-06, 610.
[127] *Id.* at 617.
[128] *Id.* at 616.
[129] *Id.* at 614.
[130] 712 F. Supp. 1010 (D. Mass. 1989).
[131] *Id.* at 1012.
[132] *Id.*
[133] *Id.* at 1019. In fact, Belleville later changed its name to Aerovox Industries, Inc.. *Id.*
[134] *Id.*
[135] *Id.* at 1015-16.
[136] *Id.* at 1019.

corporate successor liability on an otherwise legal purchase of assets. The federal courts seem willing to interpret traditional corporate law principles to impose Superfund liability on successor corporations not only where parties manipulate the corporate structure simply to escape liability, but also where, but for the successor corporation, no party would be liable.

C. Liability of Shareholders, Officers, and Directors (SOD)

One of the most basic and attractive attributes of a corporation is its limitation on the liability of shareholders, directors, and officers sued for the torts of the corporation.[137] This principle is important to Superfund liability because Superfund violations are considered torts.[138]

The CERCLA legislative scheme eliminates the protection which SODs would otherwise enjoy under traditional corporate law[139]. Both the federal circuit and district courts have grappled with this issue. As illustrated by the following cases, SOD control over or ability to influence a release is crucial in each decision to impose liability. In four cases where federal courts considered SOD environmental liability;[140] two courts imposed liability,[141] one court formulated a test for imposing liability but was reversed on factual grounds,[142] and one court denied liability.[143]

In *New York v. Shore Realty Corp.*,[144] the court held a company's sole officer and stockholder liable for the cleanup of hazardous waste he

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[137] HENN & ALEXANDER, *supra* note 86, at 130.

[138] 132 CONG. REC. H9561 (Wed. Oct. 18, 1986)(Representative Dan Glickman of Kansas stated, on the floor of the United States House of Representatives, that Congress intended to treat hazardous waste releases as tortious conduct).

[139] HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 130 (1986).

[140] *See* Joslyn Manufacturing Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); United States v. Northeastern Pharmaceutical and Chemical Co., Inc., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D. R.I. 1989).

[141] New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D. R.I. 1989).

[142] United States v. Northeastern Pharmaceutical and Chemical Co., Inc., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

[143] Joslyn Manufacturing Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

[144] 759 F.2d 1032 (2d Cir. 1985).

knew was on the site at the time of purchase.[145] The court found the officer/stockholder liable for two reasons. First, the court established that CERCLA 101(20)(A)[146] shielded parties from liability on the grounds that they 1) held indicia of ownership primarily to protect a security interest and 2) did not participate in management.[147] The court therefore reasoned that CERCLA implied that a stockholder who manages the corporation is liable as an owner or operator.[148] The court then applied this test to the officer/stockholder and concluded that the defendant was liable because he was a stockholder who exercised a degree of control by participating in the management as an officer.[149] The court therefore, held the defendant liable as an owner.[150] The court also found the defendant liable as an operator because he actively participated in management and had the power to influence management's treatment of the hazardous waste.[151]

The most recent case imposing SOD liability for an environmental claim is *United States v. Kayser-Roth Corp.*[152] In *Kayser-Roth*, the United States District Court for the District of Rhode Island held that a party who is liable as an operator cannot waive Superfund liability by claiming the ownership limited liability defense.[153] The court also held that the mere ability to influence was not in and of itself sufficient to qualify a shareholder as an operator under CERCLA.[154] The court went on to rule that because the parent company effectively exerted total influence and control over the operations of the subsidiary, it was liable as an operator .[155]

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[145] *Id.* at 1037 (interpreting CERCLA § 101(20)(A)).

[146] 42 U.S.C. § 9601(20)(A) (1988).

[147] New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985).

[148] *Id.*

[149] *Id.*

[150] *Id.*; *see* 42 U.S.C. § 9601(20)(A) (1988).

[151] New York v. Shore Realty Corp., 759 F.2d at 1052.

[152] 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

[153] *Id.* at 26. Under the ownership limited liability defense, a shareholder is entitled to a rebuttable presumption of limited liability for the liabilities of the corporation. *See supra* note 86.

[154] United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

[155] *Id.* at 27. The court listed several factors as evidence of Kayser-Roth's control over its subsidiary, including: total monetary control over the subsidiary including collection of accounts payable; restriction on the subsidiary's financial budget; directive that subsidiary governmental contact be funnelled directly through Kayser-Roth;

In contrast to *Shore Realty* and *Kayser-Roth,* the United States Court of Appeals for the Fifth Circuit in *Joslyn Manufacturing Co. v. T.L. James & Co., Inc.*,[156] refused to hold a parent corporation liable under CERCLA for the liability of its wholly-owned subsidiary corporation.[157] The plaintiff argued that the court should interpret CERCLA's definition of "owner or operator" broadly to include the parent corporations of liable subsidiaries.[158] The court ignored factors such as SOD control and instead read a restrictive interpretation of the plain meaning of CERCLA § 101(20)[159] and interpreted owner or operator[160] to exclude parent corporations of wholly-owned subsidiaries.[161] It held that to include parent corporations would rewrite the language of CERCLA and dramatically alter traditional concepts of corporation law.[162] By its refusal to disregard the traditional corporate principle of limited liability, the *Joslyn* court contradicts the holdings in *Shore Realty* and *Kayser-Roth*, making it impossible to predict a trend in court rulings.

Where an SOD exerts pervasive control over a release or potential release, several federal district courts have imposed liability.[163] In *United*

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requirement that Kayser-Roth first approve the leasing, buying or selling of subsidiary real estate; policy that Kayser-Roth approve any capital transfer or expenditures greater than $5000; and the placement of Kayser-Roth personnel in almost all of the subsidiary's director and officer positions as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out. *Id.*

[156] 893 F.2d 80 (5th Cir. 1990).

[157] *Id.* at 82.

[158] Joslyn Manufacturing Co. v. T.L. James & Co., Inc., 893 F.2d 80, 82 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); *see* 42 U.S.C. § 9601(20) (1988)(definition of owner or operator).

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *See* United States v. McGraw Edison Co., 718 F. Supp. 154 (W.D.N.Y. 1989)(action against forty-nine percent shareholder of a company alleged to have committed releases); United States v. Nicolet, 712 F. Supp. 1193 (E.D. Pa. 1989); Vermont v. Staco, 684 F. Supp. 822 (S.D. Vt. 1988)(action against former manufacturer of mercury thermometers); Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986); United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1985)(action to recover response costs); United States v. Northeastern Pharmaceutical and Chemical Co., Inc., 579 F. Supp. 823 (W.D. Mo., 1984); United States v. Carolawn Co., 14 Envtl. L. Rep. 20,699 (D.S.C., June 15, 1984)(action for response costs for removal of hazardous substances used in the manufacturing of water-based paints).

States v. Northeastern Pharmaceutical and Chemical Co., Inc. (NEPACCO),[164] the United States District Court for the Western District of Missouri imposed liability on a corporate vice president who was also a major shareholder actively participating in the management activities of the plant.[165] The court formulated a test to determine whether the vice president was liable under CERCLA.[166] The court interpreted CERCLA[167] to mean that any "person who owns an interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste".[168] The *NEPACCO* test imposing liability on SODs was followed twice[169] and cited frequently by other federal courts.[170]

As demonstrated in the preceding four cases, federal courts may or may not adhere to the traditional principle of corporate limited liability when deciding whether or not to apply liability to traditionally protected parties. Although the court in *Joslyn* held strongly in favor of limited liability, no other courts have followed its holding.

D. Lender Liability

Congress specifically excludes lenders as owners or operators under CERCLA:

> Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.[171]

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[164] 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (NEPACCO was heard by the Eighth Circuit, but that court did not address the validity of the NEPACCO test).

[165] *Id.* at 849 (interpreting the plain language of CERCLA § 101 (20)(A)).

[166] *Id.* at 848-49.

[167] 42 U.S.C. §§ 9607(a)(1), 9601(20)(A) (1988).

[168] United States v. Northeastern Pharmaceutical and Chemical Co., Inc., 579 F. Supp. 823, 848 (W.D. Mo. 1984).

[169] United States v. Nicolet, Inc., 712 F. Supp. 1193, 1204 (E.D. Pa. 1989); State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671 (D. Idaho 1986).

[170] *See, e.g.*, United States v. Consolidated Rail Corp., 729 F. Supp. 1461, 1468 (D. Del. 1990)(multiple party liability suit). United States v. Kayser-Roth Corp., 724 F. Supp. 15, 20 (D. R.I. 1989); Artesian Water Co. v. Gov. of New Castle Cty., 659 F. Supp. 1269, 1281 (D. Del. 1987)(water company sues county for alleged releases from a landfill).

[171] 42 U.S.C. § 9601(20)(a) (1988).

The following review of federal cases shows that though CERCLA protects lenders with mere indicia of ownership, the "indicia of ownership" clause is not an absolute exemption.

By virtue of CERCLA § 101(20)(A), a lender who is not involved in any management of the property is not subject to environmental liability. With land values in Hawai'i routinely running into the millions, however, lenders wishing to sustain high values may feel compelled to exercise at least some management over the property. For example, if a debtor is unable to keep up with payments, should a lender foreclose on the property and manage it until he can sell it? The issue thus arises: how active can a lender become before he is deemed a participant in management? In *United States v. Mirabile*,[172] the United States District Court for the Eastern District of Pennsylvania held that a lender who forecloses on a site is merely protecting a security interest, and as such, is exempt from CERCLA liability under CERCLA § 101(20)(A), unless the lender participates in everyday management: "[B]efore a secured creditor . . . may be held liable, it must at a minimum, participate in the day-to-day operational aspects of the site".[173]

In direct contrast to *Mirabile* is the United States Court of Appeals for the Eleventh Circuit decision in *United States v. Fleet Factors*.[174] In *Fleet Factors*, a lender foreclosed on a property in order to sell it and relieve the debtor who defaulted on the payment schedule.[175] Subsequently, the EPA discovered a release, arranged for cleanup, and later brought suit against the debtor and the lender for recovery costs.[176] The lender filed for summary judgment on the grounds that CERCLA § 101(20)(A)(1) excluded it from liability.[177] Although the court did not find the lender liable under CERCLA § 101(20)(A)(1), it denied the summary judgment motion, holding that a lender assumes environmental liability under CERCLA § 107(a)(2) if it has sufficient capacity to influence an operator's handling of a release.[178] Note that *Fleet* does not require direct management of the release activity; it only requires the ability to affect the management of the release.[179] *Fleet* cast a cloud

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[172] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. 1985).
[173] *Id.* at 20,996.
[174] 901 F.2d 1550 (11th Cir. 1990).
[175] *Id.* at 1552-53.
[176] *Id.* at 1553.
[177] *Id.* at 1555. *See* 42 U.S.C. 9601(a)(1) (1988).
[178] 901 F.2d 1550, 1555, 1558 (11th Cir. 1990).
[179] *Id.* at 1557.

of uncertainty over CERCLA § 101(20)(A) because it expanded the definition to include not only actions, but the potential to act:

> Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable-although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.[180]

As a result of the court's decision in *Fleet*, lenders must now conduct themselves cautiously to avoid engaging in any activity which a court could construe as inducing liability. At the same time, lenders must maintain enough control over the property to protect their financial interests.

The United States District Court of Maryland in *United States v. Maryland Bank & Trust*,[181] ruled that a lender's four year retention of a foreclosed property and part time operation of the business constituted outright ownership triggering CERCLA liability.[182] The court felt that "[e]xtending the interest exemption to lenders holding full title to properties would frustrate the distribution of clean-up costs achieved by CERCLA as well as reallocate the risks assumed in owning real property."[183]

In *Guidice v. BFG Electroplating & Manufacturing Co.*,[184] the United States District Court of Pennsylvania moved further toward a stricter lender liability standard when it held that a lender who foreclosed and took title to a property with the immediate goal of selling it, was liable

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[180] *Id.* at 1557-58. Among other policy reasons, the court fashioned the stricter standard of liability in order to encourage creditors to "investigate thoroughly the waste treatment systems and policies of potential debtors", and to provide debtors with "powerful incentives to improve their handling of hazardous wastes." *Id.* at 1559.

[181] 632 F. Supp. 573 (D. Md. 1986).

[182] *Id.* at 579.

[183] *Id.* at 580.

[184] 732 F. Supp. 556 (W.D. Pa. 1989).

for clean up costs even though the foreclosure was strictly to sell the property and terminate the lender's interest.[185] The *Guidice* court shared the *Maryland* court's the concern that to exempt land-owning lenders would create a special class of otherwise liable landowners who were not accountable for environmental responsibility.[186] The *Guidice* court cited the *Maryland* court, stating, "[w]hen a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been."[187]

The above case law on parent-subsidiary, corporate successor, SOD and lender liability clearly demonstrates the courts' willingness to interpret traditional corporate law to impose environmental liability on deep pockets.

V. Conclusion

As in the case of Sam, Henry, Pacific Investors and the Davis Group, real estate purchasers should always carefully inquire into the possibility of Superfund and other environmental liability. Every real property purchase carries a risk that releases have already occurred. Leaky underground storage tanks may be forgotten after years of disuse, or buried under newer buildings. Because Superfund liability is strict, purchasers of contaminated property are liable whether or not they caused the release. Clean up costs are high and Superfund litigation is expensive. Litigation of any Superfund issue is costly because the Superfund statutory scheme is complex and subject to broad interpretation. However, by carefully analyzing all Superfund liability scenarios, purchasers can make educated guesses as to the dollar amount of potential risk and whether the property is worth the risk.

Purchasers should include in their inquiries an analysis of basic Superfund elements such as whether a release of a hazardous substance has occurred; whether the purchaser is a PRP under the laws; and whether any of the statutory defenses might apply. Purchasers should also inquire as to whether any of the corporate issues presented in part IV of this comment might apply. Purchasers may qualify for protection under the principle of limited corporate liability but should beware,

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[185] *Id.* at 559-60.
[186] *Id.* at 563.
[187] *Id.*

however, that many courts will ignore the limited liability principle, especially when no other party can pay the clean up costs. As shown in part IV, courts' applications of liability show some consistent trends, but remain unpredictable on a case by case basis.

Prudent real estate purchasers will always take the necessary precautions to avoid liability by carefully researching the risk of liability. If proper inquiry is so made, purchasers will make the necessary arrangements to avoid liability rather than risk having to deal with the statutes and the applications of liability discussed herein.

Brian Sen*

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* Class of 1993, Wm. S. Richardson School of Law.

The author wishes to acknowledge Prof. M. Casey Jarman for her valuable assistance and guidance with this project. The author also wishes to acknowledge Benjamin A. Kudo, Esq., Arnold L. Lum, Esq. and Claire Hong for their suggestions and feedback.

Latent Disease and Toxic Torts in Hawai'i: Analysis of the Statute of Limitations, the Rule Against Splitting Causes of Action and Nonidentification Theories of Liability

I. Introduction

As toxic tort litigation multiplies, courts around the country are being confronted with the challenge of fashioning remedies for torts that do not fit the traditional tort model. A traditional tort usually involves a physical impact that causes an immediate injury.[1] A toxic tort, however, typically results in a disease that does not become manifest for years, or even decades, after exposure to a hazardous substance.[2] Increasingly, people are becoming worried about these future diseases and are demanding remedies from the courts when the potential for contracting a disease comes from the wrongdoing of another.[3]

Commentators have widely criticized those courts unwilling to bend the traditional rules of tort law in order to provide redress for these victims.[4] Tort victims with latent diseases may find themselves without

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[1] James D. Pagliaro & Peter J. Lynch, *No Pain, No Gain: Current Trends in Determining Compensable Injury in Toxic Tort Cases*, 4 Toxics L. Rep. (BNA) No. 10, at 271 (August 9, 1989).

[2] 2 American Law Institute, Reporter's Study, Enterprise Responsibility of Personal Injury, 362 (1991).

[3] William H. Armstrong, *Tort Damages for Personal Injuries Not Yet Suffered*, 3 Nat. Resources & Env't 26 (Spr. 1988).

[4] *See generally* William R. Ginsberg and Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 Hofstra L. Rev. 859 (1981); Gregory L. Ash, *Toxic Torts and Latent Diseases: The Case for and Increased Risk Cause of Action*, 38 U. Kan. L. Rev. 1087 (Summer 1990); Carl B. Meyer, *The Environmental Fate of Toxic Wastes, The Certainty of Harm, Toxic Torts, and Toxic Regulation*, 19 Envtl. L. 321 (1988).

remedy if the statute of limitations expires during the latency period.[5] Toxic tort victims who do receive compensation for an existing injury or disease may later be barred from collecting on a second more serious and costly disease because of the rule against splitting causes of action.[6] Additionally, even if the victims can overcome these barriers, they still must identify the responsible party[7] and prove all the elements required in a tortious liability claim.[8] The identification of the actual tortfeasor and proof of liability becomes more difficult with the passage of time.[9] This article will analyze the problems that latent disease victims encounter with statutes of limitations, the rule against splitting causes of action, and identify specific tortfeasors in the context of Hawai'i precedents.

Part II defines toxic torts by describing their characteristics and listing activities that give rise to toxic tort liability. Part III compares the traditional tort model with that of toxic torts. Part IV analyzes the problems that latent disease sufferers have with statute of limitations and the rule against splitting causes of action, and how Hawai'i's laws may affect them. Part V looks at various theories used by courts, in particular the Hawai'i Supreme Court, to overcome the problem of identifying the responsible party.[10]

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[5] *See generally* Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965 (1988) (advocating a complete elimination of statutes of limitations in latent disease cases).

[6] *See* Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 HARV. L. REV. 1989 (1990) [hereinafter *Claim Preclusion in Modern Latent Disease Cases*]. *See also* part IV, *infra*.

[7] *See, e.g.*, Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990).

[8] *See, e.g.*, Nicolet, Inc. v. Nutt, 525 A.2d 146 (Del. 1987).

[9] *See* Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980).

[10] Although the issue of causation presents another hurdle for plaintiffs, it is not directly discussed in this article. For problems in establishing causation, see David P.C. Ashton, *Decreasing the Risks Inherent in Claims for Increased Risk of Future Disease*, 43 U. MIAMI L. REV. 1081 (1989); Ora Fred Harris, Jr., *Toxic Tort Litigation and The Causation Element: Is There Any Hope of Reconciliation?*, 40 SW. L.J. 909 (1986); Peter H. Weiner & Ida O. Abbott, *Proving Causation for Toxic Torts*, 9 CAL. LAW. 80 (April 1989); Bert Black & David E. Lilienfeld, *Epidemiological Proof in Toxic Tort Litigation*, 52 FORDHAM L. REV. 732 (1984).

Also, the issue of establishment of compensable injury is not included in this article. For discussions of compensable injury, see Allan Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 RUTGERS L.J. 343 (1987); Pagliaro & Lynch, *supra* note 1; Michael A. Pope & John F. Del Giorno, *Novel Damage Theories May Contaminate Toxic Tort Litigation*, 58 DEF. COUNS. J. 495 (Oct. 1991).

II. Toxic Torts

In most jurisdictions, classifying a case as a "toxic tort" as opposed to a "traditional tort" is of little practical significance. Most attorneys only concern themselves with how to apply the law to the facts involved in the case before them. However, an attorney may find that knowing the characteristics and causes of a toxic tort will prove useful in deciding how to approach the case. For example, the attorney needs to know that typically toxic torts result in present and latent injuries. The attorneys for both the plaintiff and defendant need to know how the statute of limitations and the rule against splitting causes of action may affect present and future claims.[11]

In Hawai'i, the distinction between a toxic tort and a traditional tort may become more critical than in other jurisdictions. In 1993, Hawai'i will abolish joint and several liability and limit pain and suffering damages for some types of tort cases by state statute, but the statute specifically does not apply to toxic torts.[12] The statute seems to preclude an emotional distress claim that does not result in

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[11] 1 Michael Dore, Law Of Toxic Torts § 2.01 (Release #9, 1991).

[12] Haw. Rev. Stat. § 663-10.9 (1991) reads, in part:

Abolition of joint and several liability; exceptions. [Repealed effective October 1, 1993.][Editor's Note: The 1993 State Legislature extended the effective repeal date beyond October 1, 1993].

Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

(1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons.

(2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:

(A) Intentional torts;

(B) *Torts relating to environmental pollution*;

(C) *Toxic and asbestos-related t[illegible]*

(D) Torts relating to aircr[illegible]nts;

(E) *Strict and products liabilit[illegible]*

(F) Torts relating to motor vehicle accidents

Haw. Rev. Stat. § 663-10.9 (1991) (emphasis added).

Haw. Rev. Stat. § 663-8.7 reads:

Limitation on pain and suffering. [Repealed. Effective October 1, 1993.] Damages recoverable for pain and suffering as defined in section 663-8.5 [noneconomic damages] shall be limited to a maximum award of $375,000; *provided that this limitation shall not apply to tort actions enumerated in section 633-10.9(2).*

Haw. Rev. Stat. § 663-8.7 (1991) (emphasis added).

economic damages, such as loss of ability to work or medical costs, if asserted in conjunction with joint and several liability.[13] Plaintiffs in other jurisdictions have argued that fear of cancer, or cancerphobia, which is founded on emotional distress, should be a compensable injury in toxic tort cases.[14] The Hawai'i State Legislature has left the door open for the courts to accept this type of claim in a toxic tort action brought in Hawai'i. Plaintiffs in other jurisdictions have also asked courts to hold that the risk of contracting a future disease is a compensable injury;[15] the statute will not preclude this claim either. Therefore, in Hawai'i, classifying a case as involving a toxic tort may prove more crucial than in other jurisdictions. In order for an attorney to identify a toxic tort, she needs to recognize its characteristics and the circumstances in which it can arise.

A. Characteristics of a Toxic Tort

Michael Dore in his treatise *Law of Toxic Torts* lists the main characteristics of a toxic tort.[16] Because the list is excellent, what follows is a summary:

1) Exposure to a substance caused the injuries involved in the suit.[17]
2) A risk exists that many people suffered similar injuries as a result of the exposure to the substance.[18]
3) Latent diseases typically are involved.[19]
4) The issue of causation is arguable because questions exist as to whether the alleged substance was harmful, whether the exposure was significant, or whether the injury could have had multiple causes.[20]
5) The actual tortfeasor cannot be identified.[21]

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[13] *See* HAW. REV. STAT. § 663-10.9(1) (1991).

[14] *See* Terry M. Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box*, 53 FORDHAM L. REV. 527 (1984); Pagliaro & Lynch, *supra* note 1.

[15] *See*, Ash, *supra* note 4.

[16] Dore, *supra* note 11, § 2.02.

[17] *Id.*

[18] *Id.*

[19] *Id.* (citing Allan Kanner, *Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation*, 18 RUTGERS L.J. 343 (1987)); *see also* Robert L. Rabin, *Environmental Liability and The Tort System*, 24 HOUS. L. REV 27 (1987).

[20] Dore, *supra* note 11, § 2.02.

[21] *Id.*

6) New scientific methods are necessary to establish causation.[22]
7) Courts have a hard time applying traditional legal defenses, such as the statute of limitations, due to the courts' sympathy for plaintiffs.[23]
8) The courts are asked to provide solutions that border on being administrative or legislative decisions, which give the plaintiffs or defendants the advantage.[24]
9) Insurance is involved.[25]
10) Additional liability in non-tort areas of the law may be implicated.[26]

While not meant as comprehensive, the list describes the main characteristics of toxic tort cases.[27] These characteristics arise from a wide variety of activities.

B. Toxic Tort Exposure

Activities giving rise to toxic tort liability come in many forms.[28] Product sales, waste disposal, property ownership, and industrial activities all give rise to possible toxic tort liability.[29] Each of these general activities then include more specific categories.[30]

Within the area of product sales, products such as pharmaceuticals, chemicals, pesticides, industrial materials, and consumer products all give rise to toxic tort liability.[31] Litigation of pharmaceutical products have involved: diethylstilbestrol (DES), the Dalkon Shield, swine flue vaccines, DPT vaccines, polio vaccines, and bendectin.[32] Chemicals such as benzene, lead, PCBs, and TCE have given rise to toxic tort litigation.[33] The most litigated industrial material is asbestos.[34] In the

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[22] *Id.* (citing Edwin J. Jacob, *Of Causation in Science and Law: Consequences of the Erosion of Safeguards*, 48 BUS. LAW. 1229, 1240 (1985)).

[23] Dore, *supra* note 11, § 2.02 (citing Allen P. Gruness, *Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?*, 38 CASE W. RES. L. REV. 387 (1988)).

[24] Dore, *supra* note 11, § 2.02.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* § 3.01.

[29] *Id.*

[30] *Id.* § 3.02, § 3.04, § 3.06, and § 3.08.

[31] *Id.* § 3.02[1].

[32] *Id.* § 3.02[2].

[33] *Id.* § 3.02[3].

[34] *Id.* § 3.02[5].

past, consumer products were not the source of much litigation, but recently toxic tort litigation involving cigarettes has grown.[35] Thus, in the area of product sales alone a wide variety of activities can potentially cause toxic tort liability.

In the area of hazardous wastes, litigation has centered around activities such as generation, disposal, treatment, transportation, storage, and sales of the waste.[36]

Property ownership is also a significant activity that may entail toxic tort litigation, but usually this litigation involves a duty on the property owner to clean up the property.[37]

Many of these activities are relatively new to the law, especially in the area of product sales. The problem is that these new activities give rise to torts very different from torts of the past. To fairly respond to these new torts, courts may have to modify the traditional tort model to accommodate the new types of injuries caused by these activities.

III. The Traditional Tort Model

Courts significantly control the direction of tort law because, while statutes may influence the law in this area, tort law is mainly derived from common law.[38] Even where statutes exist, inevitably a gap will remain in which the court has to construct a remedy based on common law tort principles.[39]

The purpose of tort law is for "compensation of individuals . . . for losses which they have suffered within the scope of their legally recognized interests . . . where the law considers that compensation is required."[40] This means that, while the primary purpose of the tort law is to compensate individuals who were wronged, situations arise where public policy dictates that no compensation need be paid.[41]

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[35] *Id.* § 3.02[6].

[36] *Id.* § 3.04.

[37] *Id.* § 3.08.

[38] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 3, at 19 (5th ed. 1984).

[39] *Id.*

[40] *Id.* § 1, at 6-7.

[41] *Id.* at 15-17. Courts have determined that compensation is not required under the following two common situations: 1) when the statute of limitations for bringing an action to court has run, and 2) when a subsequent suit is brought to court that involves the same cause of action in a prior suit. *See* part IV, *infra*.

Other public policy goals besides compensation are: deterring the tortfeasor from repeating the wrong, vicariously deterring others similarly situated from doing the wrong, and achieving retribution, or corrective justice (not allowing the tortfeasor to benefit from the wrong).[42]

In a typical tort suit, it is possible that a court can fashion a solution that will satisfy all these goals. If X hits Y, X is liable for any damages caused by X to Y, as well as punitive damages. Payment for the damages satisfies the goals of compensation, deterrence, and retribution.[43] Toxic tort litigation involving latent diseases, however, presents many more difficulties in meeting these goals.

First, determining who is responsible for the alleged injury is not always clear.[44] Decades may pass before a disease physically manifests itself sufficient for a plaintiff to institute an action.[45] Identification of the responsible party becomes a problem because the victim may not remember what company manufactured the substance.[46] Sometimes several manufacturers supply products to the place where the product is distributed to the public, so plaintiffs cannot identify the specific, responsible manufacturer.[47] Traditionally, courts and commentators attempted to develop tort law guided by the principle that "there should be no liability without 'fault,' involving a large element of personal blame."[48] As long as fault is defined by moral culpability, the goals of deterrence, retribution and corrective justice are served.[49] Therefore, courts have required some "reasonable connection between the act or omission of the defendant and the damage which the plaintiff

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[42] Palma J. Strand, Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 576-77 (1983).

[43] *Id.*

[44] *See, e.g.*, Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980)(plaintiff alleged that a fungible drug ingested by her mother while pregnant with the plaintiff, and produced by at least 200 companies, caused her to develop a tumor).

[45] *See, e.g., id.*

[46] *See, e.g., id.*

[47] *See, e.g.*, Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 72 Haw. 416, 823 P.2d 717 (1991)(plaintiff alleged he contracted the AIDS virus from blood products supplied to a hospital).

[48] KEETON ET AL., *supra* note 38, § 4, at 22.

[49] *See* Strand, *supra* note 42, at 576-77 n. 5. Prosser and Keeton point out, however, that in the twentieth century courts expanded the definition of fault so that even entirely reasonable conduct can give rise to liability if social policy dictates. KEETON ET AL., *supra* note 38, § 4 at 22.

has suffered."[50] Without identifying the actual tortfeasor, establishing this connection is impossible, and some courts adhere strictly to this requirement even when the innocent plaintiff is left without remedy.[51]

The second difficulty unique to toxic torts is that to establish the connection between the wrongdoing and the damage the plaintiff must prove causation. In a battery, proving that the punch caused the injury presents very little, if any, difficulty. Latent disease sufferers, however, have difficulty proving causation because of the passage of time and the unlimited number of other substances that could have caused the disease.[52]

Part of the problem that toxic tort victims have in proving causation is establishing that they have in fact suffered an injury.[53] Because latent injuries in toxic tort cases are often hard to determine, plaintiffs are faced with a third hurdle of establishing a compensable injury. Courts are now deciding whether having a risk of a future disease is a compensable injury, and, if it is, how much compensation to allow.[54]

Fourth, unlike a battery action, where the victim can normally bring suit within a statute of limitations period, latent disease victims are often unable to institute an action within the statute of limitations period because the disease may manifest itself after the running of the statute, thereby barring the victims from filing a suit.[55]

Furthermore, in the typical tort situation, the victim at least generally knows by the time the suit is filed all of the injuries she suffered in the past and probably will suffer in the future. The toxic tort victim, however, does not know what disease will result from exposure to a harmful substance or if a disease will result at all. If the court allows damages for a presently manifested disease or medical monitoring to periodically check for the appearance of a disease, the victim may be barred from asserting a claim for another disease later because of the traditional rule against splitting causes of action.[56]

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[50] KEETON ET AL., *supra* note 38, § 41, at 263.

[51] Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986).

[52] *See*, Ashton, *supra* note 10; Harris, *supra* note 10; Weiner & Abbott, *supra* note 10; Black & Lilienfeld, *supra* note 10.

[53] The issue of proving causation may be the most difficult hurdle for plaintiffs, but is beyond the scope of this article.

[54] *See* Kanner, *supra* note 10; Pagliaro & Lynch, *supra* note 1; Pope & Del Giorno, *supra* note 10.

[55] *See* Green, *supra* note 5.

[56] *See Claim Preclusion in Modern Latent Disease Cases*, *supra* note 6.

The challenge for courts in tort law is to formulate rules that are flexible enough for courts to apply in particular circumstances and achieve equitable results, but rigid enough to guide the public's conduct.[57] The underlying question throughout this article is whether courts, especially the Hawai'i courts, can and/or should adhere to the traditional tort model in dealing with the unique problems of toxic tort cases.[58]

IV. The Statute of Limitations and The Rule Against Splitting Causes of Action

As noted above, the law will not compensate all injuries that result from the wrongdoing of another. Public policy may overrule the goal of compensating victims.[59] Statutes of limitation and rules against splitting causes of action are the result of overriding policy considerations. Both rules promote judicial economy and protection of defendants.[60] The main purpose of the statute of limitations is to prevent stale claims.[61] The rule against splitting causes of action is designed to protect defendants from vexatious law suits.[62] Most jurisdictions, including Hawai'i, are faced with a tension between the two rules because, while courts are expanding the definition of statutes of limitations to include more suits, these same courts have begun to exclude more litigation through the use of the rule against splitting causes of action.[63] Both rules may pose special hurdles for latent disease victims.

A. Statute of Limitations

Prevention of stale claims protects defendants and promotes judicial economy for three reasons. First, with prompt litigation, defendants preserve evidence they might otherwise discard, and their memories

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[57] Keeton et al., *supra* note 38, § 3, at 18.

[58] To limit the scope of this article, only the problems of statute of limitations, splitting causes of action, and identifying actual tortfeasors is discussed.

[59] *See supra* part II.

[60] *See Claim Preclusion in Modern Latent Disease Cases*, *supra* note 6.

[61] *Id.* at 1994; Yoshizaki v. Hilo Hospital, 50 Haw. 150, 154, 433 P.2d 220, 223 (1967).

[62] *Claim Preclusion in Modern Latent Disease Cases*, *supra* note 6, at 1994; Bolte v. Aits, Inc., 60 Haw. 58, 62, 587 P.2d 810, 814 (1978).

[63] *See Claim Preclusion in Modern Latent Disease Cases*, *supra* note 6, at 1990-91.

are sharper.[64] Preservation of evidence enables defendants to prepare a better case and the trier of fact to make a quicker and more accurate determination of the case on the merits than if the suit were brought later.[65] Second, late claims may be less meritorious than prompt ones.[66] Finally, courts can resolve the issue of statute of limitations easily and quickly.[67] In addition to preventing stale claims, the statute of limitations allows a potential defendant the peace of mind that after the period runs, she is not subject to a suit.[68] Notwithstanding these policies in favor of prompt adjudication, the Hawai'i Supreme Court has adopted a liberal interpretation of Hawai'i's statute of limitations that allows plaintiffs to bring a tort action many years after the event in question occurs.

In *Yamaguchi v. Queen's Medical Center*,[69] the court set the standard to determine when the statute of limitations begins to run in Hawai'i. The plaintiff was diagnosed with a malignant bone cancer in 1947 and received radiation treatment for the cancer in 1948 and 1949.[70] In 1961, the plaintiff learned that the diagnosis was erroneous; therefore, the radiation treatment was unnecessary.[71] Because of the effects of the radiation treatment, he had to have his leg amputated in 1975.[72] Six months later he filed a suit based on negligence.[73] The court held that for both types of personal injury actions, found under section 657-7 of the Hawaii Revised Statutes (HRS),[74] and malpractice actions, governed by section 657-7.3,[75] the statute of limitations begins to run,

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[64] Green, *supra* note 5, at 980.

[65] *Id.*

[66] *Id.* at 980. Green feels that this policy is suspect. He doubts that a correlation exists between time of filing and legitimacy of the claim. *Id.*

[67] *Id.* at 980-81.

[68] *Id.* at 982.

[69] 65 Haw. 84, 648 P.2d 689 (1982).

[70] *Id.* at 85-86, 648 P.2d at 691.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] HAW. REV. STAT. § 657-7 (1972) reads in part, "Damage to persons or property. Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after . . . ." HAW. REV. STAT. § 657-7 (1972).

This statute remains unchanged.

[75] HAW. REV. STAT. § 657-7.3 (1976) reads in part:

[n]o action for injury or death against a chiropractor, clinical laboratory technologist or technician, dentist, naturopath, nurse, nursing home administrator, dispensing

or accrues, "the moment the plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the former and the latter."[76] In this case, the cause of action did not accrue until 1975 when the plaintiff discovered the connection between the excessive radiation and the condition that resulted which required amputation;[77] therefore, the suit, filed six months later, was within the two year statute of limitations.[78] The court's ruling on the personal injury statute arguably was dictum because the case only involved a malpractice claim.[79] If the court, however, directly applies the *Yamaguchi* interpretation of the statute of limitations to the personal injury statute, then the court will have established a statute of limitations rule that is as liberal as any rule in the nation.[80]

The full extent of this claim-discovery rule is best illustrated by *In re: Hawai'i Federal Asbestos Cases*,[81] in which the United States Court

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optician, optometrist, osteopath, physician or surgeon, physical therapist, podiatrist, psychologist, or veterinarian duly licensed or registered under the laws of the State, *or a licensed hospital as the employer of any such person*, based upon such person's alleged, professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, *shall be brought more than two years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, but in any event not more than six years after the date of the alleged act or omission causing the injury or death. This time limitation shall be tolled for any period during which the person had failed to disclose any act, error, or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to him or as provided in section* [671-18].

HAW. REV. STAT. § 657-7.3 (1976) (emphasis added). In 1977, the legislature deleted the last phrase, "or through the use of reasonable diligence should have been known to him or as provided in section [671-18]." *See Yamaguchi*, 65 Haw. at 87-88 n.6, 648 P.2d at 692 n.6.

[76] 65 Haw. at 90, 648 P.2d at 693-94.

[77] *Id.* at 91, 648 P.2d at 694.

[78] *Id.* at 92, 648 P.2d at 694. However, the court remanded the case because the malpractice statute has an outer limit of six years from the time of the injurious act which can only be tolled if the defendant had failed to disclose an act, error or omission that is the basis for the action. *Id.* at 93, 648 P.2d at 695-96. The personal injury statute does not contain this outer limit. *See* HAW. REV. STAT. § 657-7 (1972) and HAW. REV. STAT. § 657-7.3 (1976).

[79] 65 Haw. at 90, 648 P.2d at 693-94. The court's actual holding was that the statute of limitations begins to run "under HRS §§ 657-7 and 657-7.3, the moment the plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the former and the latter." *Id.*

[80] *See* Green, *supra* note 5, at 978-79 and accompanying text.

[81] 871 F.2d 891 (9th Cir. 1989).

of Appeals for the Ninth Circuit applied section 657-7.[82] In that case, the plaintiff's father died of asbestos-related lung cancer on September 4, 1978, and plaintiff filed action on July 28, 1980.[83] The defendants contended that the statute of limitations began to run when the decedent became aware of the cause of the injury, not when he realized that the defendants were negligent in causing the injury.[84] The defendants claimed the decedent knew of the cause of the injury before July 27, 1978, over two years prior to the filing of the action.[85] The court first held that the interpretation of Hawai'i's statute of limitations set out in *Yamaguchi* applied to section 657-7.[86] Then, the court held that the statute did not begin to run until the plaintiff knew she had a claim.[87] Knowledge of a claim involved knowing that the defendant's negligence caused the injury.[88] What follows from this case is that the statute can toll indefinitely. If *X* has an injury that *X* knows was caused by *Y*'s act, the statute will not necessarily begin to run. The statute will not begin to run until *X* should know that *Y*'s act was *negligent* in addition to being the cause of *X*'s injuries. Even though the *In re: Hawai'i Federal Asbestos Cases* decision is not binding on Hawai'i state courts, the decision is consistent with the holding of *Yamaguchi*; therefore, the state courts should similarly apply the statute.

How a court views an injury can also affect the running of the statute. The Maryland Court of Appeals,[89] in *Pierce v. Johns-Mansville Sales Corp.*,[90] struggled with defining an injury in an asbestos case. In that case, the plaintiff's husband was informed that he suffered from asbestosis caused by his exposure to asbestos at work in 1973.[91] In

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[82] *Id.* at 893.

[83] *Id.* at 892.

[84] *Id.* at 894. The trial judge instructed the jury that:

> The defendant has the burden of proving by a pre-ponderance of the evidence all of the facts necessary to establish when if ever, Manuel S. Carvalho [the decedent] discovered, or through the exercise of reasonable diligence on his part should have discovered, on or before July 27, 1978: (1) that his asbestos-related lung cancer/asbestosis was caused by asbestos, (2) the Defendant's negligence (or violation of a duty), and (3) the causal connection between the two.

Id. at 893.

[85] *Id.* at 893-94.

[86] *Id.* at 894.

[87] *Id.*

[88] *Id.*

[89] The Maryland Court of Appeals is the highest state court in Maryland.

[90] 464 A.2d 1020 (Md. 1983).

[91] *Id.* at 1022.

October of that year, the Maryland Workmen's Compensation Commission determined that he suffered a fifty-percent permanent partial disability due to the asbestosis.[92] In 1979, he was diagnosed as having lung cancer; he died in 1980.[93] The plaintiff brought suit that same year for damages that resulted from the cancer.[94] Maryland's statute of limitations barred claims filed three years after the action accrued,[95] and Maryland's rule for the running of its statute of limitations was similar to Hawai'i's.[96] The defendant contended that because the asbestosis and cancer resulted from a single exposure to asbestos both diseases constituted one injury; therefore, the statute began to run in 1973 when the decedent learned he had asbestosis.[97] The court held that the diseases were separate and distinct,[98] and the policies underlying the statute of limitations could not justify barring the timely filed cancer claim.[99] In the court's view, the statute of limitations for the cancer did not begin to run until 1979, when the decedent learned of the cancer.[100]

Given the nature of latent diseases and the problems faced by latent disease victims, the most liberal interpretation by the courts of statutes of limitations is probably best. One commentator has even proposed that courts entirely do away with statutes of limitations in toxic tort cases involving latent diseases.[101] While this suggestion may sound extreme, one has to wonder what policies governing statutes of limitations are served by having a liberal interpretation of the statutes. The goals of judicial economy and protection of defendants are not achieved under a liberal claim-discovery rule. In addition, defendants cannot have the peace of mind knowing that a victim can bring suit anytime as long as the suit is brought within the statute of limitations after the victim learns she has a claim.

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[92] *Id.* at 1023.

[93] *Id.*

[94] *Id.* at 1023-24.

[95] *Id.* at 1025. The statute reads, in part, "[a] civil action at law shall be filed within three years from the date it accrues . . . ." *Id.*

[96] *Id.* at 1025. The statute provides that, "a cause of action accrues for a latent disease when the claimant knew or reasonably should have known of the nature and cause of the harm." *Id.*

[97] *Id.* at 1024-25.

[98] *Id.* at 1025. The court, however, did not state the reason why the diseases were separate and distinct.

[99] *Id.* at 1025-27.

[100] *Id.* at 1028.

[101] Green, *supra* note 5, at 980-1013.

That is not to say, however, that a strict interpretation of statutes of limitations is better. In fact, a liberal interpretation or no statute of limitations at all may actually promote judicial economy.[102] Under these rules, plaintiffs can wait until they have a legitimate case before bringing an action to court. A less liberal interpretation might force plaintiffs to file suit before they are ready, in order to adhere to the limitations period. Also, the passage of time affects the plaintiff's case as much as the defendant's case, so plaintiffs will want to bring suit as soon as possible. Because the Hawai'i Supreme Court cannot dismiss a rule mandated by state statute, the statute of limitations must remain. Hawai'i's claim-discovery rule, however, does allow for latent disease victims to get into court; consequently, it is the best possible solution.

Ironically, while the Hawai'i Supreme Court's liberal interpretation of Hawai'i's statute of limitations allows latent disease victims into the courts, Hawai'i's rule against splitting causes of action may keep some victims out of court.

B. Rule Against Splitting Causes of Action

Many toxic tort victims not only suffer from diseases that manifest themselves years later, but also from an immediate injury. The rule against splitting causes of action, which is rooted in the doctrine of res judicata, or claim preclusion, may bar plaintiffs from claiming damages for a disease that occurs years later if the plaintiff collected damages for the immediate injury.[103] The policy behind the rule is promoting judicial economy and protecting defendants from vexatious lawsuits.[104] Hawai'i has followed the general trend of courts in adopting a transactional approach to claim preclusion.[105]

In *Kauhane v. Acutron Co., Inc.*,[106] the Hawai'i Supreme Court stated that, in determining if the same claim is being litigated, "the court must look to whether the 'claim' asserted in the second action arises out of the same transaction, or series of connected transactions, as the

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[102] *See id.* at 982-1008.

[103] *Claim Preclusion in Modern Latent Disease Cases*, *supra* note 6, at 1989. For purposes of this discussion, the bar against splitting causes of action refers to that part of res judicata referred to as claim preclusion, rather than collateral estoppel or issue preclusion.

[104] *Id.* at 1994.

[105] *See id.* at 1991; Kauhane v. Acutron Co., Inc., 71 Haw. 458, 464, 795 P.2d 276, 279 (1990).

[106] 71 Haw. 458, 795 P.2d 276 (1990).

'claim' asserted in the first action."[107] This test is derived from the general rule concerning splitting causes of action found in section 24 of the Restatement (Second) of Judgments.[108] The focus of this transactional approach is to define "claim" in factual terms. A plaintiff cannot split the facts that comprise the transaction regardless of how many theories of relief are available, how many rights were invaded, or whether different evidence is needed to support each claim.[109] An egregious miscarriage of justice will result if the court applies this approach to subsequent suits involving toxic tort victims who have previously been compensated for different, more immediate injuries.

The transactional approach was never intended to bar plaintiffs from subsequent claims when they could not have raised the claim in the first suit; therefore, the approach should not apply to subsequent claims involving diseases that manifest themselves after the first suit. The drafters of the Restatement intended to eliminate the possibility of multiple suits that existed when civil procedure was still influenced by historical forms of action and the distinction between law and equity.[110] The transactional approach was intended as a "balance

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[107] *Id.* at 464, 795 P.2d at 279.

[108] *Id.* The actual language of the Restatement (Second) of Judgments § 24 is:

> Dimensions of "Claim" for purposes of Merger or Bar—General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

[109] 71 Haw. at 464 n. 6, 795 P.2d at 279 n. 6 (citing the commentary to RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)).

[110] RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982). Because of the influence of forms of action and the division of law and equity, courts tended to define a claim by a single theory of recovery. *Id.* Therefore, if a plaintiff was defeated on one theory of recovery, she could then bring another action on another theory, which the court would consider as a separate claim. *Id.* This was done even though all the theories arose from the same facts. *Id.*

Some courts defined the claim as a single primary right of substantive law. *Id.*

between, on the one hand, interests of the defendant and of the courts in bringing litigation to a close and, on the other hand, the interest of the plaintiff in vindication of a just claim.''[111] The assumption was that modern rules of civil procedure would govern the courts applying this approach which would enable the plaintiffs to fully develop the entire transaction in a suit without undue hardship.[112] Based on this assumption, the approach largely reflects an ''expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so.''[113] Anticipating that rules of civil procedure in some jurisdictions would prevent a plaintiff from presenting her entire controversy, the drafters provided exceptions to the general rule against splitting that allow plaintiffs in those jurisdictions to bring a second claim.[114] These exceptions and the assumption underlying the general

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Although the definition of a primary right was ambiguous, if defined narrowly, plaintiffs could bring a suit for property damage and after a final judgment, could then institute an action to recover for personal injuries. *Id.*

Claim was also defined based on the sameness of evidence. *Id.* If the evidence needed to establish the second claim was the same as that needed in the first suit, then the second claim was barred. *Id.*

[111] *Id.* § 24 cmt b.

[112] *Id.* § 24 cmt a. For those jurisdictions without modernized rules, exceptions to the general rule of defining the claim by the transaction are set out in Restatement (Second) of Judgments § 26(c).

[113] RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt a (1982).

[114] The Restatement (Second) of Judgments § 26 reads in part:

> Exceptions to the General Rule Concerning Splitting.
>
> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second claim for a second action by the plaintiff against the defendant:
>
> . . .
>
> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982).

Section 26(1) has other exceptions that may apply to subsequent suits by toxic tort victims, but none of the exceptions are completely satisfactory as grounds to avoid applying the transactional approach.

Section 26(1)(a) reads:

> The parties have agreed in terms or in effect that the plaintiff may split his claim,

rule indicate the drafters did not intend to preclude claims that

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or the defendant has acquiesced therein . . .

RESTATEMENT (SECOND) of JUDGMENTS § 26(1)(a).

This section requires that the plaintiff depend on the defendant to allow the plaintiff to bring a subsequent claim, which is probably unlikely. The plaintiff must also anticipate that another claim will arise. While toxic tort victims are probably aware that latent diseases may follow a present injury, they should not be precluded from a second claim if they do not anticipate the latent disease. Plaintiffs are well advised, however, to seek permission from the defendant because, if obtained, the plaintiff at least can later argue that this exception applies.

Section 26(1)(b) states that:

> The court in the first action has expressly reserved the plaintiff's right to maintain the second action . . .

RESTATEMENT (SECOND) of JUDGMENTS § 26(1)(b). As in § 26(1)(a), this requires that the latent disease be anticipated, which should not bar a subsequent claim. However, plaintiffs would stand on firmer ground if they persuade the court to reserve the right to bring a second action.

Section 26(1)(c) provides an exception when:

> For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of the suit, and chooses the latter course . . . .

RESTATEMENT (SECOND) of JUDGMENTS § 26(1)(c).

The problem with this exception is that a "continuing or recurrent wrong" is required. This type of wrong is illustrated in the comments by nuisance and trespass. *Id.* at cmt f. The illustrations infer that in order for the wrong to be "continuing or recurrent" the action, on inaction, by the defendant must continue to occur after the first suit is ended. *Id.* This does not fit the prototype toxic tort situation where the wrong, subjecting the plaintiff to a hazardous substance, has ceased after the first suit, but the effects of the wrong continue.

The situation of nuisance and trespass can be distinguished from the latent disease scenario on policy grounds. For nuisance and trespass, the defendant after the first suit can stop the activity that is causing the nuisance or discontinue the trespass, thereby preventing further harm. However, the defendant in the toxic tort situation does not have the ability to prevent the imminent harm to come. Therefore, a court can view the second harm in the case of trespass and nuisance as resulting from another transaction, while the court cannot treat the harm in the toxic tort situation in any other way than as stemming from the same transaction.

Finally, § 26(1)(f) excepts situations where:

> It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy . . . .

RESTATEMENT (SECOND) of JUDGMENTS § 26(1)(f).

On its face, this provision would seem to apply to the toxic tort situation. However,

plaintiffs cannot raise in the first suit, at least when the claims are barred by a procedural rule.

Of course, a toxic tort victim's inability to raise the latent disease claim in the first action is due to lack of proof rather than rules of civil procedure. Courts, however, should not use this fact as a significant distinguishing factor. It is no less onerous for the courts to bar subsequent claims for diseases not proven in the first suits because the diseases have not manifested themselves than it is to preclude a subsequent claim because of procedural barriers. In both cases, the plaintiffs, through no fault of their own, did not have the capacity to present their entire controversies in the first suit.

Moreover, a problem is created because the statute of limitations requires plaintiffs to bring the first action promptly. A plaintiff cannot wait for all diseases to become manifest because the statute of limitations may bar recovery for diseases or injuries that she contracted earlier. For instance, if a person is physically impaired due to asbestosis which resulted from exposure to asbestos, she must bring a claim within two years.[115] If she pursues that claim and later contracts cancer that results from the same exposure, under the transactional approach, she finds herself barred from collecting damages for her cancer. If she waits for the cancer to manifest and it appears more than two years after the asbestosis was contracted, then she may only receive compensation for the cancer because of the statute of limitations' bar on the asbestosis claim. If she waits and never contracts cancer, she receives nothing.

The New Jersey Supreme Court, in dicta, stated that the rule against splitting causes of action "cannot sensibly be applied to a toxic-tort claim filed when the disease is manifested years after the exposure merely because the same plaintiff sued previously to recover for property damages and other injuries."[116] As an alternative to

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§ 26(2) requires following §§ 78-82 when invoking these exceptions. *Id.* § 26(2).

Unfortunately, §§ 78-82 involves the procedures for obtaining relief from judgments. The toxic tort victim is not seeking relief from the judgment, she wants the prior judgment to stand. She wants to bring suit notwithstanding the fact that she received a judgment in her favor in a prior suit, although this exception may be useful if she lost in the first suit.

[115] *See supra* part IV.A. and accompanying notes for a full discussion of statutes of limitations.

[116] Ayers v. Township of Jackson, 525 A.2d 287, 300 (N.J. 1987). Although the New Jersey Supreme Court had not adopted the transactional approach before this case was

allowing the plaintiff a second claim, a court could award plaintiffs damages for an increased risk of disease at the time of the first claim. An increased risk action, however, is unsatisfactory to both plaintiffs and defendants.[117] Plaintiffs who ultimately do contract a disease could find themselves undercompensated because the trier of fact in all likelihood will not allow the same amount of damages for the risk of disease as for the disease itself. Defendants will have to pay damages to some plaintiffs who never contract any disease, providing those plaintiffs with a windfall at the expense of the disease sufferers. The Hawai'i Supreme Court should follow the lead of the New Jersey Supreme Court and hold that it cannot sensibly apply the rule against splitting causes of action, and that the drafters of the Restatement never intended to apply the rule to toxic torts.

V. Identifying Actual Tortfeasors

In response to the problem of identifying actual tortfeasors, attorneys have argued traditional theories of liability, such as concert of action and alternative liability, and some courts have constructed new theories, such as market share liability and enterprise liability. These theories produced varying degrees of success that are described in this section.

A. Market Share Liability

In 1980, the California Supreme Court, in *Sindell v. Abbott Laboratories*,[118] created market share liability to relieve the plaintiff of the burden of identifying the exact manufacturer of the drug diethylstilbestrol (DES) that had caused her injuries.[119] Under this approach, once a plaintiff establishes a cause of action and joins a substantial percentage of the manufacturers that sold the DES, the burden shifts to the defendant manufacturers to prove that they could not have

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decided, a New Jersey appellate court did use the approach in Chatlin v. Cape May Greene, Inc., 524 A.2d 841 (N.J. Super. Ct. App. Div. 1987), decided just prior to the *Ayers* case. *Id.*

[117] *See* Hagerty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986).

[118] 607 P.2d 924 (Cal. 1980).

[119] *Id.* at 937. Although California was the first court to adopt this new theory of liability, the court used the ideas from Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963 (1978).

supplied the drug to the plaintiff. If they do not overcome the burden, they are held responsible for the percentage of the market they controlled at the time the drug was bought.[120] *Sindell* is significant in the toxic tort area not only because the court provided a practical remedy to the problem of identifying a particular defendant, but because the court recognized that it must fashion new remedies for the problems created by today's technological society.[121]

Five states besides California have adopted some form of market share liability in DES litigation,[122] while three states have expressly rejected it in DES suits.[123] Almost no state has applied the market share approach to other areas of toxic torts.[124] The Hawai'i Supreme Court, however, recently acknowledged the market share approach as a viable theory of liability in Hawai'i in a non-DES case.[125] Understanding the implications of the Hawai'i Supreme Court's ruling requires a full discussion of *Sindell* and its progeny.

In *Sindell*, the plaintiff sued several manufacturers of DES alleging that her mother had taken the drug to prevent a miscarriage, causing

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[120] *Sindell*, 607 P.2d at 937.

[121] *Id.* at 936.

[122] Andrew B. Nace, Note, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395, 396 (1991). *See also*, William J. Warfel, *Adoption of the Market Share Approach in Long-Tail Product Liability Litigation—The Transformation of the Tort System into a Compensation System*, 17 OHIO N.U. L. REV. 785, 787-800 (1991). The five states that have adopted market share liability in DES cases are: Washington, Florida, Wisconsin, New York, and Massachusetts. *See* Martin v. Abbott Laboratories, 689 P.2d 368 (Wash. 1984); Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990); Collins v. Eli Lilly and Co., 342 N.W. 2d 37 (Wis. 1984) *cert. denied*, 469 U.S. 826 (1984); Hymowitz v. Eli Lilly and Co., 539 N.E.2d 1069 (N.Y. 1989); McCormack v. Abbott Laboratories, 617 F. Supp. 1521 (D. Mass. 1985). A federal district court adopted the holding in Massachusetts, but it was consistent with the state supreme court's prior decision in Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982). *See McCormack*, 617 F.Supp. 1521 (D. Mass. 1985).

[123] *See* Smith v. Eli Lilly & Co., 560 N.E.2d (Ill. 1990); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984).

[124] Nace, *supra* note 122, at 396; Warfel, *supra* note 122, at 801-803 (rejection of market share approach in asbestos and DPT cases).

[125] Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 72 Haw. 416, 823 P.2d 717 (1991). The *Smith* opinion was decided in response to certified questions sent to the Hawai'i Supreme Court as to whether Hawai'i allows recovery in a blood contamination case where the actual tortfeasor could not be identified and, if so, under what theory. *See* Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 911 F.2d 374 (9th Cir. 1991). The Hawai'i Supreme Court reviewed all the options and rejected all but the market share approach. *See* Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 72 Haw. 416, 823 P.2d 717 (1991).

the plaintiff to develop a malignant bladder tumor about forty years later.[126] After the tumor was removed, she received constant medical monitoring to detect possible future malignancies.[127] The trial court dismissed the suit because the plaintiff could not identify the specific defendant who manufactured the drug responsible for her injuries.[128] In fact, the plaintiff could not even prove that any of the defendants produced the drug that caused her harm.[129] In its reversal, the California Supreme Court adopted the market share approach.[130]

Traditional common law liability theories could not provide a remedy for the plaintiff.[131] As the court was faced with either fashioning a new remedy or denying the plaintiff relief, the court chose to adopt the market share approach in this case.[132] The court, however, carefully limited its holding by specifically noting that this case involved defendants who produced the drug from an identical formula and a plaintiff who could not identify the exact manufacturer through no fault of her own.[133] The court gave two policy reasons for not requiring the plaintiff to identify the exact producer of the drug.

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[126] *Sindell*, 607 P.2d at 926.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 931. It was possible that any one of 200 companies could have produced the DES that harmed the plaintiff. *Id.* This action was brought against 11 named drug companies and Does 1 through 100. *Id.* at 925. The plaintiff alleged that Eli Lilly and Company and five or six other companies had produced 90% of the DES market. *Id.* at 937.

[130] *Id.* at 937.

[131] *See id.* at 930-35. The *Sindell* court found that the common law theories of alternative liability, concert of action, and enterprise liability, all of which would allow recovery without identifying the particular tortfeasor, did not apply to this case. *Id.* Alternative liability did not apply because it required that the plaintiffs join all possible tortfeasors, which was not the case here. *Id.* at 928-31. *See infra* part V.C. and accompanying notes.

The court rejected the concert of action theory because it found no "tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that [the defendants] substantially aided and encouraged one another in these omissions." *Sindell*, 607 P.2d at 932. *See infra* part V.B. and accompanying notes.

The court refused to apply enterprise liability because of the large number of manufacturers involved, the absence of delegating functions related to safety to a central association, and the unfairness of holding a defendant jointly and severally liable when that particular defendant may not have supplied the drug. *Sindell*, 607 P.2d at 933-35. The court did not believe it should hold manufacturers who were not the actual tortfeasors responsible because the standards within their industry were set by the government. *Id.* *See infra* part V.D. and accompanying notes.

[132] *Sindell*, 607 P.2d at 936.

[133] *Id.*

The first, and most persuasive to the court, was that "between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."[134] The court acknowledged that the defendants were not directly to blame for the plaintiff's inability to identify the actual producer of the drug.[135] Nonetheless, the court placed responsibility for the unavailability of proof on the defendants because they marketed a drug with delayed effects and that delay was a major factor in inhibiting the plaintiff's ability to identify the exact manufacturer.[136]

The second policy reason recognized by the court was that the defendants were "better able to bear the cost of injury resulting from the manufacture of a defective product."[137] The court noted that, while the cost to the injured party might prove overwhelming, the manufacturer could insure itself and pass the cost to the consumer.[138] Furthermore, the court felt that manufacturers were in a better position to find and guard against defects.[139] Consequently, holding them responsible for defects in the product or failing to warn of the defects would promote product safety.[140]

The rationale for adopting the market share approach was that "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products."[141] The court explained this rationale through an illustration.[142] If each plaintiff could identify the actual manufacturer of the DES that their respective mothers ingested and manufacturer *X* had sold one-fifth of the DES marketed, then manufacturer *X* would have been the sole defendant in one-fifth of the cases and liable for all damages. Under the market share approach, manufacturer *X* is a defendant in all cases, but only pays one-fifth of the damages in each case. In either scenario, manufacturer *X* is responsible for the same amount.[143] As one commentator has stated,

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[134] *Id.* The policy that negligent defendants should bear the cost of injury rather than innocent plaintiffs is traditional tort policy. *See* Summers v. Tice, 199 P.2d 1 (Cal. 1948). The *Sindell* court, in fact, obtained this policy from *Summers*. *Sindell*, 607 P.2d at 936.

[135] *Id.* at 936.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 137.

[142] *Id.* at 937 n. 28 (citing Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 965 (1978)).

[143] *Id.*

this approach was the court's answer to "link liability to culpability, while dispensing with the insurmountable identification problem."[144] The court recognized that the actual tortfeasor could escape liability, but felt that the likelihood was diminished if the plaintiff joined a substantial percentage of the market.[145]

Although other jurisdictions have allowed a cause of action in DES cases when the exact manufacturer was not identifiable, no court has applied the *Sindell* holding without modification or clarification.[146] The questions left by *Sindell* were: (1) what constitutes a substantial share of the market,[147] (2) how is the market to be defined,[148] and (3) most importantly, could courts hold the defendants jointly and severally liable?[149] The California Supreme Court answered the third question eight years later in *Brown v. Superior Court (Abbott Laboratories)*;[150] the first two were resolved in other jurisdictions by modifying the market share approach.[151]

The *Brown* court held that a defendant was only severally liable under the market share approach, not jointly liable.[152] The court

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[144] Nace, *supra* note 122, at 402.

[145] *Sindell*, 607 P.2d at 937.

[146] *See* McCormack v. Abbott Laboratories, 617 F.Supp. 1521 (D. Mass. 1985)(holding that *Martin* approach was consistent with concerns of the Massachusetts Supreme Court in Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982)); Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990)(market share alternate liability); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989)(market share with national market); Martin v. Abbott Laboratories, 689 P.2d 368 (Wash. 1984)(market share alternate liability); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984), *cert. denied*, 469 U.S. 826 (risk contribution). Arguably, a South Dakota district court did apply *Sindell* in McElhaney v. Eli Lilly & Co., 564 F.Supp. 265 (D.S.D. 1983); *see* Nace, *supra* note 122, at 407 n. 89 (citing Sharon Novak, Comment, *Into the Quagmire: Washington Adopts Market Share Liability in DES Cases*, 21 GONZ. L. REV. 199, 226 (1985)).

[147] Nace, *supra* note 122, at 403. The *Sindell* court did indicate, however, that substantial share did not have to mean 75% to 80% of the market. *Sindell*, 607 P.2d at 937.

[148] Nace, *supra* note 122, at 403.

[149] *Id.*

[150] 751 P.2d 470 (Cal. 1988).

[151] *See* Martin v. Abbott Laboratories, 689 P.2d 368 (Wash. 1984)(holding that a substantial share of the market was not needed); Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990)(holding that substantial share was not needed; market defined as narrowly as evidence allows); Collins v. Eli Lilly Co., 342 N.W. 2d 37 (Wis. 1984), *cert. denied*, 469 U.S. 826 (holding that substantial share was not needed); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989)(national market).

[152] 751 P.2d at 486. The difference in liability is that if a defendant is jointly liable, then a plaintiff can recover 100% of her damages from any defendant. Under several

reasoned that the purpose of market share liability was to hold defendants liable for their share of the harm by approximating their share of the market.[153] Joint liability would frustrate this purpose because any manufacturer could be held liable for the entire amount of damages due to a plaintiff, even if that defendant's market share was relatively insignificant.[154] The court recognized that this meant that plaintiffs bore the cost if a manufacturer became insolvent or was not joined and that it was unlikely that a plaintiff would join all defendants.[155] The court, however, felt that several liability best balanced the interests of the plaintiffs and the manufacturers.[156]

Four years after the *Sindell* decision, the Washington Supreme Court, in *Martin v. Abbott Laboratories*, followed California's lead.[157] The court's "market-share alternate liability,"[158] which modified *Sindell* to overcome the shortcomings of the California approach, has become the most accepted market share approach.[159]

The court justified its use of the market share approach on two grounds: (1) by producing or marketing an allegedly defective product, each of the defendants contributed to the risk of injury to the plaintiffs, therefore each shared a degree of culpability, and, (2) as in *Sindell*, the manufacturers were in a better position to absorb the cost of the injury.[160]

The court modified *Sindell* to allow the plaintiff to bring suit against any number of defendants, including a single defendant, changing *Sindell*'s requirement of a substantial share of the market.[161] Under the *Martin* holding, to join defendants, the plaintiff only needs to allege that each defendant produced the type of DES taken by the plaintiff's

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liability, the plaintiff can only recover damages from any one defendant in an amount proportionate to the defendant's market share.

In other parts of the opinion the court held that the defendants in DES cases were not liable under *Sindell* for claims founded on strict liability, *id.* at 477-80, failure to warn, *id.* at 480-83, breach of express or implied warranty, *id.* at 483-84, or fraud. *Id.*

[153] *Id.* at 486.

[154] *Id.*

[155] *Id.* at 485.

[156] *Id.* at 486-87.

[157] 689 P.2d 368 (Wash. 1984).

[158] *Id.* at 381.

[159] *See supra* note 146. A Massachusetts district court and the Florida Supreme Court have basically adopted *Martin*. *Id.*

[160] 689 P.2d at 381.

[161] *Id.*

mother, that the DES caused the harm, and that each defendant breached a legally recognized duty to the plaintiff.[162] If, at trial, the plaintiff proves these elements by a preponderance of evidence, the burden shifts to each defendant to exculpate itself.[163] Each defendant can exculpate itself by proving, by a preponderance of evidence, that it could not have supplied the actual drug which did the harm.[164] If a defendant cannot completely exculpate itself, that defendant can limit its liability by proving its actual share of the market at the time the drug was sold.[165] Defendants who cannot prove their share of the market are presumed to have occupied the remaining portion of the market in equal shares.[166] To reduce its presumptive share, each defendant can implead third party defendants.[167] If all defendants carry their burden of proof as to actual market share and the plaintiff fails to join all manufacturers, the plaintiff will recover less than one hundred percent of the damages.[168]

This decision sweeps away the problems left by *Sindell*. Under *Martin*, the plaintiff does not need to name a substantial share of the market because the plaintiff can bring an action against just one defendant. Furthermore, the court no longer needs to define the market because, presumably, the defendants limit the market themselves by proving that they could not have supplied the drug or by limiting their market share. Finally, because the court rejected joint and several liability, manufacturers are only responsible for their share of the market, assuming they meet their burden of proof.

Unfortunately, this decision creates another problem in that a defendant who cannot carry its burden of proving actual market share will be liable for more of the market than it controlled. The Wisconsin Supreme Court in another DES case perceived many problems in proving actual market share. Because of these perceived problems, the

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[162] *Id.*

[163] *Id.*

[164] *Id.* at 382. One way for a manufacturer to prove that it could not have supplied the actual drug that did the harm would be to prove that it did not sell the drug in that area or at the time the drug was ingested. *Id.*

[165] *Id.* at 383.

[166] *Id.* This means that if manufacturers *X*, *Y*, and *Z* were named defendants and *X* proves that it only occupied 20% of the market while *Y* and *Z* cannot prove the actual share they controlled, then *Y* and *Z* would each be held liable for 40% of the judgment. *Id.*

[167] *Id.*

[168] *Id.*

Wisconsin court, in *Collins v. Eli Lilly*,[169] formulated another approach, even though the court employed the same policy justifications as the *Martin* court.

Under the *Collins* approach, a plaintiff can bring an action under either strict liability[170] or negligence.[171] As in *Martin*, the plaintiff can bring suit against any number of defendants.[172] In a negligence claim, the plaintiff needs to allege and prove the same elements articulated in *Martin*.[173] Under either claim, as in *Martin*, the plaintiff only need prove that each defendant marketed the type of DES taken by the plaintiff's mother.[174] Once the elements of the claim are proven, the burden shifts to each defendant to prove that it could not have sold the DES to the plaintiff's mother.[175] The *Collins* approach differs from *Martin* in how the court determines the percentage of liability.

The court viewed Wisconsin's comparative negligence statute as flexible enough to equitably apportion damages among the defendants.[176] Under the statute, the jury determines how to apportion

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[169] 342 N.W.2d 37 (Wis. 1984).

[170] *Id.* at 51. For the court to find the defendant strictly liable, the plaintiff would have to prove:

> (1) that the DES was defective when it left the possession or control of the drug company; (2) that it was unreasonably dangerous to the user or consumer; (3) that the defect was a cause of the plaintiff's injuries or damages; (4) that the drug company engaged in the business of producing or marketing DES or, put negatively, that this was not an isolated or infrequent transaction not related to the principal business of the drug company; and (5) that the product was one which the company expected to reach the user or consumer without substantial change in the condition it was when sold.

Id.

The California Supreme Court rejected strict liability as a cause of action against drug manufacturers. *Brown*, 751 P.2d at 477.

While the Washington Supreme Court did not expressly preclude a strict liability action, the plaintiff had to prove the elements of negligence before asserting market share alternative liability. *See Martin*, 689 P.2d at 382.

[171] 342 N.W.2d at 50-51.

[172] 342 N.W.2d at 50.

[173] *Id.* at 50-51 (requiring a breach of duty of care).

[174] *Id.* at 50.

[175] *Id.* at 52. As in *Martin*, the defendant can exculpate itself by proving it did not produce or market the drug at the time the drug was ingested or in the geographic area where the plaintiff's mother bought the drug. *Id.*

[176] *Id.* at 53. The Wisconsin comparative negligence statute Section 895.045 reads:

> Contributory negligence. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence

damages.[177] The court's reason for rejecting the market share approach was its view that defining and proving market share, while conceptually attractive, has limited practical applicability.[178] Moreover, the court held it was a waste of judicial resources to try to surmount what the court perceived as a nearly impossible task.[179] These two concerns were major justifications for the complete rejection of any form of market share liability in Illinois as applied to DES cases.[180]

In *Smith v. Eli Lilly & Co.*,[181] the Illinois Supreme Court illustrated the problem by quoting a San Francisco trial judge who defined the market on a national scale because no data was available on a narrower scale.[182] Also, a Los Angeles trial judge, after four weeks of attempting to formulate market shares, declared that the data just did not exist.[183] The court stated that no accurate way existed to assess market share and that to attempt to do so would "imprudently bog down the

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resulting in death or in injury to person or property, if such negligence was not greater than the negligence or the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Id. n. 13.

[177] *Id.* at 53. The court set out some factors that the jury could consider. They were: whether the drug company conducted tests on DES for safety and efficacy in use for pregnancies; to what degree the company took a role in gaining FDA approval of DES for use in pregnancies; whether the company had small or large market share in the relevant area; whether the company took the lead or merely followed the lead of other in producing or marketing DES; whether the company issued warnings about the dangers of DES; whether the company produced or marketed DES after it knew or should have known of the possible hazards DES presented to the public; and whether the company took any affirmative steps to reduce the risk or injury to the public.

Id.

[178] *Id.* at 48. The court noted that many drug companies simply did not have records on when and how much they produced or marketed. Even if records existed the factfinder would have problems assessing market share because many companies entered and left the market, and many no longer existed. *Id.*

[179] *Id.* at 48-49.

[180] Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990). Iowa and Missouri also rejected market share liability in all forms. *See* Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986)(refusing to alter the traditional requirement of causation); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984)(refusing to alter the traditional requirement of causation).

[181] 560 N.E.2d 324 (Ill. 1990).

[182] *Id.* at 337.

[183] *Id.* at 324.

judiciary in an almost futile endeavor."[184] In contrast, in *Hymowitz v. Eli Lilly*,[185] decided just prior to the *Smith* decision, the Court of Appeals of New York resolved the problem of proving market share by employing a national market.[186]

The Court of Appeals of New York[187] took a radical approach by dismissing the need to "provide a reasonable link between liability and the risk created by defendant to a particular plaintiff."[188] Instead, the court apportioned liability to correspond to the "overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large."[189]

Hymowitz directly contrasted with *Martin*. In *Martin*, a defendant was exculpated if it could show that it did not market the drug at the time or in the geographical area in question.[190] *Hymowitz* rejected this exculpatory test and held that even if a defendant could prove it did not market the drug under those circumstances, a plaintiff could still join the defendant in a suit.[191] The *Hymowitz* court reasoned that each defendant was liable for damages in proportion to its share of the national market.[192] The court explained that the California experience showed that a smaller market was impractical and unfair because each case involves a separate market share matrix that places an impossible burden on plaintiffs.[193]

On the heels of these decisions, the Hawai'i Supreme Court, in *Smith v. Cutter Biological, Inc., a Division of Miles Inc.*,[194] recently recognized a hybrid market share approach that joins *Martin* and *Hymowitz* in a Factor VIII blood product case.[195] In *Smith*, the plaintiff,

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[184] *Id.* at 338.

[185] 539 N.E.2d 1069 (N.Y. 1989).

[186] *Id.* at 1078.

[187] The Court of Appeals of New York is the highest state court in New York.

[188] 539 N.E.2d at 1078.

[189] *Id.*

[190] *Martin*, 689 P.2d at 382.

[191] *See Hymowitz*, 539 N.E.2d at 1078. A plaintiff could join the any manufacturer who was a member of the national market irrespective of where the manufacturer actually distributed its product. *Id.* A defendant, however, could exculpate itself by proving it marketed DES only for uses other than pregancy. *Id.* at 1078 n.2.

[192] *Id.*

[193] *Id.* at 1077-78.

[194] 72 Haw. 416, 823 P.2d 717 (1991).

[195] *Id.* at 436-37, 823 P.2d at 728. A Florida district court, applying Florida law, has also allowed a plaintiff to state a claim based on alternative market share liability on facts almost identical to *Smith*. Ray v. Cutter Laboratories, Div. of Miles, Inc., 754 F.Supp. 193 (M.D.Fla. 1991).

who tested HIV-positive for the AIDS virus, was a hemophiliac who claimed that he contracted the virus from injections of a blood coagulant, Factor VIII.[196] While he could not identify the specific manufacturer who supplied the infected blood product, he joined four manufacturers who supplied the coagulant to the hospital where he received the injections.[197] The action was brought in federal district court and appealed in the United States Court of Appeals for the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit then sent certified questions to the Hawai'i Supreme Court and asked the Hawai'i Supreme Court to decide whether the plaintiff could recover damages without identifying the actual tortfeasor and, if so, under what theory.[198] The Hawai'i Supreme Court accepted *Sindell*'s policy justifications in adopting a market share approach.[199] The court further explained that, in toxic exposure cases that involve latent injuries such as this case, the court could "[n]o longer . . . apply traditional rules of negligence" when the plaintiff, through no fault of her own, could not identify the responsible party.[200] Otherwise, the court reasoned, the "innocent plaintiff would be left without a remedy."[201]

The Hawai'i Supreme Court stated that the defendants' argument that Factor VIII was not a fungible product like DES was unconvincing because the breaches alleged were lack of screening of donors and failure to warn.[202] Although the Hawai'i Supreme Court did not explain why the alleged breaches rendered the defendant's argument unconvincing, an inference can be drawn from the court's discussion of how to define the market.

In defining the market, the Hawai'i Supreme Court adopted a national market approach, agreeing with the theoretical policy propounded by *Hymowitz* which measured the amount of culpability, and therefore liability, by the amount of risk the defendant exposed to the public.[203] By inference, it is likely that the Hawai'i Supreme Court decided that, by not screening the donors or warning the plaintiff, the

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[196] *Smith*, 72 Haw. at 421, 823 P.2d at 721.
[197] *Id.* at 421-22, 823 P.2d at 721-22.
[198] *Id.* at 419-20, 823 P.2d at 720.
[199] *Id.* at 435, 823 P.2d at 727-28.
[200] *Id.* at 428, 823 P.2d at 724.
[201] *Id.*
[202] *Id.* at 426-27, 823 P.2d at 724.
[203] *Id.* at 436-37, 823 P.2d at 728.

defendant possibly could have exposed the plaintiff to a risk for which the court may hold the defendant culpable.

Whereas in the DES cases the product itself exposed the plaintiffs to a risk, in this case the method by which the defendants distributed the Factor VIII may have exposed the plaintiffs to a risk. Therefore, the possibility remains that the defendants were culpable in the way they administered their product rather than culpable for the distribution of the product itself, as in the DES cases. Under this view, fungibility of the product has little relevance,[204] but universality in failing to screen donors and warn donees becomes paramount.

The Hawai'i Supreme Court adopted the national market approach based not only on the theoretical justification of *Hymowitz*, but also on the practical concerns expressed by the *Hymowitz* court.[205] However, unlike the *Hymowitz* court, the Hawai'i Supreme Court decided to allow a defendant to exculpate itself by proving that the defendant did not market the product when the plaintiff was allegedly exposed.[206]

In apportioning damages, the Hawai'i Supreme Court stated that the plaintiffs "should use due diligence to join all manufacturers, but failure to do so is not a defense."[207] The Hawai'i Supreme Court employed the *Martin* approach in apportioning damages among defendants,[208] which the Hawai'i Supreme Court held was enough incentive for the plaintiffs to join all defendants.[209]

Considering the philosophical and practical implications of the Hawai'i Supreme Court's decision, Hawai'i probably has taken the best path with regard to market share liability. Philosophically, holding a defendant liable for the amount of risk that defendant has exposed to the public best approximates culpability. In a traditional tort situation, if a person creates a risk of harming someone, but no one is actually harmed, the court will not allow a cause of action because no com-

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[204] Fungibility of the product still has relevance because it affects the culpability of the defendant. For instance, assume one distributor of Factor VIII somehow discovers a vaccine that would kill the HIV-virus 90% of the time. Then assume that distributor injects the vaccine only into its blood products. Further assume that donors are not screened, nor donees warned. Presumably, the court will have to take this into consideration in deciding liability because that distributor is less culpable in exposing the plaintiff to the risk of contracting AIDS than the other defendants.

[205] 72 Haw. at 436-37, 823 P.2d at 728.

[206] *Id.* at 438, 823 P.2d at 729. *See supra* note 164 and accompanying text.

[207] *Id.* at 437, 823 P.2d at 729.

[208] *Id.* at 438, 823 P.2d at 729. *See supra* note 162 and accompanying text.

[209] *Id.*

pensation is due to anyone. The fact that the court will not allow a cause of action, however, is not as reflective of the risk creator's culpability, as it is reflective of her luck. If *X* and *Y* both create the same kind and amount of risk and only *X*'s risk harms another person, that does not make *Y* any less culpable, even though *Y* will escape liability. In cases where the plaintiff cannot identify the specific tortfeasor, it is not unreasonable to hold a defendant liable for the amount of risk the defendant created because the amount of risk created best approximates that defendant's culpability.

Admittedly, under this rationale, the *Collins* approach to apportioning liability would consider many, if not all, of the factors needed to truly assess the amount of risk the defendant created. In practice, however, the *Collins* approach is probably not the most accurate approach because all the considerations become blurred, resulting in an almost arbitrary apportionment. In the case of DES, where manufacturers of a fungible product subjected certain members of the public to a risk by distributing the product, each manufacturer's market share best approximates the amount of risk that the manufacturer exposed to those members of the public. Likewise, in the case of Factor VIII, if the defendants subjected the public to a risk by the method of administrating the plasma and the defendants all employed the method that produced the risk, then each defendant's market share reflects the amount of risk created by that defendant.

Furthermore, under the risk contribution rationale, the risk that a defendant exposes to the public is best approximated on a local scale rather than a national market. The California experience, however, has shown that anything smaller than a national market is nearly impossible to determine. The options left then are to reject market share altogether, as the Illinois court did, thus denying plaintiffs any relief, or use a workable market that may somewhat distort the actual risk created by the defendant. The latter option is probably more attractive because the defendant manufacturers are in a better position to bear the cost of the injury than the individual plaintiffs.

The only problem with Hawai'i's *Smith* decision is the Court's acceptance of the *Martin* approach to apportioning damages. Holding defendants liable in equal shares when they cannot prove their share of the market unduly distorts those defendants' contribution of risk. While this method allows more plaintiffs to recover one hundred percent of their damages, it has the potential of burdening a defendant with liability far in excess of the amount of risk created. A better solution is for the fact finder to make the best approximation possible,

erring on the side of the plaintiff, if a defendant made a good faith effort but was unable to determine its market share.

The *Smith* decision impacts not only market share liability but other forms of liability as well. By deciding *Smith* as it did, the Hawai'i Supreme Court has shown a willingness to reform the traditional tort model to accommodate the other forms of liability that plaintiffs have begun to argue in toxic tort cases.

B. Concert of Action

Another theory of liability that plaintiffs have employed in order to avoid identifying an actual tortfeasor out of a group of defendants is concert of action. Concert of action is founded on the criminal law concept of aiding and abetting.[210] Under the Restatement (Second) of Torts,[211] a defendant acts in concert with another when that defendant,

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
> (c) gives substantial assistance to others in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[212]

An express agreement among the parties is not required; an agreement can be implied from the conduct of the actors.[213] Plaintiffs have had sparse success arguing concert of action in toxic tort claims, but they continue to assert this theory of liability.[214]

Drag racing illustrates the concept of concert of action.[215] If three drivers are drag racing and only one of the drivers injures an innocent bystander, all three are held jointly and severally liable.[216] Joint and several liability makes concert of action especially attractive to latent disease victims because it allows one hundred percent recovery even

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[210] *Smith*, 72 Haw. at 431, 823 P.2d 726.

[211] RESTATEMENT (SECOND) OF TORTS § 876 (1977).

[212] *Id.*

[213] 1 MICHAEL DORE, LAW OF TOXIC TORTS § 6.02, at 6-6.1 (1992).

[214] *See* Richard H. Krochock & Stephen O. Plunkett, *Getting Nasty with Manufacturers: Civil Conspiracy Claims*, 57 DEF. COUNS. J. 188 (April 1990).

[215] *See* Abel v. Eli Lilly & Co. 343 N.W.2d 164, 176 (Mich. 1984).

[216] *Id.* at 176.

if one of the tortfeasors becomes insolvent, or all tortfeasors cannot be identified.[217]

Most jurisdictions have refused to apply concert of action to DES cases.[218] However, courts have applied this theory in two cases. In *Bichler v. Eli Lilly and Co.*,[219] the plaintiff brought action against only Eli Lilly and Company, a major manufacturer of DES, even though three other manufacturers could have supplied the drug to the plaintiff's mother.[220] The Court of Appeals of New York affirmed the plaintiff's damage award of $500,000 based on a concert of action in failing to test the DES before marketing.[221] The Court of Appeals of New York only reviewed the sufficiency of the evidence based on the definition read to the jury, without making a ruling on whether the definition was legitimate, and found the evidence sufficient.[222]

The Michigan Supreme Court allowed a plaintiff to survive summary judgement on a concert of action claim in *Abel v. Eli Lilly and Company*.[223] In *Abel*, the plaintiffs brought a negligence action against sixteen manufacturers of DES alleging manufacture and promotion of an ineffective and dangerous drug, inadequate testing, and insufficient warnings.[224] In order to circumvent identification, they claimed the defendants were jointly and severally liable due to concert of action.[225]

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[217] The Hawai'i Supreme Court mentioned in dicta that the defendant who actually caused the injury usually can be identified, but lack of identification does not preclude recovery. *Smith*, 72 Haw at 431, 823 P.2d at 726.

[218] Morton v. Abbott Laboratories, 538 F.Supp. 593 (M.D.Fla. 1982)(applying Florida law); Hymowitz v. Eli Lilly and Co., 539 N.E.2d 1069 (N.Y. 1989); Martin v. Abbott Laboratories, 689 P.2d 368 (Wash. 1984); Collins v. Eli Lilly Co, 342 N.W.2d 37 (Wis. 1984); Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980); Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d 185 (N.J. 1979).

[219] 436 N.E.2d 182 (N.Y. 1982).

[220] *Id.* at 184.

[221] *Id.* at 188-89. The result, however, may be due to defense counsel's failure to preserve an objection for appeal rather than the court's approving of concert of action in the DES context. *See id.* at 187.

[222] *Id.* At trial, the defense failed to preserve objections to jury instructions on the definition of concerted action and thus limited the issues up on appeal. *Id.* The jury was allowed to find concert of action in failing to test the DES on either of two grounds. *Id.* First, "the jury was allowed to infer from evidence of consciously parallel behavior that an implied agreement existed between Lilly and other drug companies to market DES without conducting tests . . . ." *Id.* at 188. Second, "Lilly's failure to test . . . substantially aided or encouraged other DES manufacturers to do the same." *Id.*

[223] 343 N.W.2d 164, *cert. denied* 469 U.S. 833 (1984).

[224] *Id.* at 176.

[225] *Id.* at 167.

The court found the allegations sufficient to withstand summary judgement even though the plaintiff could not identify the specific manufacturers.[226] Interestingly, the court expressed an inclination to accept market share liability, but declined to do so because the plaintiff did not allege market share liability.[227] In the future the court may do away with *Abel* and recognize market share liability claims. *Bichler* may already be outdated with New York's acceptance of market share liability.[228]

All the courts that have adopted some form of market share liability in DES cases have rejected concert of action.[229] The Hawai'i Supreme Court rejected concert of action in *Smith*[230] because the court held that joint and several liability was an excessive burden to place on the defendants.[231] Even though concert of action has met with only minimal success in other toxic tort areas,[232] cases occasionally survive the summary judgment stage.

In *Nicolet, Inc. v. Nutt*,[233] the Delaware Supreme Court allowed the plaintiffs to survive summary judgment in an asbestos case.[234] The plaintiffs alleged that Nicolet and the defendants conspired with other manufacturers to misrepresent and suppress information on the hazards of asbestos.[235] Even though the plaintiffs could not prove that Nicolet

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[226] *Id.* at 176.

[227] The court stated, "while it is not this Court's intention to be unreceptive to developing theories in the everchanging matrix of the law, neither should the Court adopt new theories where no need exists . . . [the plaintiffs] have not urged us to adopt 'enterprise,' 'industry-wide,' or 'market share' liability " *Id.*

[228] *See* Hymowitz v. Eli Lilly and Co., 539 N.E.2d 1069 (N.Y. 1989). Although the New York Court of Appeals did not overrule *Bichler*, it did reject concert of action as a basis of liability. *Id.* For a discussion of *Hymowitz*, see *supra* part V.A.

[229] McCormack v. Abbot Laboratories, 617 F. Supp 1521 (D.Mass. 1985)(applying Massachusetts law); Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989); Martin v. Abbott Laboratories, 689 P.2d 368 (Wash. 1984); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984); Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980).

[230] Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 72 Haw. 416, 431-32, 823 P.2d. 717, 726 (1991).

[231] *Id.*

[232] *See, e.g.*, Gaulding v. Celotex Corp., 748 S.W.2d 627 (Tex. 1988)(asbestos); Sheffield v. Eli Lilly and Co., 192 Cal. Rptr. 870 (Cal. App. Ct. 1983)(polio vaccine).

[233] 525 A.2d 146 (Del. 1987).

[234] *Id.* at 147.

[235] *Id* The exact wording of the allegations were that Nicolet and the other defendants "knowingly and willfully conspired and agreed among themselves" to:

supplied the specific injury-causing asbestos,[236] the court held that if Nicolet was part of a conspiracy, then Nicolet was jointly and severally liable.[237] The court held that in order to find Nicolet liable, it was necessary to show that Nicolet knowingly participated in the conspiracy.[238] The plaintiffs could prove knowing participation by showing that a "knowing concerted action was contemplated or invited, [and that] the defendant adhered to the scheme and participated in it."[239] The court allowed the case to survive summary judgment based on the court's finding that sufficient evidence existed to prove that two trade associations, of which Nicolet was a member, intentionally suppressed information and that Nicolet knew about and participated in the suppression.[240] The Texas Court of Appeals relied upon the

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8. (b) Cause to be positively asserted to plaintiffs in a manner not warranted by the information possessed by said defendants, that which was and is not true, to wit, that it was safe for plaintiffs to work in close proximity to such [asbestos] materials;

(c) Suppress said medical and scientific data and other knowledge, causing plaintiffs to be and remain ignorant thereof.

Id.

[236] *Id.* at 147-48.

[237] *Id.* at 150.

[238] *Id.* at 148.

[239] *Id.*

[240] *Id.* at 148-49. Nicolet was a member of the Quebec Asbestos Mining Association ("QAMA") and the Asbestos Textile Institute ("ATI"). *Id.* at 148. Whether these associations actually conspired to suppress information was disputed. *Id.* The court, however, found the issue was triable because of two pieces of evidence: 1) a letter from M.Q. Scowcroft of Raybestos-Manhattan to Johns-Manville, both of whom were members of ATI's Board of Governors, that said in part, "[w]e feel it expedient to submit a letter prior to June 15th in order to contribute to discouraging a development program on substitutes for asbestos in shipboard insulation," and 2) reports and publications that indicated that the U.S. asbestos industry had been concerned about cancer as early as 1943 and became greatly concerned by the mid-1950's. *Id.* at 148-49.

Nicolet denied belonging to QAMA and knowingly taking part in the conspiracy, if there was one. *Id.* at 148. The court pointed out that, in order to knowingly participate, a tacit agreement was sufficient, as opposed to an express agreement. *Id.* at 148. The court found the issue of a tacit agreement by Nicolet triable because of a response, written in 1969 from the president of Nicolet to a Navy inquiry on asbestos dangers, which stated that the research on the dangers had been inconclusive. *Id.* at 148-49. Also, the publications mentioned above indicated that the industry was greatly concerned about the dangers by the mid-1950's. *Id.*

The court then enumerated the elements that the plaintiffs needed to prove to establish a prima facie case of intentional misrepresentation or fraudulent concealment.

(1) Deliberate concealment by the defendant of material past or present fact, or

Nicolet decision in *Rogers v. R.J. Reynolds Tobacco Co.*,[241] to allow a concert of action case to survive summary judgment.

In *Rogers*, the Texas appellate court found enough evidence to establish that the defendant tobacco companies, known as the Big-6,[242] through their trade associations, conspired to suppress scientific and medical information relating smoking to a resulting disease.[243] The plaintiff brought action against the Big-6 and the two trade associations based on negligence, fraud, and misrepresentation claiming that his wife's death due to lung cancer was caused by cigarette smoking and the conspiracy to suppress information.[244] The plaintiff's wife exclusively smoked cigarettes manufactured by The American Tobacco

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silence in the fact of a duty to speak;
(2) That the defendant acted with scienter;
(3) An intent to induce plaintiff's reliance upon the concealment;
(4) Causation; and
(5) Damages resulting from the concealment.

Id. at 149.

For conspiracy or concert of action, the plaintiffs needed to prove:
(1) A confederation or combination of two or more persons;
(2) An unlawful act done in furtherance of the conspiracy; and
(3) Actual damage.

Id. at 149-50.

[241] 761 S.W.2d 788 (Tex. 1988).

[242] R.J. Reynolds Tobacco Co., Philip Morris, Inc., Grown & \ .amson Tobacco Corp., Lorillard, Inc., Liggett & Myers Tobacco, Inc., Liggett Group, Inc., and The American Tobacco Co. *Id.*

[243] 761 S.W.2d at 798. In 1954 or 1955, five of the Big-6 formed The Tobacco Industry Research Committee, now known as The Council for Tobacco Research - U.S.A., Inc. ("CTR"), for the purpose of aiding research on the relationship between tobacco use and health and to publish information on this subject. *Id.* at 791-92. In 1958, the Big-6 formed The Tobacco Institute, Inc. ("TI"), for the purpose of collecting and disseminating scientific and medical material as well other information relating to the tobacco use and health. *Id.* at 792. The sixth manufacturer, Liggett & Myers, completed the Big-6 when it joined the group in 1964. *Id.* at 791.

[244] *Id.* at 789-90. The plaintiff's wife, Marjorie Rogers, was born in 1925, began smoking at nine or ten years of age, smoked regularly by age 16, and smoked one to one and a half packs a day from the early 1950's until 1982. *Id.* at 790. She told her husband that she began smoking because she saw adults doing it. *Id.* at 791. In November 1982, she was diagnosed as having lung cancer and quit smoking. *Id.* at 790. She died of lung cancer in 1983. *Id.*

The plaintiff claimed that neither he nor his wife was aware that the chance of dying from smoking was 25% or possibly higher, and that had they known this fact Marjorie would have quit smoking. *Id.*

Company, but the trial court severed that company as a party leaving only five of the six companies as parties on appeal.[245]

The court first held that negligence was sufficient to find a conspiracy.[246] The court then cited *Nicolet* for the proposition that because civil conspiracy involves joint liability, the defendant's product need not have caused the actual harm for the court to hold the defendant liable.[247] The court went on to say that the causal relationship between smoking and lung cancer, at the time of trial, was "reasonably established, by generally accepted scientific research and medical opinion."[248] Whether the defendants knew or should have known of the dangers was a triable question of material fact with respect to the negligence claim because the plaintiff had some evidence supporting this claim.[249] In addition, evidence of suppression of research projects and grants gave rise to a triable issue on the concert of action, or civil conspiracy, claim.[250]

Rogers and *Nicolet* illustrate that, given the proper fact situation, plaintiffs can employ concert of action to avoid exact identification of a defendant. While the Hawai'i Supreme Court was reluctant to attach joint and several liability in *Smith*, that was probably because the manufacturers did not agree to not test the blood. If Hawai'i is faced with a fact scenario similar to *Rogers* and *Nicolet*, the court should proceed to hold the defendants jointly and severally liable for conspiracy even under a negligence claim. If the tort law holds one party liable for acting in a negligent manner, the law should also hold equally liable a party who knowingly participates in the action. The same amount of culpability should attach because each encourages the other's behavior, with no reason to distinguish the two.

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[245] *Id.* at 789. The Court of Appeals does not explain why the trial court dismissed The American Tobacco Company as a party.

[246] *Id.* at 796. The defendant tobacco companies claimed that the action agreed upon must rise to the level of an intentional tort. *Id.* The court, however, stated that the defendant with the others just needed to proceed in a tortious manner. *Id.* In other words, "that the defendant had the intention of committing a tort or merely proceeding in a negligent manner." *Id.* Therefore, in order for joint liability to attach, the "conspirators must engage in a course of conduct that results in injury and that the course of conduct must be known to them." *Id.* at 797.

[247] *Id.* at 797.

[248] *Id.* at 798.

[249] *Id.* The evidence included two confidential reports dated 1954 and 1958, where a doctor stated he was aware of attacks made for decades against the use of tobacco and that he wanted to do research to refute the attacks. *Id.*

[250] *Id.* The court does not explain what this evidence was.

C. Alternative Liability

Under alternative liability, when two or more defendants act tortiously toward a plaintiff and only one of the defendants actually causes harm, but the plaintiff cannot identify which defendant caused that harm, all defendants are held jointly and severally liable.[251] On its face, this theory seems helpful in toxic torts because, unlike concert of action, it does not require an agreement among the defendants. Courts are, nonetheless, reluctant to apply this theory to toxic tort products liability because plaintiffs must join all possible tortfeasors in court, and plaintiffs have had trouble proving that they joined all the possible tortfeasors.[252]

Alternative liability is founded on the classic case of *Summers v. Tice*.[253] In *Summers*, two defendant hunters simultaneously shot in the direction of the plaintiff, who was hit by one of the bullets.[254] The court found that both hunters acted negligently.[255] Therefore, the court shifted the burden onto the defendants to absolve themselves.[256] The defendants, after all, were in a better position to determine which one actually caused the injury.[257] Furthermore, the court noted the unfairness of denying the plaintiff redress because he could not identify the exact tortfeasor.[258] For these reasons, the court held the defendants jointly and severally liable.[259]

Many jurisdictions do not accept alternative liability in toxic tort causes of action[260] and mostly reject this theory on the ground that not all possible defendants were joined.[261] The Hawai'i Supreme Court rejected this theory in the *Smith* case on three grounds.[262] First, the

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[251] *See* Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 72 Haw. 416, 429-30, 823 P.2d 717, 725 (1991).

[252] *See id.* at 430-31, 823 P.2d at 725.

[253] 199 P.2d 1 (Cal. 1948).

[254] *Id.* at 2.

[255] *Id.* at 4.

[256] *Id.*

[257] *Id.*

[258] *Id.* at 3-4.

[259] *Id.* at 5.

[260] *See, e.g.*, Marshall v. Celotex, 652 F. Supp. 1581 (E.D.Mich. 1987)(asbestos); Sheffield v. Eli Lilly & Co., 192 Cal. Rptr. 870 (Cal. App. Ct. 1983) (Salk polio vaccine); Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980)(DES).

[261] *Id.*

[262] Smith v. Cutter Biological, Inc., a Div. of Miles Inc., 72 Haw. 416, 823 P.2d 717 (1991). *See supra* part V.A. and accompanying notes.

court understood the theory to mean that the defendants had to act simultaneously, which was not the case.[263] Second, the plaintiff did not join all possible defendants.[264] Finally, the court did not wish to modify the theory because market share liability was a better solution.[265] In contrast, in *Poole v. Alpha Therapeutic Corp*,[266] an Illinois district court did apply alternative liability in a Factor VIII case. The difference between *Smith* and *Poole* was that, in *Poole*, the plaintiff joined all defendants, and the Illinois district court held that simultaneous action was not required.[267] The district court also may have used concert of action because the Illinois Supreme Court had not accepted market share liability. Consequently, without concert of action the plaintiffs were without remedy.[268]

Requiring simultaneous action does not make sense, given the rationale behind holding all defendants liable. Joint liability shifts the burden onto defendants to absolve themselves because the courts are reluctant to leave an innocent plaintiff without redress where she cannot identify the cause of the actual harm. In cases dealing with nonsimultaneous actions where causation is as difficult to prove as a simultaneous action case, the court should shift the burden through joint liability. This assumes, of course, that all defendants are joined and they all acted tortiously toward the plaintiff.

D. Enterprise Liability

The premise of enterprise liability is that when an enterprise or activity causes a loss to society, then the entire enterprise is held responsible.[269] When all members of an industry jointly control a risk that the industry exposes to the public, then all members face joint liability for wrongful harm caused by that risk.[270] Plaintiffs, however,

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[263] *Smith*, 72 Haw. at 430, 823 P.2d at 725.

[264] *Id.* at 430-31, 823 P.2d at 725.

[265] *See id.* at 431, 823 P.2d at 725.

[266] 696 F. Supp. 351 (N.D. Ill. 1988)(applying Illinois law).

[267] *Id.* at 354-56.

[268] In fact, the Illinois Supreme Court expressly rejected any form of market share liability two years later. *See* Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990) and part A of this section.

[269] Martin v. Abbott Laboratories, 689 P.2d 368, 379 (Wash. 1984) (citing Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 158 (1976)).

[270] *See* Smith v. Cutter Biological Inc, a Div. of Miles Inc., 72 Haw. 416, 432, 823 P.2d 717, 726 (1991).

have minimal success arguing enterprise liability because industry wide control of risks to the public is rare.[271]

A New York district court, in *Hall v. E.I. Du Pont De Nemours & Co., Inc.*,[272] applied enterprise liability.[273] *Hall* involved blasting caps that injured twelve children in unrelated incidents.[274] The six named defendants comprised virtually the whole industry in the United States.[275] Some Canadian companies could have supplied the caps, but they were not named.[276] The complaint alleged failure to warn of the dangers by not placing labels on the caps and failing to take other safety measures.[277] No named defendant was identified as causing a particular injury.[278] The court held that enough evidence existed to find that the members of the industry jointly controlled the risk; therefore, the court denied the defendants' motion for summary judgment.[279] The plaintiffs alleged that the defendants, acting independently, adhered to an industry-wide standard, delegated some duties of safety investigation and design to a trade association, and cooperated in manufacturing the caps.[280] The court held that if the plaintiffs could prove that the defendants held joint control of the risk and that one of the defendants was responsible for the injuries, then the burden of proof regarding causation would shift to the defendants.[281] If the defendants could not meet this burden, they were jointly liable.[282] Joint liability was one of the main reasons why the Hawai'i Supreme Court rejected the enterprise liability theory in the *Smith* case.[283]

Because Hawai'i has adopted market share liability, the enterprise liability theory is not very attractive. While enterprise liability allows for one hundred percent recovery for plaintiffs, joint liability unduly burdens defendants. Furthermore, plaintiffs would have a difficult time proving that one of the defendants caused the actual injury. Concert

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[271] Dore, *supra* note 11, § 6.05 at 6-15.
[272] 345 F.Supp. 353 (E.D.N.Y. 1972).
[273] *Id.*
[274] *Id.* at 359.
[275] *Id.* at 358.
[276] *Id.*
[277] *Id.* at 359.
[278] *Id.*
[279] *Id.* at 378.
[280] *Id.* at 359.
[281] *Id.* at 379-80.
[282] *Id.* at 378.
[283] *Smith*, 72 Haw. at 434, 823 P.2d. at 727.

of action is possibly an easier theory to argue because all that is required is a tacit understanding, without a need to prove a nexus between the injury and a specific defendant.

VI. Conclusion

The Hawai'i Supreme Court has shown an inclination to provide innocent plaintiffs with remedies that defy the traditional tort model with regard to liability theories. Given the broad language espoused in the *Smith* decision, it is hard to imagine that the Hawai'i Supreme Court will preclude plaintiffs from bringing a later, second claim in toxic tort cases. The court has taken a step in the right direction by considering new theories, and toxic tort victims should argue new theories before this court.

Toby M. Tonaki

United States v. Humberto Alvarez-Machain: Government-sponsored international kidnapping as an alternative to extradition?

I. Introduction

In *United States v. Humberto Alvarez-Machain*,[1] the United States Supreme Court ruled that the government-sponsored abduction of a Mexican national for trial in this country does not divest the court of jurisdiction over the defendant. The Court acknowledged that the abduction may be "shocking" or "in violation of principles of general international law,"[2] but it did not exercise its supervisory power to administer and give effect to international law.[3] Instead, the Court narrowly focused its attention on the Extradition Treaty between the United States and Mexico (Extradition Treaty).[4] Concluding that the Extradition Treaty is silent on the abduction issue, the Court refused to construe it as containing an implicit provision prohibiting abduction.[5] Accordingly, the Supreme Court ruled that the abduction did not violate the Extradition Treaty.[6] In the absence of a treaty violation,

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[1] 112 S. Ct. 2188 (1992).

[2] *Id.* at 2196.

[3] The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction[.]").

[4] Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Extradition Treaty]. *See infra* Part III.A for a more detailed discussion of extradition treaties in general.

[5] *Alvarez-Machain*, 112 S. Ct. at 2195-96.

[6] *Id.* at 2197.

the Court applied the *Ker-Frisbie* doctrine,[7] which stands for the proposition that a court's power to try a person for crime is not impaired by the illegality of the method used to procure the person.[8] Upon remand, Humberto Alvarez-Machain, the victim of the government's illegal act of international kidnapping, was tried in this country.[9]

This note examines the Supreme Court's decision in *Alvarez-Machain*. Following this introduction, Part II provides the facts of this case. Part III gives an overview of the three sources of legal authorities governing this case: (1) the United States-Mexico Extradition Treaty, (2) the development of the *Ker-Frisbie* doctrine in U.S. domestic law, and (3) the doctrine of territorial sovereignty in customary international law. Part IV analyzes the Supreme Court's rationale in applying the *Ker-Frisbie* doctrine to sanction official kidnapping as an acceptable alternative to extradition and the Court's conclusion that the Extradition Treaty does not prohibit abduction. Part V is a commentary on the Court's analysis, centering on the Court's disregard of the customary international legal principle of territorial integrity, and the reasons why violations of customary international law in general have surprisingly little domestic legal repercussions. Finally, Part VI discusses the possible impact of the Court's decision on present treaty partners, future treaty negotiations, and other undesirable effects of sanctioned official unlawfulness.

II. Facts

In February, 1985, Special Agent Enrique Camarena-Salazar (Camarena) of the United States Drug Enforcement Administration (DEA)

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[7] This doctrine derives its name from the following two cases, *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952). This is also known as the maxim of *mala captus, bene detentus* ("wrongfully taken, rightfully held"). Under this doctrine the courts will assert in personam jurisdiction without inquiring into the means by which a defendant was brought before the court. *See* 1 M. Cherif Bassiouni, International Extradition: United States Law and Practice 194 (2d rev. ed. 1987). The validity of this doctrine is questionable because this practice implicates three categories of violations: violations of sovereign territorial integrity and the legal process of the state where such an act occurred, violations of human rights of the individual involved, and violations of the international legal process. *Id.* at 214. For further discussion of the *Ker-Frisbie* doctrine, see *infra* Part III.B.1.

[8] *Alvarez-Machain*, 112 S. Ct. at 2197.

[9] This case was finally dismissed for lack of evidence on December 14, 1992 by District Judge Edward Rafeedie, the same judge who previously wrote the district court's opinion ordering the return of Alvarez to Mexico in 1990. *U.S. Judge Frees Kidnapped Mexican Doctor in Drug Agent Murder*, Reuter Library Report, Dec. 14, 1992, *available in* LEXIS, Nexis Library, NEWS File.

was kidnapped, tortured, and murdered in Mexico.[10] One month later, Agent Camarena's mutilated body was found about sixty miles outside of Guadalajara along with the body of Alfredo Zavala-Avelar, a Mexican pilot who worked closely with Camarena in locating marijuana plantations.[11] Doctor Humberto Alvarez-Machain (Alvarez) is a medical doctor accused of having participated in the torture and murder of Camarena.[12] The doctor allegedly injected Camarena with lidocaine[13] which kept his heart going to prolong his life so that others could continue interrogating and torturing him.[14]

Alvarez is a citizen and resident of Mexico. Prior to his abduction, DEA officials had attempted to bring Alvarez to the United States through a series of unsuccessful informal negotiations with representatives of the Mexican government held between 1989 and 1990.[15] Initially the DEA offered a reward of $50,000 plus expenses. Respond-

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[10] United States v. Caro-Quintero, 745 F. Supp. 599, 601-602 (C.D. Cal. 1990); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343 (9th Cir. 1991). Caro-Quintero and Verdugo-Urquidez were co-conspirators of Alvarez-Machain in this case. In the case of *Alvarez-Machain*, the Court of Appeals for the Ninth Circuit affirmed the district court's order to repatriate Alvarez-Machain based on its prior legal rulings announced in *Verdugo-Urquidez*.

[11] *Caro-Quintero*, 745 F. Supp. at 602.

[12] *Id.* at 601.

[13] *Long Arm of the Law: A Decision to Uphold an International Kidnapping Alarms Latin America*, TIME, June 26, 1992, at 30.

[14] *Caro-Quintero*, 745 F. Supp. at 602. Twenty-two persons have been charged with crimes in connection with the Camarena and Zavala torture/murder. By August 1990, seven of the twenty-two indicted persons have been brought to the United States to stand trial on these offenses. Of the seven, three have been brought before this court by means of covert forcible abduction from their homeland. Besides Alvarez, the other kidnapping victims were Matta-Ballesteros, *see* Matta-Ballesteros *ex rel.* Stolar v. Henman, 896 F.2d 255 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 209 (1990), and Verdugo-Urquidez, *see Verdugo-Urquidez*, 939 F.2d 1341. High-level Mexican officials, including former Minister of the Interior Manuel Bartlett, former Attorney General Enrique Alvarez del Castillo, and former Minister of Defense Juan Arevalo Gardoqui, participated directly in the conspiracy to murder Agent Camarena. Jorge Castaneda, *Drug Trial Was Not Its Finest Hour*, L.A. TIMES, Dec. 27, 1992, at M5.

Alvarez was charged in a sixth superseding indictment with conspiracy to commit violent acts in furtherance of racketeering activity in violation of 18 U.S.C. §§ 371, 1959; committing violent acts in furtherance of racketeering activity in violation of 18 U.S.C. § 1959(a)(2); conspiracy to kidnap a federal agent in violation of 18 U.S.C. §§ 1201(a)(5), 1201(c); kidnap of a federal agent in violation of 18 U.S.C. § 1201(a)(5); and felony murder of a federal agent in violation of 18 U.S.C. §§ 1111(a), 1114. *Alvarez-Machain*, 112 S. Ct. at 2190 n.1.

[15] *Caro-Quintero*, 745 F. Supp. at 602

ing in part to this offer, Jorje Castillo Del Rey, a commandante in the Mexican Federal Judicial Police, approached DEA Special Agent Hector Bellerez through the DEA informant Antonio Garate-Bustamante. Del Rey proposed a possible exchange of a Mexican national implicated in Camarena's murder for a Mexican fugitive living in the United States. The arrangement, however, fell apart by the end of January, 1990.[16]

On the evening of April 2, 1990, five or six armed men apprehended Alvarez in his office in Guadalajara.[17] He was flown by a private plane to El Paso, Texas, where he was arrested by DEA agents.[18]

After Alvarez's abduction, the Mexican government made a series of prompt and unambiguous protests. On April 18, 1990, sixteen days after the abduction, the Mexican Embassy presented a diplomatic note to the United States Department of State requesting a detailed report regarding "possible U.S. participation in the abduction of Dr. Machain."[19] On May 16, 1990, the Mexican Embassy presented a second diplomatic note to the Department of State. The Mexican government considered the abduction to have been done with the knowledge of the U.S. government and demanded the return of Alvarez.[20] On July 19, 1990, the Embassy of Mexico sent a third diplomatic note.[21] The Mexican government continued to protest throughout the trial pro-

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[16] The first meeting between the two sides resulted in an agreement whereby Alvarez would be delivered to the United States in exchange for Isaac Naredo Moreno, who was wanted by the Attorney General of Mexico in connection with the theft of a large sums of money from politicians in Mexico. *Id.* The Mexican officials suggested that this arrangement be carried out "under the table" and requested $50,000 in advance to cover the expenses of transporting Alvarez to the United States. *Id* The agents indicated that the DEA would not front any money for the operation. This was the apparent undoing of the agreement. *Id.* Castillo requested a second meeting on January 25, 1990, but Special Agent Berrellez canceled the meeting fearing that the meeting was a "set-up." *Id.* at 602-03. No further meetings occurred between the DEA and the Mexican government concerning exchange arrangements. *Id.* at 603.

[17] *Id.* at 603.

[18] *Id.* at 610. Agent Berrellez and Mr. Garate were waiting on the runway when the plane containing Alvarez arrived. Only Alvarez exited the plane. As he exited, one of the men in the plane reportedly said, "We are Mexican police, here is your fugitive."

[19] *Id.* at 604.

[20] *Id.*

[21] *Id.* This time the Mexican government was seeking the arrest and extradition of Garate-Bustamante and Berrellez to stand trial in Mexico for crimes related to Alvarez's abduction.

ceedings. While the case was on appeal to the United States Court of Appeals for the Ninth Circuit, the Mexican Counsel General in Los Angeles submitted a letter to the circuit judges maintaining, *inter alia*, that the Extradition Treaty was applicable to Alvarez' abduction and that Alvarez could rely on the Treaty violation to oppose the jurisdiction asserted over him by the United States.[22] During the appeal to the United States Supreme Court, the Mexican government filed an *amicus* brief to the Supreme Court in support of Alvarez.[23]

Both the trial court and the appellate court ruled that Alvarez should be dismissed and repatriated to Mexico. At the trial in the District Court for the Central District of California, Alvarez moved to dismiss the indictment, claiming, among other things, that "his abduction constituted outrageous government conduct, and that the District Court lacked jurisdiction to try him because he was abducted in violation of the extradition treaty between the United States and Mexico."[24] After conducting a careful investigation of the facts, District Judge Rafeedie concluded that the DEA was responsible for the abduction.[25] Although the judge rejected the outrageous governmental conduct claim, he ruled that the abduction constituted a treaty violation which divested the court of jurisdiction.[26] Accordingly, Judge Rafeedie ordered that Alvarez be repatriated to Mexico.[27]

The Ninth Circuit affirmed the district court's decision and reasoned that, since there was a violation of the Extradition Treaty, the case should be dismissed and Alvarez be repatriated to Mexico.[28]

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[22] Letter from Jose Angel Pescador Osuna, Consulada General of Mexico, to the Honorable Justices of the Ninth Circuit Court of Appeals, *reprinted in* Joint Appendix at 68-69, *Alvarez-Machain* (No. 91-712) [hereinafter *Joint Appendix*].

[23] Amicus Curiae Brief for Alvarez-Machain filed by the United Mexican States. *Alvarez-Machain* (No. 91-712). The Mexican government took the position that:

> (1) At no time during the negotiation of the extradition did the United States state or suggest that the United States reserved to itself the right to secure the presence of Mexican nationals for trial in the United States "outside the extradition context," and there exists no such reservation to the treaty; [and]
>
> (2) absent consent by Mexico, the Extradition Treaty provides the sole means by which the United States may secure an offender from Mexico.

[24] *Caro-Quintero*, 745 F. Supp. at 614.

[25] *Id.* at 606. Agent Berellez testified that the final terms of the abduction and the abduction itself had been approved by the DEA in Washington, D.C., and he believed that the United States Attorney General's Office had also been consulted.

[26] United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).

[27] *Caro-Quintero*, at 614.

[28] *Alvarez-Machain*, 946 F. 2d at 1476. In reaching this decision, the Ninth Circuit

The United States Supreme Court granted certiorari,[29] and upon reviewing this case, the Court held that nothing in the Extradition Treaty stated that extradition was the exclusive means of procuring a suspect from Mexico.[30] Therefore, Alvarez's abduction did not violate the Extradition Treaty and the decision of the court of appeals was reversed.[31]

III. History

Three sources of law govern the issue of whether the abduction of a Mexican national by U.S. agents defeats jurisdiction of a U.S. court over the abducted victim: United States-Mexico Extradition Treaty, United States domestic law, and customary international law. This section gives a brief description of each of these sources and its interaction, if any, with the other two.

A. United States-Mexico Extradition Treaty

Extradition is a cooperative criminal process between states whereby a treaty partner surrenders to the requesting partner an individual physically present in its territory who has been accused or convicted of an offense.[32] Although some states have granted the extradition of a fugitive even in the absence of a treaty, the modern trend is to disallow extradition without a treaty.[33] The United States, for example, does not grant extradition without a treaty.[34] For this and other reasons, the United States has traditionally attached great importance

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relied on its earlier decision in *Verdugo-Urquidez*, 939 F.2d 1341. The defendant in *Verdugo-Urquidez*, Rene Martin Verdugo-Urquidez, was also indicted for the murder of agent Camarena. *See also supra* note 14. The Ninth Circuit held that the ruling of repatriation in *Verdugo* applied *a fortiori* to the facts of this case because of the clear U.S. involvement in abducting Alvarez and the repeated protests of the Mexican government. *Alvarez-Machain*, 946 F. 2d at 1476.

[29] The writ of certiorari was granted on January 10, 1992. 112 S. Ct. 857 (1992).

[30] *Alvarez-Machain*, 112 S. Ct. at 2194.

[31] *Id.* at 2197.

[32] *Id.* at 2194; *see also* Tavarez v. U.S. Attorney General, 668 F.2d 805 (5th Cir. 1982); Barry E. Carter & Phillip R. Trimble, International Law 787 (1991).

[33] Carter & Trimble, *supra* note 32, at 787.

[34] Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (holding that extradition from the United States to a foreign country may be accomplished only during existence of a treaty of extradition); *see also* Valentine v. U.S. *ex rel.* Neidecker, 299 U.S. 5, 9 (1936) (holding that there is no executive discretion to surrender a person to a foreign government unless that discretion is given by law or treaty).

to the improvement of bilateral and multilateral law enforcement cooperation with other countries[35] and has entered into more than one hundred extradition treaties.[36] For many countries, these agreements reflect the commitment of the United States to use cooperative measures rather than unilateral actions in pursuing United States law enforcement objectives.[37]

Extradition treaties may be bilateral or multilateral. Bilateral treaties, in which two states customize the terms to suit their particular situations, constitute the majority of international extradition agreements.[38] Regional conventions made by several states with close geographical and historical connections are examples of multilateral arrangements.[39]

Although there is no general, universal extradition treaty providing a uniform system open for accession by any state,[40] the basic framework in extradition procedure is nearly universal.[41] A typical extradition treaty specifies in great detail the steps each nation must take in order to compel the other side to fulfill its obligation of extraditing a suspect to the requesting nation.[42] A treaty usually lists the crimes for which an individual may or may not be extradited, the evidence that is required to obtain extradition, and the method of presenting such evidence.[43]

Mexico and the United States, as neighboring states, have cooperated in law enforcement since 1862, concluding three extradition treaties and several mutual assistance agreements.[44] The current ex-

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[35] *The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) (statement of Abraham D. Sofaer, Former Legal Advisor, U.S. Dept. of State), *reprinted in* Addendum to Brief for Appellee at 6, 19, *Alvarez-Machain*, 946 F.2d 1466 (No. 90-50459) [hereinafter *Sofaer Hearing Statement*].

[36] John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1454 (1988); Historical and Revision Notes of 18 U.S.C.A. § 3181 (West 1985).

[37] *Sofaer Hearing Statement*, *supra* note 35, at 21.

[38] GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 20 (1991).

[39] *Id.*

[40] *Id.*

[41] CARTER & TRIMBLE, *supra* note 32, at 790 ("[A]lmost every country requires a judicial determination on requisitions. And almost every country allows its executive some discretion in the final determinations of extradition request.").

[42] *Verdugo-Urquidez*, 939 F.2d at 1349.

[43] *Id.*

[44] Amicus Curiae Brief for Alvarez-Machain filed by Allard K. Lowenstein Inter-

tradition treaty, United States-Mexico Extradition Treaty, entered into force on January 25, 1980.[45] The treaty's object and purpose, as stated in the Preamble, are to "cooperate more closely in the fight against crime, and to this end, to mutually render better assistance in matters of extradition."[46] The current treaty includes some new features not present in the old treaties. For instance, new offenses relating to narcotics and aircraft hijacking were added to the Extradition Treaty.[47] Furthermore, because Mexican law does not allow extradition of Mexican nationals,[48] the United States and Mexico also adopted a new Article 9 which provides that the requested state may in its discretion either surrender the suspect, or submit the case to its own authorities for prosecution.[49]

A treaty is recognized by the United States Constitution as the supreme law of the land.[50] The framers of the Constitution honored international obligations and placed treaties in the same category as other laws enacted by Congress.[51] Because of their equal legal status, when an irreconcilable conflict between a federal statute and a treaty arises, the one enacted later governs.[52]

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national Human Rights Clinic and the Center for Constitutional Rights, *Alvarez-Machain*, 112 S. Ct. 2188 (No. 91-712). The extradition treaties were: Treaty of Extradition, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 (entered into force January 25, 1980); Treaty for the Extradition of Criminals, U.S.-Mex., 12 Stat. 1199 (entered into force May 20, 1862; terminated January 24, 1899); Treaty of Extradition, U.S.-Mex., 31 Stat. 1818 (entered into force April 22, 1899; terminated 1980); Supplementary Extradition Convention, 44 Stat. 2409 (entered into force July 11, 1926); Supplementary Extradition Convention, U.S.-Mex., 55 Stat. 1133 (entered into force April 14, 1941).

Subsequent to the current Extradition Treaty, the United States and Mexico have further concluded a Treaty of Cooperation for Mutual Legal Assistance, U.S.-Mex., 27 I.L.M. 443 (entered into force May 8, 1991); and an Agreement on Cooperation in Combating Narcotics Trafficking and Drug Dependency, U.S.-Mex., 29 I.L.M. 58 (entered into force July 30, 1990).

[45] Extradition Treaty, *supra* note 4.

[46] *Id.* Extradition Treaty pmbl.

[47] *Id.* President's Message to Senate for Advice and Ratification of United States-Mexico Extradition Treaty.

[48] *Id.* ("[T]his article thus takes into account the law of Mexico prohibiting the extradition of its nationals but allowing for their prosecution in Mexico for offenses committed abroad.").

[49] *Id.*

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

[51] *See* Head Money Cases, 112 U.S. 580, 598 (1884).

[52] *See, e.g.*, United States v. Palestine Liberation Organization, 695 F. Supp. 1456

B. *United States Domestic Law*

Another source of law which governs the relationship between jurisdiction and abduction is the *Ker-Frisbie* doctrine. Unless the abduction process involves a treaty violation or egregious governmental conduct, the *Ker-Frisbie* doctrine mandates that a court's jurisdiction will not be defeated simply because the suspect was brought into court through illegal means.

1. Ker-Frisbie *Doctrine*

The *Ker-Frisbie* doctrine refers to a rule developed in the two Supreme Court decisions of *Ker v. Illinois*[53] and *Frisbie v. Collins*.[54] This doctrine stands for the proposition that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"[55]

In *Ker v. Illinois*, Ker was a United States citizen wanted for trial in Illinois on larceny charges.[56] After Ker fled to Peru, the President of the United States sent a messenger to retrieve him in Peru according to the terms of the extradition treaty between the United States and Peru.[57] When the agent arrived in Peru, the armed forces of Chile, then at war with Peru, were in control of Lima.[58] Unable to present extradition papers to the Peruvian authorities as he was instructed, the messenger instead kidnapped Ker and placed him on a ship bound for the United States. During trial, Ker claimed that his abduction violated both his due process right and the extradition treaty.[59] The Supreme Court rejected both claims. The Court ruled that due process of law is complied with when the party is regularly indicted and is

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(S.D.N.Y. 1988) (reconciling the Anti-Terrorism Act with the US-UN Headquarter Agreement); The Chinese Exclusion Case, 130 U.S. 581 (1889) (concluding treaty made between the United States and any foreign power is subject to such acts as Congress may pass for its enforcement, modification, or appeal); Whitney v. Robertson, 124 U.S. 190 (1888) (placing a treaty and a statute on the same footing, but holding that when the two are inconsistent, the one later in date controls).

[53] 119 U.S. 436 (1886).

[54] 342 U.S. 519 (1952).

[55] *Id.* at 522.

[56] *Ker*, 119 U.S. at 437-38.

[57] *Id.* at 438.

[58] Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 685 (1953).

[59] *Ker*, 119 U.S. at 439.

given a fair trial according to the form and modes prescribed in such trials.[60] Furthermore, the Court decided that there was no violation of the treaty because the agent who kidnapped Ker never invoked the treaty.[61] It was a "clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty from the government of the United States."[62] The Court held that Ker might be tried by Illinois regardless of the manner by which he was brought into custody.[63]

Sixty-six years later in *Frisbie v. Collins*, the Supreme Court confirmed the rule regarding forcible abduction it had set out in *Ker* in a domestic context. In *Frisbie*, a *habeas* petitioner asserted that the Michigan trial court which had convicted him of murder lacked jurisdiction because Michigan authorities had kidnapped him from Illinois.[64] The petitioner based his claim on the due process clause of the Fourteenth Amendment and the Federal Kidnapping Act.[65] In its ruling, the Court stated that it had "never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"[66] The Court further declared that, even assuming a violation of the Federal Kidnapping Act, it still could not read into the Act "a sanction barring a state from prosecuting persons wrongfully brought to it by its officers."[67]

The *Ker-Frisbie* doctrine has since been applied in numerous cases to preclude a suspect from claiming immunity from prosecution because he was brought into court by an unlawful arrest.[68] The courts have generally held that the exclusionary rule,[69] which bars evidence

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[60] *Id.* at 440.

[61] *Id.* at 443.

[62] *Id.*

[63] *Id.* at 440.

[64] *Frisbie*, 342 U.S. at 519-20, 521 n.5.

[65] *Id.* at 520.

[66] *Id.* at 522.

[67] *Id.* at 523.

[68] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) ("The ['body['] or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest."); United States v. Crews, 445 U.S. 463, 474 (1979) ("[A]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."); Stone v. Powell, 428 U.S. 465, 485 (1976) ("[J]udicial proceedings need not abate when the defendant's person is unconstitutionally seized.").

[69] *E.g.*, Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S.

illegally obtained, does not stop prosecution altogether.[70] In other words, even though evidence illegally obtained will be suppressed to deter official unlawfulness, this rule does not extend to include the physical body of the accused. An accused is not himself the "suppressible fruit" of official unlawfulness and the illegality of his detention does not deprive the government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the official misconduct.[71] To bar prosecution altogether was believed to "increase to an intolerable degree interference with the public interest in having the guilty brought to book."[72]

Despite the wide application of the *Ker-Frisbie* doctrine, the Second Circuit has carved out an exception based on the due process concept when shocking, outrageous, or egregious governmental conduct is involved.[73] In *United States v. Toscanino*, the Second Circuit determined that a district court would be barred from assuming jurisdiction if extreme torture, brutality, and kidnapping were used in bringing an accused into the court's jurisdiction.[74] In subsequent cases, however, the Second Circuit specified that the government conduct must reach the level proscribed by *Toscanino* before a court would apply this exception.[75]

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643 (1961); Terry v. Ohio, 392 U.S. 1 (1968). These cases use the exclusionary rule to delimit the proof the government may offer against the defendant at trial; information obtained through official brutality will not be introduced into evidence.

[70] United States v. Blue, 384 U.S. 251, 255 (1966).

[71] *Crews*, 445 U.S. at 474.

[72] *Blue*, 384 U.S. at 255.

[73] United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974). The exception is known as the *Toscanino* exception. In that case the suspect Toscanino was brought from Uruguay to New York to face charges related to importing narcotics into the United States. During the seventeen-day journey to the United States he was incessantly tortured and interrogated. He was denied sleep for days at a time and nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. *Id.*

[74] *Toscanino*, 500 F.2d at 275 ("[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.").

[75] The Second Circuit limited the *Toscanino* exception to situations involving outrageous government conduct in the subsequent case of United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2nd Cir. 1975). In *Lujan* the Second Circuit specified that not every violation during the process of transporting an accused can bar prosecution; the government conduct involved must reach the *Toscanino* level in order to bar prosecution. *Id.* at 66.

2. Cases involving treaty violations

Treaty violations provide another exception to the *Ker-Frisbie* doctrine. Neither *Ker* nor *Frisbie* involved treaty violations. In *Ker*, there was no official act of the United States which might violate the extradition treaty with Peru. Since no treaty violation occurred, the Court declined to bar prosecution on the defendant's due process claim alone because the requirement of due process of law was deemed satisfied when one present in court had been given a fair trial according to constitutional procedural safeguards.[76]

The Court's decisions regarding the exercise of jurisdiction reach different results when a case implicates a treaty with a foreign sovereignty.[77] Three cases—*United States v. Rauscher*,[78] *Ford v. United States*,[79] *Cook v. United States*[80]—demonstrate the Supreme Court's position when the jurisdiction issue arises in the context of an international treaty.

The opinion for *United States v. Rauscher* was issued on the same day as *Ker* and both opinions were written by Justice Miller. In *Rauscher*, the United States obtained custody of a sailor, William Rauscher, on the charge of the murder of another crew member through an extradition treaty between the United States and the United Kingdom.[81] Rauscher, however, was tried not for murder, but for cruel and unusual punishment.[82] Rauscher claimed that he could only be prosecuted for the charge under which he was indicted. The Court agreed and stated that a defendant who came before the court by operation of an extradition treaty shall be tried only for the crime with which he was charged under the extradition treaty.[83] This has come to be known as the "doctrine of specialty."[84] Although the extradition treaty in *Rauscher* contained no express provision regulating the issue Rauscher raised, the Supreme Court rested its holding on the following three considerations: the internationally accepted doctrine of specialty,[85] a

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[76] *Ker*, 119 U.S. at 440. This ruling was followed in *Frisbie*, 342 U.S. at 522.

[77] United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979), *cert. den.*, 444 U.S. 832 (1979).

[78] 119 U.S. 407 (1886).

[79] 273 U.S. 593 (1927).

[80] 288 U.S. 102 (1933).

[81] *Rauscher*, 119 U.S. at 408.

[82] *Id.* at 409.

[83] *Id.* at 424.

[84] *Verdugo-Urquidez*, 939 F.2d at 1348.

[85] *Rauscher*, 119 U.S. at 419-420.

provision in the Treaty requiring evidence of criminality to justify a suspect's commitment for trial which the United States failed to satisfy because it did not present any evidence regarding cruel and unusual punishment,[86] and two federal statutes that indicated that Congress embraced the doctrine of specialty.[87]

In *Ford*, the defendants were brought into the jurisdiction of the United States after the United States Coast Guard seized them and their ship in violation of a treaty between the United States and Great Britain regarding interdiction of smugglers.[88] The Court distinguished *Ford* from *Ker* by noting that while *Ford* directly involved a treaty violation, *Ker* did not.[89] Because the issue of whether the treaty had been breached was waived in the trial court, the Court only suggested that had a seizure outside of the treaty been shown, there might have been no personal jurisdiction.[90]

The Convention for Prevention of Smuggling of Intoxicating Liquors[91] between the United States and Great Britain was again at issue in *Cook v. United States*. In *Cook* the defendant had been assessed a fine after American officials seized his vessel.[92] The vessel, however, had been caught outside the permissible zone defined by the treaty.[93] The Court found that the treaty violation defeated the jurisdiction of a United States court over the vessel,[94] reasoning that the government lacked the power to seize and therefore lacked the power to initiate judicial proceedings.[95]

The holdings in *Rauscher*, *Cook*, and *Ford* clearly demonstrate that *Ker* should not be interpreted so broadly as to imply that a court may never inquire into how a criminal defendant came before the court.[96] The violation of a treaty may, under appropriate circumstances, prevent a court from exercising jurisdiction over a defendant.[97]

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[86] *Id.* at 420-422.

[87] *Id.* at 423-424 (Revised Statutes §§ 5272, 5275).

[88] *Ford*, 273 U.S. at 600. The treaty at issue is the Convention between the United States and Great Britain for Prevention of Smuggling of Intoxicating Liquors, May 22, 1924, U.S.-Gr. Brit., 23 Stat. 1761.

[89] *Id.* at 605-06.

[90] *Id.*

[91] *See supra* note 88.

[92] *Cook*, 288 U.S. at 108.

[93] *Id.* at 108.

[94] *Id.* at 121-22.

[95] *Id.*

[96] *Verdugo-Urquidez*, 939 F.2d at 1348.

[97] *Id.*

C. Customary International Law

The doctrine of sovereign territorial integrity in customary international law provided additional support for Alvarez's position. Customary international law refers to a diffuse body of general practices that states follow out of a sense of legal obligation, or *opinio juris*.[98] These rules generally evolve through a long historical process. Sources of customary international law include diplomatic acts and instructions, practice of international organs, works of jurists, decisions of state courts, and state military or administrative practices.[99]

The doctrine of territorial integrity is well established in customary international law. Article 2(4) of the United Nations Charter (UN Charter) provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[100] In addition, the Charter of the Organization of American States (OAS Charter), Article 17, also states that "[t]he territory of a State is inviolable."[101] The

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[98] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §102 cmt. c (1987), states in relevant part that:

> c. Opinio juris. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary international law. . . Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.

Id.

[99] CARTER & TRIMBLE, *supra* note 32, at 110-12 (quoting JOSEPH. G. STARK, INTRODUCTION TO INTERNATIONAL LAW (1984)). *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2nd Cir. 1980); The Paquete Habana, 175 U.S. at 700, for general discussions on customary international law.

[100] U.N. CHARTER art. 2, ¶ 4. Article 2 paragraph 4 of the United Nations Charter provides in full that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

Id.

[101] Charter of the Organization of American States, Apr. 30, 1948, art. 17, 2 U.S.T. 2394, T.I.A.S. No. 23,861 (amended effective 1970, 21 U.S.T. 607, T.I.A.S. No. 6847). Article 17 of the OAS Charter provides in full that:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or

United States and Mexico are signatories to both of these formal agreements.[102] Putting aside the issue of whether these treaties create any enforceable rights in a domestic court,[103] they provide strong customary understanding with which the United States-Mexico Extradition Treaty was formed.[104]

Noted publicists generally reject the use of extraterritorial arrests without the consent of the affected state.[105] For example, the *Restatement of Foreign Relations Law of the United States* (Restatement) provides that a state may enforce its criminal law *only* within its own territory.[106] Law enforcement officers may perform their duties in another state's territory only after obtaining the approval of a duly authorized official of that state.[107] The decisions of the U.S. courts also furnish support for the need to respect another sovereign's territorial integrity.[108]

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special advantages obtained either by force or by other means of coercion shall be recognized.

Id.

[102] *Verdugo-Urquidez*, 939 F.2d at 1352.

[103] *Caro-Quintero*, 745 F. Supp at 614 ("[T]he weight of authority indicates that these international instruments are not self-executing and therefore are not enforceable in federal courts absent implementing legislation."). The district court in *Caro-Quintero* documented a long list of cases which it surveyed to arrive at this conclusion, *Id.* at 614-15 n.24. Among these cases are: Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 n.5 (7th Cir. 1985) (U.N. Charter provisions not self-executing); People of Saipan by Guerrero v. U.S. Dept. of Interior, 502 F.2d 90, 102 (9th Cir. 1974) (UN Charter not self-executing); Haiti v. INS, 343 F.2d 466, 468 (2nd Cir. 1965) (provision of U.N. Charter not self-executing and does not invalidate provision of immigration law).

[104] *Alvarez-Machain*, 112 S. Ct. at 2195 ("respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms."). *See infra* part V.A for further discussion on this issue.

[105] *See, e.g.*, Fritz. A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of* International Law, *in* INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407 (Yoram Dinstein ed., 1989); Andreas F. Lowfield, *Still More on Kidnapping*, 85 AM. J. INT'L L. 655, 661 (1991).

[106] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 432(1) (1987).

[107] *Id.* § 432(2).

[108] *See, e.g.*, Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812) ("One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under *an express license.*") (emphasis added).

The practice of states affirms this basic principle.[109] The Adolph Eichmann incident, in which Israeli agents abducted a former Nazi from Argentina and brought him to trial in Israel, provides the most famous example of international consensus in condemning the practice of international kidnapping.[110] After Eichmann was kidnapped, the U.N. Security Council adopted, without opposition,[111] a resolution condemning the kidnapping and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law[.]"[112] The incident ended when Israel and Argentina issued a joint statement which described the Israeli actions as "infring[ing] fundamental rights of the state of Argentina."[113]

It is clear that customary international law, apart from any formal treaties, prohibits forcible abductions across national borders. A recalcitrant problem, however, is in ascertaining the legal status of customary international law in U.S. courts. The United States Constitution itself lacks explicit provisions governing the status of customary law in domestic courts, but the Supreme Court offered some guidelines in the benchmark case of *The Paquete Habana*.[114] In that case, the Court declared that customs and usages of nations will be relied on when there is "no treaty, and no controlling executive or legislative act or judicial decision."[115]

This reliance on international customs is not obligatory. In general, a state is free to reject a customary international rule and may do so by persistent, contradictory behavior.[116] Furthermore, in *Garcia-Mir v. Meese*, the Eleventh Circuit ruled that the Executive Branch may violate international law.[117]

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[109] *See generally* 1 BASSIOUNI, *supra* note 7, at 235-37.

[110] *In re* Eichmann, 5 Whiteman, *A Digest of Int'l Law*, 208-14 (1961).

[111] *Id.* at 212. The vote was 8 in favor, none opposed, with two abstentions (U.S.S.R. and Poland). Argentina did not vote.

[112] S.C. Res., 868th mtg., U.N. Doc. S/4349 (1960).

[113] *In re* Eichmann, 5 Whiteman at 212-213.

[114] 275 U.S. 677.

[115] *Id.* at 700.

[116] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 15 (1985).

[117] 788 F.2d 1446, 1455 (11th Cir. 1986) (ruling the President may have the power to act in ways that constitute violations of international law by the United States). It is worth noting that in *Garcia-Mir*, the Attorney General decided to incarcerate indefinitely unadmitted aliens, pending efforts to deport. *Id.* In *Alvarez-Machain*, apparently low-level DEA agents made the decision to abduct and the Attorney General's Office was only believed to have been consulted. *Caro-Quintero*, 745 F. Supp. at 603.

Because of the ambiguous status of customary international law, the U.S. government's attitude toward forcible abductions seems to change from administration to administration. For example, during the Carter Administration the Office of Legal Counsel advised the FBI *not* to abduct a fugitive residing in a foreign state without the asylum state's consent.[118] The Executive Branch's attitude changed during the Bush Administration. On June 21, 1989, then-Assistant Attorney General William Barr issued an opinion stating that FBI *has* legal authority to seize fugitives overseas without a foreign state's permission.[119] In his testimony before Congress, Mr. Barr dismissed the Carter Administration ruling as "fundamentally flawed."[120] Mr. Barr's position will most likely be declared invalid under the Clinton Administration. President Clinton, after a meeting with Mexican President Carlos Salinas, had already stated that he did not believe the United States should be involved in kidnapping.[121]

Even Mr. Barr, however, admitted, at least on one occasion, that the United States should develop and adhere to international norms which promote peace and stability.[122] The United States may believe that it is not bound by certain international practices, but it is

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[118] Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Counsel 543 (1980).

[119] Ronald J. Ostrow, *Ruling on FBI Seizures Defended in Congress*, L.A. TIMES, Nov. 9, 1989, at A18. While the U.S. government believes that it has right to violate another country's territory for law-enforcement purposes, similar conducts by other governments are still considered grave infringements of U.S. territorial sovereignty. The most recent incident occurred on January 4, 1991, when Canadian police arrested an American citizen at least 200 yards onto the U.S. side of the border line in the Windsor-Detroit tunnel. The United States government promptly protested, and shortly after the Department of External Affairs of Canada announced it regretted the infringement and took steps to secure the release of the individual in question. The American Embassy, however, issued a clarifying statement stating that the United States does not believe that the extradition treaty is intended to be the exclusive means to procure a fugitive. 86 AM. J. INT'L L. 109-10 (1992).

[120] Ostrow, *supra* note 119, at A18.

[121] *Clinton Says U.S. Should Not Be Involved in Kidnapping*, Reuter Library Report, Jan. 8, 1993, *available in* LEXIS, Nexis Library, NEWS File.

[122] William Barr, *Proceedings of Conference on Strengthening the Rule of Law in the War against Drugs and Narco-Terrorism*, 15 NOVA L. REV. 838, 851 (1991) ("The United States has a strong interest in developing a just set of international norms that promote peace and stability in the world, and it is a very serious matter with potentially grave consequences whenever the United States chooses to ignore those aspects of customary international law.").

undeniable that a deviation from an international norm often threatens the friendly relationship between states.[123]

Even if customary international law does not provide an independent source of legal obligations, international norms at least form the legal backdrop for treaty interpretation. A court may imply a term not explicitly stated in the treaty because the practice is recognized internationally. For example, in the *Rauscher* case no provision in the 1842 Treaty with Great Britain explicitly limited the requesting state's right to prosecute for an offense different from that for which a defendant was extradited.[124] However, based on the practice of nations, the Court in *Rauscher* implied the doctrine of specialty into the treaty.[125] This power to imply was significantly limited by the majority in *Alvarez-Machain* to cases where the implication would be "a small step to take."[126]

IV. Analysis

This part first discusses how the Supreme Court decided that the *Ker-Frisbie* doctrine was applicable to the facts of this case in spite of the existence of U.S. government involvement and Mexican government's repeated protests. The second half this part discusses why the

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[123] For example, the Iranian parliament passed a law authorizing its police to abduct Americans abroad shortly after the Justice Department authorized FBI to use forcible abduction in carrying outs its function. Cartel & Trimble, *supra* note 32, at 785; *see also Iran Bill Allows Arrest of Americans who offend Nation*, L.A. Times, Nov 1, 1989, at A7.

[124] *Rauscher*, 119 U.S. at 422. *See supra* notes 81-87 and accompanying text.

[125] *Id.* at 420.

[126] *Alvarez-Machain*, 112 S. Ct. at 2196. The majority explains that in *Rauscher* a term was implied according to the practice of nations with regard to extradition treaties. In *Alvarez-Machain*, the Court would need to imply a term from the general principle of territorial sovereignty. According to the Court, implying such a term would lead to absurd results. Waging war, for example, would violate the principle of territorial sovereignty. However, the Court went on to say, it cannot be seriously contended that the act of waging war will violate the extradition treaty between the warring states. *Id.*

The Court's example is unrealistic. Even if an extradition treaty comes with an express term denouncing forcible intrusion into another state's territory, it is unlikely that an invaded state would use an extradition treaty to protest the military invasion of another state. An extradition treaty would be suspended during a military conflict and be replaced only by an altogether new treaty after the conflict. I. A. Shearer, Extradition in International Law 44 (1971).

Supreme Court refused to read an implied term prohibiting abduction into the Extradition Treaty. The Court reasoned that implying such a term from the most general principle of territorial integrity would be too large an inferential step to take.[127]

A. *Applicability of the* Ker-Frisbie *Doctrine*

As an initial matter, the Supreme Court determined that the *Ker-Frisbie* doctrine, rather than the *Rauscher-Cook* line of precedents, controlled. Writing for the majority, Justice Rehnquist ruled that the *Ker-Frisbie* doctrine was applicable despite the important factual differences pointed out by the Ninth Circuit[128] and the dissenting Supreme Court justices to distinguish *Ker-Frisbie* from the present case.[129]

Ker can be distinguished from *Alvarez-Machain* first by the different reaction of the two offended states. In *Ker*, Peru did not formally protest the abduction of Ker.[130] In *Alvarez-Machain*, on the other hand, Mexico's protest was prompt and unambiguous.[131] A formal protest from the offended state is of importance because a state may willingly surrender a suspect on procedures outside of the extradition treaty. Protests from the offended state ensure that it did not consent to the territorial violation.[132]

Another important difference was that this case, unlike *Frisbie v. Collins*, involved the abduction of another country's citizen by the U.S. agents rather than the apprehension of an American fugitive within the territory of the United States.[133] There was a violation of international law in this case which was not present in *Frisbie*.[134]

The last distinguishing fact was that in *Ker* there was no government-sponsored abduction; the abduction was done by a private party.[135] In the present case, however, the district court in *Caro-Quintero* found

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[127] *Alvarez-Machain*, 112 S. Ct. at 2195-96.

[128] *Verdugo-Urquidez*, 939 F.2d at 1346.

[129] *Alvarez-Machain*, 112 S. Ct. at 2197, 2203-04. Justice Stevens wrote the dissenting opinion in which Justice Blackmun and Justice O'Connor joined.

[130] *See supra* notes 57-58 and its accompanying text for a description of the situation in Peru at the time of Ker's abduction.

[131] *Joint Appendix*, *supra* note 22, at 33, 35, 67.

[132] *Verdugo-Urquidez*, 939 F.2d at 1357.

[133] *Alvarez-Machain*, 112 S. Ct. at 2197.

[134] *Id.*

[135] *Ker*, 119 U.S. at 443.

clear governmental involvement because Alvarez was abducted by paid agents of the United States.[136]

The dissenting justices, relying on *Cook v. United States*, wrote extensively to point out the importance in differentiating between governmental and private actions in finding treaty violations.[137] The enforcement of a treaty, being a compact between nations, depends on the honor of the governments which are parties to it.[138] The significance of governmental action in treaty violation was explained in detail by Justice Brandeis in *Cook*.[139] Justice Brandeis explained that the Government's power to seize was limited by the agreement between the United States and Great Britain. Although the agreement only contained the conditions under which a vessel may be seized, the jurisdictional effects were deemed to follow automatically.[140] Justice Brandeis reasoned that the government lacked power to seize, since the Treaty imposed a territorial limitation upon its authority.[141] Because the government lacked power to seize, it also lacked power to subject the vessel to its laws.[142] Accordingly, if a court were to uphold jurisdiction when the Government seized beyond the limitation of the Treaty, the court would be nullifying the purpose and effect of the treaty.[143]

The Court's majority opinion in *Alvarez-Machain* did not discuss *Cook*.[144] It did, however, refer to *United States v. Rauscher*, another case

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[136] *Caro-Quintero*, 745 F. Supp. at 605.

[137] *Alvarez-Machain*, 112 S. Ct. at 2203-05.

[138] *The Head Money Cases*, 112 U.S. at 598.

[139] *Cook*, 288 U.S. at 102.

[140] *Id.* at 111. Article 2 of the Agreement provided that:

> If there is a reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

Id.

[141] *Id.* 121.

[142] *Id.*

[143] *Id.* at 121-22.

[144] However, the Government contended in its brief that the treaty in *Cook* contained express limits on the adjudicative power of the courts, but nothing in the Extradition Treaty affirmatively indicates that a defendant who has been forcibly abducted from a treaty partner is immune from prosecution. Brief for Appellant at 20, *Alvarez-Machain* (No. 91-712). The Government relied on Article 2 of the treaty which states that "the vessel may be seized and taken into a port of the United States . . . for adjudication

which, if found controlling, would lead the Court to the opposite conclusion. The majority cited with approval the Government's position that *Rauscher* is an exception to *Ker*.[145] The Government contended that *Rauscher* applies "only when an extradition treaty is invoked, and the terms of the treaty provide that its breach will limit the jurisdiction of a court."[146] In *Rauscher*, the defendant was brought to the United States by way of an extradition treaty.[147] In the present case, Alvarez was abducted; the United States never invoked the Extradition Treaty to extradite Alvarez.[148] Accordingly, the Court decided that *Ker* would apply in this case if the Extradition Treaty does not prohibit abduction.[149]

The next step in the Court's analysis was to determine whether the Extradition Treaty prohibits abduction.[150] In the absence of a treaty violation, the *Ker* rule would dictate that a court need not inquire how a defendant came before the court.[151]

B. Was There A Treaty Violation?

Courts have authority to construe treaties and executive agreements.[152] In interpreting a treaty, a court must not alter, amend, or add to any treaty.[153] The tendency of courts is to reject literal-minded interpretation[154] and to ascertain the meaning intended by the contracting parties.[155]

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in accordance with such laws." *See supra* note 140 for full text of the provision. It is questionable whether this provision, which establishes the conditions under which U.S. authorities may seize a vessel, can be considered an *express* limit on the courts' jurisdiction power. It certainly did not explicitly say that illegally seized vessels would divest the court of its jurisdiction.

[145] *Alvarez-Machain*, 112 S. Ct. at 2193.

[146] *Id.*

[147] *Rauscher*, 119 U.S. at 410.

[148] *Alvarez-Machain*, 112 S. Ct. at 2191-92. It is worth noting that the Court's position essentially allowed the Government to bypass the formal extradition procedure altogether if it wants to avoid the restrictions contained in an extradition treaty.

[149] *Id.* at 2193.

[150] *Id.* at 2193-97

[151] *Id.* at 2193.

[152] Japan Whaling Assoc. v. American Cetacean Soc'y, 478 U.S. 221, 230 (1986).

[153] The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 69 (1821).

[154] John H. Jackson, *United States*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW 141, 165 (Francis G. Jacobs et al. eds., 1987)

[155] United States v. Conners, 606 F.2d 269 (10th Cir. 1979); Sullivan v. Kidd, 254 U.S. 433 (1921).

The Supreme Court took a three-step analysis in deciding that the forcible abduction did not violate the United States-Mexico Extradition Treaty. The Court began with the language of the treaty,[156] then recounted the history and practice under the Treaty,[157] and finally decided that a term prohibiting extraterritorial kidnapping should not be implied into the Treaty.[158]

1. The express language of the treaty

The Supreme Court observed that nothing in the treaty explicitly forbids the United States or Mexico to kidnap suspects from the other's territory.[159] The Defendant offered Article 22(1) of the Treaty, which states that the Treaty "shall apply to offenses specified in Article 2 [including murder] committed before and after this Treaty enters into force,"[160] as indicative of an intent to make extradition mandatory for offenses specified in Article 2.[161] The Supreme Court rejected this argument, finding that it would be more natural to interpret Article 22 as ensuring that "the Treaty was applied to extraditions requested after the Treaty went into force, regardless of when the crime of extradition occurred."[162] The Supreme Court based this conclusion on the second clause of Article 22.[163]

Defendant also offered Article 9 of the Treaty which allows either state the discretion to not to extradite its own nationals. Article 9 states:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities

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[156] *Alvarez-Machain*, 112 S. Ct. at 2193.

[157] *Id.* at 2194-95.

[158] *Id.* at 2195-96.

[159] *Id.* at 2193.

[160] *See* Extradition Treaty, *supra* note 4, at 5073-74.

[161] *Alvarez-Machain*, 112 S. Ct. at 2193.

[162] *Id.*

[163] *Id.* at 2193 n.10. Article 22 provides that "[r]equests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899[.]" *See* Extradition Treaty, *supra* note 4, at 5074.

> for the purpose of prosecution, provided that party has jurisdiction over the offense.[164]

The defendant claimed that this provision allows each government the discretion to either extradite its citizens upon request or to submit the requested person to its own authorities for prosecution.[165] In other words, both nations preserved the right to try its own citizens in its own court. The defendant contended that this preservation of rights would be frustrated if either nation was free to kidnap nationals of the other nation.[166]

The dissenting justices agreed with the Defendant's analysis. The dissenting opinion pointed out that the Extradition Treaty is a comprehensive document with twenty-three articles and an appendix listing detailed information regarding extradition of suspects.[167] If the United States is deemed to have silently reserved the right to abduct Mexican nationals, all the procedures and restrictions[168] established in the Extradition Treaty would become mere verbiage.[169]

The majority held a more restrictive view of the Extradition Treaty. According to the majority opinion, extradition is no more than one of the many ways to secure an individual from another state.[170] The Court reasoned that, without an extradition, nations have no obligation to surrender suspects physically present in their territories to a foreign authority for prosecution.[171] Therefore, extradition treaties exist to impose mutual obligations to surrender individuals at a treaty partner's request. Kidnapping can coexist with extradition because an extradition treaty merely provides a mechanism which otherwise would not exist.[172]

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[164] Extradition Treaty, *supra* note 4, at 5076.

[165] *Alvarez-Machain*, 112 S. Ct. at 2193-94.

[166] *Id.* at 2194.

[167] *Id.* at 2198.

[168] Some of these restrictions include: provision requiring sufficient evidence to grant extradition (Art. 3), withholding extradition for political or military offenses (Art. 5), withholding extradition when the person sought has already been tried (Art. 6), withholding extradition when the statute of limitation for the crime has lapsed (Art.7), and granting of the requested state discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8). Extradition Treaty, *supra* note 4.

[169] *Alvarez-Machain*, 112 S. Ct. at 2198-99.

[170] *Id.* 112 S. Ct. at 2194 ("The Treaty thus provides a mechanism which would not otherwise exist, requiring under certain circumstances, the United States and Mexico to extradite individuals to the other country[.]").

[171] *Id.* (citing *Rauscher*, 119 U.S. at 411-12; *Factor v. Laubenheimer*, 290 U.S. at 287).

[172] *Id.*

2. History of negotiation and practice under the treaty

To strengthen its argument, the Supreme Court cited with approval the Government's argument that history showed that abductions outside of the extradition process do not violate a treaty.[173]

The Government noted that as early as 1906 the Mexican government was made aware of the *Ker-Frisbie* doctrine.[174] In 1906, a Mexican national, Martinez, was abducted from Mexico and brought to the United States for trial. A Mexican official wrote to the Secretary of State protesting that Martinez's arrest was made outside of the procedures established in the Extradition Treaty.[175] Mr. Robert Bacon, the Secretary of State at the time, responded that this issue had been decided by *Ker*.[176]

As further proof that the Mexican government was on notice early on, the Government mentioned that the language to curtail *Ker* was drafted by a group of prominent legal scholars in 1935.[177] However, the Mexican government failed to incorporate this language into the Extradition Treaty.[178]

The Supreme Court concluded that neither the language nor the history of the Treaty supported the proposition that the Treaty is the exclusive means of obtaining suspects physically present Mexico.[179] The remaining question was whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution when the defendant's presence was obtained by abduction.[180]

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[173] *Id.* at 2194-95.

[174] *Id.* at 2194.

[175] Papers Relating to the Foreign Relations of the United States, H.R. Doc. No. 1, 59th Cong., 2d Sess., pt.2, p.1121 (1906).

[176] *Id.* at 1121-22. In the letter, however, Mr. Bacon granted the Mexican government's request to extradite Martinez' abductor.

[177] *Harvard Research in International Law*, 29 AM. J. INT'L L. 442 (Supp. 1935). The language appeared in Article 16 of the Draft Convention on Jurisdiction with Respect to Crime, the Advisory Committee of the Research in International Law. It states:

> In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

Id.

[178] *Alvarez-Machain*, 112 S. Ct. at 2194-95.

[179] *Id.* at 2196-97.

[180] *Id.* at 2195.

3. Interpreting silence

The Defendant argued that customary international law provided the basis for implying such a term.[181] Customary international law clearly prohibits violating another state's territory limits; this rule of territorial integrity is well-established through United Nation resolutions, state practices, and scholarly commentaries.[182] With this understanding, a term prohibiting the United State from exercising its police power in Mexico, an act which would violate Mexico's territorial sovereignty, should be inferred from the Treaty.[183]

Implying a term into a treaty in the absence of an express provision is not without precedents. For example, the Supreme Court in *Rauscher* implied a term into a treaty according to the practice of nations.[184] Although the dissenting opinion in *Alvarez-Machain* pointed out that the background supporting the decision in *Rauscher* was far less clear than the rule of territorial integrity,[185] the majority nevertheless rejected Alvarez' argument claiming that the required inferential step would be "too big."[186] The Court explained that in *Rauscher* the justices implied a term from international practices with regard to extradition. In the present case, however, the international practices are general principles unrelated to extradition.[187] The Court therefore refused to imply a term prohibiting international abduction into the United States-Mexico Extradition Treaty.[188]

V. COMMENTARY

In this case, the majority opinion did not give effect to an established principle in customary international law. First, it refused to imply a term prohibiting international kidnapping from the principle of terri-

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[181] *Id.*

[182] *See supra*, part III.C.

[183] *Alvarez-Machain*, 112 S. Ct. at 2195.

[184] *Id.* at 2195-96. *See also supra* text accompanying notes 124-25.

[185] *Id.* at 2201. The dissent stated that authorities that had ruled against the doctrine of specialty were cited in the briefs of both parties in the case of *United States v. Rauscher*. *Id.* n.19.

[186] *Id.* at 2196.

[187] *Id.* at 2195-96.

[188] *Id.* at 2196. Although this was a 6-3 decision, in the dissenting opinion Justice Stevens called this a "monstrous decision" that would disturb most courts throughout the civilized world. *Id.* at 2206.

torial integrity.[189] Second, the Court did not exercise its supervisory power to condemn the Government's violation of customary international law by divesting the court of jurisdiction.

A. *The Strong Link between Territorial Integrity and Extradition Treaty*

The majority adopted a restrictive view of the Extradition Treaty. According to the Court's opinion, the Extradition Treaty is an optional mechanism for procuring fugitives; it does not limit the ability of the United States to take actions within the territory of a treaty partner.[190] Because of this restrictive view, the Court did not acknowledge the link between the principle of territorial integrity and extradition treaties.

The Supreme Court's view stands in sharp contrast to Ninth Circuit's position. Unlike the Supreme Court, the Ninth Circuit adopted a broader perspective and considered extradition treaties as means of safeguarding sovereignty of the signatory nation.[191]

Good reasons support the Ninth Circuit's position. The need to negotiate an extradition treaty is directly premised on the notion of state sovereignty. If sovereignty is not at issue, there will not be any need to impose jurisdictional limits on a state's law enforcement power. If a state's territory is not deemed inviolable, the law enforcement officers of another state should be allowed to continue their pursuits beyond the border. The very existence of an extradition treaty between the United States and Mexico signals the United State's acknowledgment of Mexico's sovereignty. Given the close connection between the principle of territorial integrity and extradition treaties, it would not require a large inferential step to imply a term prohibiting cross-border abduction into the Extradition Treaty.[192]

B. *Court's Supervisory Power*

The case law shows that a federal court may, within limits, exercise its supervisory power to implement a remedy for violations of recog-

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[189] *Id.* at 2196.

[190] *Id.* at 2194.

[191] *Verdugo-Urquidez*, 939 F.2d at 1350 ("The requirements extradition treaties impose constitute a means of safeguarding the sovereignty of the signatory nations, as well as ensuring the fair treatment of individuals.").

[192] *Alvarez-Machain*, 112 S. Ct. at 2196.

nized rights and to deter illegal conduct.[193] In extreme cases, a court may reverse a conviction under the exercise of supervisory power.[194] In the *Alvarez-Machain* case, if the Court wanted to deter illegal conduct of the Government or to enforce Alvarez' right under customary international law, it could have barred the prosecution of Alvarez by divesting the jurisdictional power of the district court.

The Court apparently did not feel that the facts of this case required it to exercise its supervisory power. According to the district court's findings, the Government's actions did not reach the *Toscanino* level.[195] Therefore, it is perhaps understandable that the illegality involved was not egregious enough for the Court to take on the supervisory role.

The issue of whether customary international law creates enforceable rights, however, was ignored by the Court's opinion. If enforceable rights exist under customary international law, the Court needs to fashion a remedy for the violated rights.

1. Customary international law was violated

The principle of sovereign territorial integrity is well established in customary international law.[196] In addition to "soft" sources such as precedents, habitual practices, or customs, this principle is also embodied in the UN Charter, an international agreement with 159 signatory nations.[197] Article 2(4) of the UN Charter clearly forbids the threat or use of force against the territorial integrity of any state. Furthermore, the UN Security Council, after holding a series of debates following the illegal kidnapping of Adolf Eichmann from Argentina, unambiguously announced that international kidnapping violates Article 2(4).[198] The next question is whether the UN Charter creates enforceable rights in a U.S. court.

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[193] United States v. Hasting, 461 U.S. 499, 505 (1982) ("[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution."); *Toscanino*, 500 F.2d at 276 ("[T]he supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process.").

[194] *Hasting*, 461 U.S. at 505-508.

[195] *Caro-Quintero*, 745 F. Supp. at 605-06. *See supra* notes 74-75 and accompanying text or a discussion of the *Toscanino* exception.

[196] *See supra* part III.C.

[197] The United Nations Charter, *see supra* note 100. The United States and Mexico are both members of the United Nations.

[198] *See supra* text accompanying notes 110-13.

2. The UN Charter creates enforceable rights

Not every treaty is enforceable in a municipal court without some implementing legislation by Congress. Only self-executing treaties are enforceable without the aid of further legislation.[199] Whether a treaty is self-executing or non-self-executing is a matter for judicial interpretation;[200] it is perhaps one of "the most confounding [questions] in treaty law."[201]

Some factors for determining whether a treaty is self-executing were suggested in *People of Saipan v. United States Department of the Interior*;[202] these include: (1) the purpose of the treaty and the objectives of its creators; (2) the existence of domestic procedures and institutions appropriate for direct implementations; (3) the availability and feasibility of alternative enforcement methods; and (4) the immediate and long-range social consequences of self- or non-self-execution.[203] These factors were used by the Ninth Circuit in subsequent cases such as *Frolova v. Union of Soviet Socialist Republics*[204] and *Islamic Republic of Iran v. Boeing*.[205]

The Restatement also provides some helpful guidelines in determining whether a treaty is self-executing. For example, Section 111 states that a treaty is non-self-executing if the agreement manifests an intention "not to become effective as domestic law without the enactment of implementing legislation," or if the Senate, in giving its consent to a treaty, required further implementing legislation.[206]

Some provisions of the UN Charter are considered non-self-executing because they are declarations of general principles, not a code of legal rights.[207] As broad generalities, these provisions do not create

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[199] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 (1987); Jackson, *supra* note 154; United States v. Postal, 589 F.2d 862 (5th Cir. 1979); *Caro-Quintero*, 745 F. Supp. at 607.

[200] *Postal*, 589 F.2d at 876.

[201] *Id.*

[202] 502 F.2d 90 (9th Cir. 1974).

[203] *Id.* at 97.

[204] 761 F.2d 370 (9th Cir. 1985) (holding articles 55 and 56 of the UN Charter not self-executing).

[205] 771 F.2d 1279 (9th Cir. 1985) (holding article VI of the Claims Declaration between the United States and Iran not self-executing).

[206] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (4) (1987).

[207] *See supra* note 103, for a list of cases which support this proposition. *But see* Sei Fujii v. State, 242 P.2d 617, 621 (Cal. 1952) (Article 104 and 105 of the UN Charter self-executing (quoting Curran v. City of New York, 77 N.Y.S.2d 206, 212 (1947))).

enforceable rights. However, Article 2(4) in the international kidnapping context may present an exception to this general rule.[208]

The most crucial step in determining the self-execution question is to examine the language of a treaty to understand the intent of the contracting parties.[209] If the language of a treaty purports to forbid an act, such mandatory language would usually support a self-executing construction.[210] Accordingly, it may be argued that Article 2(4) of the UN Charter, which employs such prohibitory language as "[a]ll Members shall refrain . . . from the use of force," is self-executing.[211]

Other *Saipan* factors support this conclusion as well. For example, in reaching a self-executing conclusion, the court in *Saipan* viewed as positive the fact that the enforcement of the rights created by the Trusteeship Agreement require little legal or administrative innovation in the domestic court.[212] Article 2(4) violations in the international kidnapping context also have ready remedies in the U.S. court—the court can simply divest itself of jurisdiction. The existence of easy domestic remedies and the lack of alternative enforcement methods add reasons to creating enforceable rights under Article 2(4).[213]

A serious concern for construing the UN Charter as a self-executing agreement is that judicial resolution of cases involving international law may have foreign policy implications which the court could not anticipate.[214] While this concern may be true for other provisions of the UN Charter, it does not apply to territorial violations in the kidnapping cases. In general, individuals are extradited or abducted to the United States for the purpose of subjecting them to criminal

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[208] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 11 cmt. h (1987) ("Some provisions of an international agreement may be self-executing and others non-self-executing.").

[209] For example, the Ninth Circuit in *Islamic Republic of Iran v. Boeing Co.* concluded that the language and the intent of an agreement is most critical in determining whether it is self-executing. 771 F.2d at 1283.

[210] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 5 (1987) ("Obligations not to act, or to act only subject to limitations, are generally self-executing.").

[211] U.N. CHARTER, *see supra* note 100.

[212] 502 F.2d at 97.

[213] For example, a violation is unlikely to be resolved through diplomatic channels, as facts of this case demonstrated. The Mexican government has been demanding the repatriation of Alvarez since 1990, but American authorities did not release him until Judge Rafeedie finally dismissed the case for lack of evidence in December 1992. *See supra* note 9.

[214] *Frovola*, 761 F.2d at 375.

prosecution and courts are the natural place to address extradition and abduction issues.[215] Therefore, enforcing Section 2(4) in a domestic court would not produce harmful long-range foreign-policy consequences.

Finally, even if Section 2(4) is considered non-self-executing, the *Restatement* suggests that "the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement."[216] This provides an additional reason for the Supreme Court to exercise its supervisory power to condemn international kidnapping.

Because self-execution is a flexible concept, it can be used by the courts to refuse enforcing international agreements. As international law gains more recognition and importance, the U.S. courts may need to respond to this change by recognizing that international law does confer enforceable rights.[217]

3. Alvarez has standing to enforce customary international law

Another traditional barrier to enforcing customary international law in a U.S. court is in deciding whether an individual has standing to raise a violation of international law as a defense.

Standing doctrine embodies several judicially self-imposed limits on the exercise of federal jurisdiction. Standing doctrine, for example, prohibits a litigant from raising another person's right.[218] Because customary international law, similar to treaties, is considered compacts between nations rather than individuals,[219] the principal argument against granting individual standing in this case is that a violation of the customary international norm is a matter between governments and should be resolved through diplomatic channels.[220]

This standing issue presents a serious problem only if the interests of the offended state and the offended individual differ. For example, in December 1989, a Greenpeace vessel was removed by the United

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[215] *Verdugo-Urquidez*, 939 F.2d at 1357.

[216] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

[217] In fact, very few states in the world distinguish between self-executing and non-self-executing treaties. *Id.* reporter's note 5.

[218] Allen v. Wright, 468 U.S. at 751 (1984)

[219] *Verdugo-Urquidez*, 939 F.2d at 1356.

[220] *Id* at 1355.

States Navy from the Trident launch site off the coast of Florida.[221] The removed Greenpeace vessel flew a Dutch flag. Because the Netherlands apparently urged Greenpeace to refrain from disrupting the launch, it may be difficult for Greenpeace to gain compensation for the damage done to its vessel.[222]

No such problem exists in this case. The protest of the Mexican government was loud and clear from the beginning.[223] Since there was no conflict between the sovereign's rights and the individual's rights, Alvarez should be allowed to enforce the rights conferred by customary international law.

Further support can be found, by analogy, in cases in which the Supreme Court approved a private party's right to challenge violations of bilateral treaties.[224] In the context of extradition treaties, the Supreme Court held, as early as in 1886, that an individual defendant may raise a violation of the principle of specialty as an objection to jurisdiction.[225] Treaties and customary international law are both agreements between governments; if the standing doctrine does not bar an individual from enforcing treaty rights, then similarly the standing doctrine should not bar an individual from enforcing rights under customary international law.[226]

An argument against permitting individual standing to enforce customary international law is the concern that this practice would

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[221] Jon M. Van Dyke, *Military Exclusion and Warning Zones on the High Seas*, MARINE POLICY, May 1991, at 166-67.

[222] *Id.*

[223] *See supra* notes 19-23 and accompanying text.

[224] *See, e.g.*, Asakura v. Seattle, 265 U.S. 332 (1924) (holding Japanese citizens are permitted to assert provisions of 1911 Friendship, Commerce and Navigation Treaty between the United States and Japan to challenge local ordinance); *Cook*, 288 U.S. 102 (ruling private British subjects are permitted to challenge seizure of vessel on high seas in violation of a 1924 treaty between the United States and Great Britain).

[225] *Rauscher*, 119 U.S. at 424.

[226] Because the defendant did not raise an independent international law claim, this exact issue was not addressed. The Ninth Circuit, however, did rule that Alvarez had standing to raise violations of the Extradition Treaty because of the formal protests from Mexico. *Id.* at 1357. The Supreme Court did not reach the standing issue because it found no violation of the Extradition Treaty. *Alvarez-Machain*, 112 S. Ct. at 2197. The Court seemed to suggest, in dicta, that if a treaty is self-executing, then a court must enforce it on behalf of an individual regardless of the reactions from the offended state. *Id.* at 2195 ("[I]f, as respondent asserts, [the extradition treaty] is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation.").

lead to unwelcomed intrusion by the courts into the area of foreign affairs.[227] However, this issue was addressed in the Ninth Circuit opinion in *Verdugo-Urquidez*.[228] Because the kidnapping cases are likely to be few and courts have always assumed the supervision of the extradition process, the Ninth Circuit felt confident that granting individual rights in a kidnapping case will not lead to an expanded role for the courts.[229]

The United States has obligations to comply with customary international law. The U.S. government should not be allowed to hide behind judicial doctrines to avoid legal consequences of its flagrant violation.

VI. Impact

This case clearly demonstrates the Bush Administration's disrespect for international law at a time when rapid globalization has made international cooperation more important than any other period in history. The Supreme Court similarly showed its disregard for international law. On the one hand, the Court conceded that "respondent . . . may be correct that respondent's abduction was 'shocking'. . . and that it may be in violation of general international law principle."[230] On the other hand, the Court shirked responsibility and ruled that whether Alvarez should be repatriated to Mexico was an issue for the Executive Branch. As a result, the government escaped all consequences of its illegal conduct and Alvarez was tried in the U.S. court.

The combined effects the DEA actions and the Supreme Court's opinion are disturbing. They indicate that although internationally the U.S. government has embraced the doctrine of territorial integrity—in the UN Security Council during the *Eichmann* incident[231] and in signing the UN and OAS Charters[232] —domestically it continues to violate international norms whenever the need arises. The Executive Branch openly authorizes its agents to conduct kidnapping across national borders, and now the Supreme Court has announced it will not compel the Executive Branch to observe international law by divesting the courts of jurisdiction.

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[227] *Verdugo-Urquidez*, 939 F.2d at 1357-58.

[228] *Id.*

[229] *Id.*

[230] *Alvarez-Machain*, 112 S. Ct. at 2196.

[231] *See supra* note 111 and accompanying text.

[232] *See supra* note 100-02 and accompanying text.

If the United States values its network of extradition partners, it must take steps to assure the partners that the United States does not intend to use kidnapping as an acceptable alternative to extradition. Mexico, for example, was so outraged by this ruling that it immediately threatened to suspend anti-drug cooperation with the United States.[233] The threat was rescinded after the Bush Administration assured Mexico that Washington did not plan to implement the Supreme Court's decision. The State Department also issued a statement saying, "We have the utmost respect for Mexican sovereignty. We intend to work carefully with the government of Mexico to allay any concerns or perceptions to the contrary."[234]

It is unrealistic to assume that an apology from the Executive Branch can always restore the confidence of the treaty partners. Moreover, the United States has always taken pride in being a nation of law. Condoning official kidnapping, which violates both international law and the local law of the victim's state, is clearly against this spirit. This deviation may present more than a moral problem; treaty partners, relying on this opinion, may now consider it appropriate to conduct kidnapping on American territory.

This decision coupled with ex-Attorney General William Barr's secret legal opinion[235] essentially removed all legal barriers to conducting illegal extraterritorial activities. Furthermore, the Supreme Court has failed to exercise its supervisory role in compelling the Executive Branch to execute its international obligations faithfully. The present Court's rationale in not interfering with the Executive Branch's actions is similar to the position taken by the 1889 Supreme Court when the infamous *The Chinese Exclusion Case*[236] came before the Court. In that case, arguing that the Court is not the censor of the morals of other departments of the government, the Court upheld a discriminatory Act enacted by Congress to exclude the Chinese laborers from the United States solely on the basis of their race.[237]

In this case the Supreme Court gave in to the Executive Branch's intense desire to punish Alvarez for Agent Camarena's death. How-

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[233] *Long Arm of the Law: A Decision to Uphold an International Kidnapping Alarms Latin America*, *supra* note 13, at 31.

[234] *Mexico to Continue Cooperating on Drug War; Operations to Proceed during Talks on Extradition Treaty*, STAR TRIBUNE, June 17, 1992, at 2A

[235] Ostrow, *supra* note 119.

[236] 130 U.S. 581.

[237] *The Chinese Exclusion Case*, 130 U.S. at 603.

ever, the cost of revenge may be too high, for sanctioned official unlawfulness undermines the society and the world's faith in the United States' commitment to law and order.

The Government's understandable concern in bringing justice to the brutal murder of a capable agent is better addressed by legal means. For example, the United States could have urged the Mexican government to take seriously its promise to extradite or prosecute.[238] If the United States is fundamentally skeptical of the Mexican prosecutorial process, then it should not have allowed the inclusion of Article 9 in the Extradition Treaty. A new Extradition Treaty should be negotiated as soon as possible to prevent similar problems in the future.[239]

Since the Judicial Branch has refused to step in and stop the Executive Branch from conducting illegal kidnapping, it is now up to the Legislative Branch to remedy this problem and restore the faith of other extradition partners. Instead of letting the policy on extraterritorial kidnapping to change from administration to administration, Congress should make international kidnapping a federal crime. After all, *Ker* was decided in 1886, more than 100 years ago. It may be time to remove this embarrassing, archaic precedent to keep up with new standards in human rights and in proper international behavior!

VII. Conclusion

After a very lengthy trial process, Alvarez was finally acquitted by Judge Rafeedie for lack of evidence. The Mexican government declared immediately that he would not be judged again in Mexico. Although the doctor is now free, the Supreme Court's ruling will not be erased. In focusing on the narrow issue of jurisdiction, this opinion essentially

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[238] For example, Mexico has tried and imprisoned Rafael Caro-Quintero, a co-conspirator of Alvarez-Machain, in Mexico on a 40-year sentence. *Alvarez-Machain*, 112 S. Ct. at 2197 n.2.

[239] A more permanent solution may be to establish an international criminal court with jurisdiction over persons who may be engaging in acts of international drug trafficking. A proposal for creating such a court is under serious consideration. For more details, *see* M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 Vand. J. Transnat'l L. 151 (1992).

allowed official kidnapping to stand as an alternative to extradition. This case sets a dangerous precedent for the future.

Elizabeth Chien[240]

[240] The author wishes to thank Professor Ralph Steinhardt and Judge Samuel King for sharing with her their first-hand knowledge about the case. The author also thanks Professor Jon Van Dyke for his many helpful comments and suggestions.

Foucha v. Louisiana: The Keys to the Asylum for Sane But Potentially Dangerous Insanity Acquittees?

I. Introduction

In *Foucha v. Louisiana*,[1] the Supreme Court of the United States held that a state may not continue to confine an insanity acquittee indefinitely in the absence of evidence of continuing mental illness, regardless of whether the acquittee remains a danger to himself and others.[2]

The holding compels a reassessment of the statutory schemes governing post-acquittal confinement in a number of states, including Hawai'i,[3] which rely on dangerousness as the sole criterion for determining whether an insanity acquittee may be released.

Part II of this note examines the facts relevant to the Supreme Court's decision in *Foucha*. Part III reviews the history of the insanity defense in Anglo-American jurisprudence and the development of substantive and procedural law related to the disposition of insanity acquittees. Part IV analyzes the majority, concurring and dissenting opinions in *Foucha*, and Part V attempts to assess the probable impact of *Foucha*, with particular attention to the measures necessary to bring Hawai'i's laws into compliance with the opinion. The case note concludes with Part VI.

II. Facts

The State of Louisiana charged petitioner Terry Foucha with aggravated burglary and illegal discharge of a firearm.[4] The trial court

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[1] 112 S.Ct. 1780 (1992).
[2] *Id.* at 1789.
[3] *See* Haw. Rev. Stat. § 704-415 (1985).
[4] 112 S.Ct. at 1782.

appointed two physicians to conduct a pretrial examination of the defendant.[5] The doctors initially reported, and the trial court initially found, that Foucha lacked capacity to proceed.[6] Four months later, however, the trial court found Foucha competent to stand trial.[7] The physicians later concluded that Foucha had been unable to distinguish right from wrong at the time of the offense,[8] and on October 12, 1984 the trial court adjudged Foucha not guilty by reason of insanity.[9] Specifically, the court found that Foucha was unable to appreciate the usual, natural and probable consequences of his acts; that he was unable to distinguish right from wrong; that he was a menace to himself and others; and that he was insane at the time of the commission of the above crimes and was still insane at the time judgment was rendered.[10] He was committed to a state psychiatric facility until such time as doctors recommended his release and the court so ordered.[11]

In 1988, the superintendent of the facility to which Foucha was committed recommended his release.[12] A three-member panel was convened at the institution to assess Foucha's condition and determine whether he could be released or placed on probation without danger to himself or others.[13] The panel reported that there had been no

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* Under Louisiana law, "if the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." LA. REV. STAT. ANN. § 14:14 (West 1986).

[10] 112 S.Ct. at 1782.

[11] *Id.* Louisiana's Code of Criminal Procedure provides in pertinent part:

> When a defendant is found not guilty by reason of insanity in any [non-capital] felony case, the court shall remand to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment.

LA. CODE CRIM. PROC. ANN. art. 654 (West 1986).

[12] 112 S.Ct. at 1782.

[13] *Id.* Louisiana's Code of Criminal Procedure provides in pertinent part:

> When the superintendent of a mental institution is of the opinion that a person

evidence of mental illness since Foucha's admission in 1984 and recommended that Foucha be conditionally discharged.[14] The trial judge appointed the same two doctors who had conducted the pretrial examination to again examine Foucha.[15] They concluded that the petitioner was in remission from mental illness, but added, "[w]e cannot certify that he would not constitute a menace to himself or others if released."[16] One of the doctors later testified that at the time he was committed, Foucha had probably suffered from a drug-induced psychosis but had since recovered from that condition.[17] The doctor also testified, however, that Foucha possessed an antisocial personality, a condition that is not a mental disease and is not treatable.[18] The doctor also noted that Foucha had been involved in several altercations at the institution.[19] The court ruled that Foucha was a danger to himself and others and ordered him returned to the mental institution.[20] The Court of Appeals of Louisiana refused supervisory writs,[21] and the Supreme Court of Louisiana affirmed,[22] holding that Foucha had not fulfilled the burden imposed upon him by Louisiana law to prove that he was

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committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. . . . After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to himself or others.

LA. CODE CRIM. PROC. ANN. art. 655 (West 1986).

[14] 112 S.Ct. at 1782 n.2. According to the majority opinion, the institution's panel recommended that Foucha's release be subject to the following conditions: (1) that he be placed on probation; (2) that he remain free from intoxicating and mind-altering substances; (3) that he attend a substance abuse clinic on a regular basis; (4) that he submit to regular random urine drug screening; and (5) that he be actively employed or seeking employment. *Id.*

[15] 112 S.Ct. at 1782.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 1782-1783.

[20] *Id.* at 1783.

[21] *Id.*

[22] State v. Foucha, 563 So.2d 1138 (La. 1990).

not dangerous.[23] The Supreme Court of the United States granted Foucha's petition for certiorari, concluding that the holdings below were arguably at odds with prior decisions of the Court.[24]

The law relied upon by the Louisiana courts to justify Foucha's continued confinement is article 657 of the Louisiana Code of Criminal Procedure, which provides in pertinent part:

> After considering the report or reports filed [by the review panel] the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or indeterminate period, or recommitted to the state mental institution.[25]

III. History

A. A Brief History of the Insanity Defense

Anglo-American jurisprudence has recognized the insanity defense in one form or another for more than five centuries.[26] The philosophical underpinning for the defense derives from the fundamental premise underlying western criminal justice, namely that persons possessed of free will should be held accountable for the exercise of such will.[27] While the ordinary criminal defendant is regarded as "culpable" or "blameworthy" because that person could have chosen to obey the law, the mentally ill defendant is perceived to be unable to make the rational choices upon which criminal responsibility and punitive sanctions are predicated.[28] Rather than punishing the mentally ill defendant,

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[23] 112 S.Ct. at 1783.

[24] *Id.*

[25] La. Code Crim. Proc. Ann. art. 657 (West 1986).

[26] *See* Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law—Part I. The English Experience*, 43 U. Cin. L. Rev. 1, 49 (1974).

[27] Rita J. Simon & David E. Aaronson, The Insanity Defense: A Critical Assessment of Law and Policy in the Post-Hinckley Era 4 (1988).

[28] *Id.*

society subjects the person to treatment in a clinical setting and confines the more violent mentally ill to secure hospitals.[29]

Determining which criminal defendants should be exempt from punishment for reasons of mental illness is a problem that has bedeviled judges and legislators for almost as long as the defense has been recognized. Among the early tests for insanity used by English courts was the "Wild Beast Test," which got its name from the instructions given jurors in the 1724 trial of Edward Arnold, accused of shooting and wounding Lord Thomas Onslow.[30] The judge in the case cautioned the jury that in order to be exempt from punishment on the basis of insanity, one "must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast."[31]

Three-quarters of a century later, the trial of James Hadfield suggested a more forgiving formulation.[32] Hadfield had fired a shot at King George III. During Hadfield's trial for treason, his defense counsel, Thomas Erskine (who later became lord chancellor) argued for a rejection of the "total deprivation" standard applied in the Arnold case. Erskine contended that a person could know right from wrong; understand the nature of a criminal act the person was about to commit; manifest a clear design, foresight, and cunning in the planning and execution of the crime; and yet have been moved to commit the crime by mental illness.[33] Hadfield's jury accepted the justice's recommendation that the trial be terminated and acquitted the defendant because "he was under the influence of insanity at the time the act was committed."[34]

The *Hadfield* case proved to be more of an aberration than a turning point. In the following 12 years, English courts heard three murder cases in which the defendants advanced the insanity defense. In each case, the courts returned to the "Wild Beast" test of the *Arnold* case. All three of the defendants were convicted and executed.[35]

In 1843, an English jury acquitted Daniel M'Naghten of the murder of an assistant to the prime minister after hearing medical witnesses

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[29] *Id.*

[30] THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE 10-11 (1985).

[31] *Id.*

[32] Rex v. Hadfield (K.B. 1800), 27 St. Tr. 1281 (1800).

[33] SIMON & AARONSON, *supra* note 27, at 11.

[34] 27 Hadfield St. Tr. 1281 (1800).

[35] SIMON & AARONSON, *supra* note 27, at 12.

describe the defendant as "an extreme paranoiac."[36] In response to the public uproar that followed, fourteen of the fifteen judges of the common law courts endorsed an insanity test that still stands in Great Britain:

> To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong.[37]

Less than a decade later, the *M'Naghten* rules were adopted in the federal courts and most of the state courts in the United States.[38] A number of jurisdictions later grafted an "irresistible impulse" test onto *M'Naghten*, providing that a defendant should be spared punitive sanctions if mental illness prevented the person from controlling his or her conduct.[39]

In the years immediately following *M'Naghten*, only New Hampshire adopted an insanity test at odds with the prevailing standard.[40] The New Hampshire rule provided essentially that a defendant would not be deemed criminally responsible if his unlawful act was the product of mental disease or defect.[41] The United States Court of Appeals for the District of Columbia adopted the New Hampshire rule in *Durham v. United States*.[42] Although cheered in psychiatric circles as far more

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[36] Regina v. M'Naghten, 8 Eng. Rep. 718 (1843).

[37] MAEDER, *supra* note 30, at 32-33.

[38] SIMON & AARONSON, *supra* note 27, at 14.

[39] SIMON & AARONSON, *supra* note 27, at 15.

[40] *See* State v. Pike, 49 N.H. 399 (1870); State v. Jones, 50 N.H. 369 (1871).

[41] *Jones*, 50 N.H. at 369. The court approved the following instruction given by the court in the defendant's trial for the murder of his wife: "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of mental disease in the defendant." *Id.*

[42] 214 F.2d 862 (1954). Unlike many of the defendants in celebrated insanity defense cases, Monte Durham was charged with housebreaking and not murder or some other violent offense. *Id.* at 864. The 26-year-old Durham had a history of petty thievery and mental disorder. *Id.* On the appeal from Durham's conviction, Judge David Bazelon explained the rule to guide the district court on remand:

> The rule . . . is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

Id. at 874-75.

consonant with modern psychiatric science than *M'Naghten*,[43] the *Durham* rule did not gain wide acceptance. In the decade following the decision, thirty state and five federal courts considered and rejected the rule.[44]

The rejection of *Durham* was codified in the American Law Institute's Model Penal Code test, essentially an updated restatement of the *M'Naghten* rule plus the irresistible impulse test:

> A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law.[45]

The A.L.I. test became the law in a majority of courts and, until October 1984, in the federal circuits.[46]

The A.L.I. test came under increased scrutiny in 1982, when would-be presidential assassin John Hinckley, Jr. was acquitted by reason of insanity in the March 1981 shooting of Ronald Reagan and his press secretary. The shooting had been witnessed by millions of television viewers, and many people were stunned by the verdict.[47] One result was the Insanity Defense Reform Act of 1984 (Reform Act),[48] the first federal codification of the insanity defense. The test embodied in the Reform Act provides for the affirmative defense that "the defendant, as a result of severe mental disease or defect was unable to appreciate the nature and quality or the wrongfulness of his acts."[49] The new formulation does away with the irresistible impulse prong of the A.L.I. test. The Reform Act also shifts the burden of proof from the prosecution to the defense, which must prove by clear and convincing evidence that the test is met.[50] In addition, the Reform Act limits the role of experts, mandating that they not proffer an opinion as to "whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto."[51]

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[43] MAEDER, *supra* note 30, at 86.

[44] SIMON & AARONSON, *supra* note 27, at 19.

[45] MODEL PENAL CODE, § 4.01 (proposed official draft 1962).

[46] SIMON & AARONSON, *supra* note 27, at 19.

[47] SIMON & AARONSON, *supra*, note 27, at 1.

[48] Pub. L. No. 98-473, 98 Stat. 2057 (1984) (codified at 18 U.S.C. § 17 (1988)).

[49] 18 U.S.C. § 17(a) (1988).

[50] 8 U.S.C. § 17(b) (1988).

[51] Pub. L. No. 98-473, § 406, 98 Stat. 2057, 2067-2068 (1984) (amending FED. R. EVID. 704).

In the years following the Hinckley acquittal, about half of U.S. states imposed new restrictions on the insanity defense.[52] Most states now require that the defendant bear the burden of proving he or she was insane at the time the offense was committed, though usually by a preponderance of the evidence rather than by the clear and convincing standard embodied in the federal statute.[53]

Still other states followed the lead taken by Michigan in 1975 and adopted statutes providing for a verdict of guilty but mentally ill.[54] The Michigan statute retains the verdict of not guilty by reason of insanity but provides as well that a jury could find a defendant guilty but mentally ill, provided that it found that the defendant was not legally insane at the time of the commission of the crime but was mentally ill.[55] The effect of such a verdict is that a court may impose any sentence permitted by law for the crime of which the defendant is convicted, including a prison sentence, jail or probation.[56] Statutes vary from state to state, but may provide for treatment to be arranged by mental health or corrections agencies.[57] Treatment may be rendered in prison or on an outpatient basis.[58] Critics contend that the guilty but mentally ill verdict has failed in its proponents' goal of reducing the number of Not guilty by reason of insanity acquittals, pointing to data suggesting that the verdict more often is rendered in the case of defendants who otherwise would have been found simply guilty rather than to defendants who would have been acquitted by reason of insanity.[59] Other studies suggest that offenders found guilty but mentally ill are no more likely to receive treatment than other similarly afflicted offenders in the general prison population.[60]

B. Confinement of Insanity Acquittees

Once a state has decided whether to afford criminal defendants an insanity defense, it must determine what to do with acquittees and

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[52] SIMON & AARONSON, *supra* note 27, at 22.

[53] *Id.* at 22-23.

[54] *Id.* at 188. *See, e.g.*, ALASKA STAT. § 12.47.030 (1990); DEL. CODE ANN. tit. 11, § 401 (1987); ILL. ANN. STAT. ch. 38, para. 6-2 (Smith-Hurd 1989); KY. REV. STAT. ANN. § 504.130 (Baldwin 1984); N.M. STAT. ANN. § 31-9-3 (Michie 1984); 18 PA. CONS. STAT. ANN. § 314 (1983); S.D. CODIFIED LAWS ANN. § 23A-26-14 (1988).

[55] MICH. COMP. LAWS ANN. § 768.36(1) (West 1982).

[56] *Id.*

[57] SIMON & AARONSON, *supra* note 27, at 191.

[58] *Id.*

[59] *See, e.g.*, Gare A. Smith & James A. Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77 (1982).

[60] SIMON & AARONSON, *supra* note 27, at 193.

when, and under what conditions, it will return those acquittees to the community. The choices in this area are guided by both policy considerations and constitutional jurisprudence.

1. Due Process

The United States Supreme Court has not mandated that states provide an insanity defense. Where such a defense is provided and successfully invoked, however, a defendant has a right to expect that he or she will avoid punishment.[61] This expectation in turn gives rise to a state-created liberty interest protected under the due process clause of the Fourteenth Amendment.[62] Although a state may not punish an insanity acquittee, it may confine a mentally ill acquittee if release would pose a danger to the acquittee or others.[63]

With regard to the substantive due process rights of a civil committee or insanity acquittee, the Supreme Court held in O'Connor v. Donaldson[64] that it was unconstitutional for a state to confine a harmless, albeit mentally ill, person.[65] Thus a committed person could not be held merely for custodial purposes or on the basis of societal "intolerance or animosity."[66] In *Jackson v. Indiana*,[67] the Court held

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[61] *See* Jones v. U.S., 463 U.S. 354, 369 (1983) (holding that because an insanity acquittee has not been convicted, he cannot be punished).

[62] *See* Vitek v. Jones, 445 U.S. 480, 488-490 (1980). The Court in *Vitek* held that a prison inmate's reasonable expectation that he would not be transferred to a mental institution absent a procedurally adequate finding of mental illness gave rise to a constitutionally protected liberty interest. *See* discussion, *infra* notes 102-105 and accompanying text.

[63] Foucha v. Louisiana, 112 S.Ct. 1780, 1786 (1992).

[64] 422 U.S. 563 (1975). *O'Connor* involved a civil rights action brought by an individual committed for almost 15 years despite repeated petitions for release and despite evidence that the petitioner was dangerous neither to himself nor others. The Court held that a state may not constitutionally confine a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. *Id.* at 576.

[65] *Id.* at 575.

[66] *Id.*

[67] 406 U.S. 715 (1972). The defendant in *Jackson* was a robbery suspect found by the trial court to be incompetent to stand trial. The trial court ordered the defendant committed until certified sane. Evidence showed the accused was a mentally defective deaf mute with the mental level of a pre-school child, without ability to read, write, or otherwise communicate except through limited sign language, and with a "rather dim" prognosis. *Id.* at 717. The Supreme Court held that Jackson's indefinite commitment violated the due process clause because he was confined solely on account

that due process requires that the nature and duration of commitment be reasonably related to the purpose for which the individual was committed.[68]

In the area of procedural due process, the Court held in *Addington v. Texas*[69] that a civil committee was entitled to an adversary proceeding in which the State would have to prove by clear and convincing evidence[70] the two statutory preconditions to commitment in the case: that the person was both mentally ill and required hospitalization for his own welfare and the protection of others.[71] The Court applied much the same standard in the criminal context in *Baxstrom v. Herold*,[72] holding that an allegedly mentally ill convict nearing the end of his prison term was entitled to release unless the State committed him as a result of a full-blown civil commitment proceeding.

2. Equal Protection

Equal protection analysis generally begins with a determination of the appropriate standard of judicial review. Three standards have evolved in the course of Supreme Court decisions: minimum rationality, intermediate review and strict scrutiny.[73] Strict scrutiny has generally

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of his incompetency to stand trial and without a substantial probability that he would even be able to participate fully in a trial. In such circumstances, the Court added, the State must either institute civil commitment proceedings or release the defendant *Id.* at 738.

[68] *Id.* at 738.

[69] 441 U.S. 418 (1979). The appellant in *Addington* was committed upon the petition of his mother and following a trial in which the jury was instructed that commitment must be based on "clear, unequivocal and convincing evidence" that appellant was mentally ill and required hospitalization for his own protection and that of others. *Id.* at 421.

[70] *Id.* at 425-431. The *Addington* Court found the preponderance of evidence standard then employed for civil commitment proceedings in Texas lacking in due process protection given the "significant deprivation of liberty" entailed in such commitments. But the Court could not bring itself to go along with the petitioner's demand for a standard of proof "beyond a reasonable doubt," noting that "[t]he subtleties and nuances of psychiatric diagnosis render certainties beyond reach in most situations." The "clear and convincing standard," the Court concluded, "strikes a fair balance between the rights of the individual and the legitimate concerns of the State." *Id.* at 427-432.

[71] *Id.* at 433.

[72] 383 U.S. 107 (1966).

[73] *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 994-1000 (rational basis), 1082-1092 (intermediate review) and 1000-1002 (strict scrutiny) (1978) [hereinafter TRIBE].

been reserved for statutes or policies affecting ancestral or racial minorities,[74] or such fundamental rights as freedom of travel, voting, access to courts, and reproductive rights.[75] Thus courts reviewing post-acquittal statutes have generally chosen between the rational basis and intermediate review standards.[76]

The minimum rationality, or rational basis, analysis is the most deferential standard, allowing the invalidation of a statute only if there is no legitimate state interest the classification adopted by the State could advance.[77] Under intermediate review, a court may require that the State articulate the interest to be served rather than leaving the court to hypothesize such an interest; that the articulated interest pertain to a real concern underlying the classification rather than one the State may come up with after the fact; that the interest be an important one as well as legitimate; and that the classification be substantially related to the interest claimed.[78]

Although the Supreme Court has used the deferential language of the rational basis test in criminal commitment cases such as *Baxstrom*, its invalidation of the statutes at issue in various cases, including *Baxstrom*, suggest a standard more in line with that of intermediate review.[79]

Because a verdict of not guilty by reason of insanity at first blush suggests a status for the acquittee somewhat similar to that of the civil committee, courts have used the rights of civil committees as a starting point for equal protection analyses of states' post-acquittal procedures.[80]

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[74] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Strauder v. West Virginia, 100 U.S. 303 (1879).

[75] *See generally* TRIBE, supra note 73, at 1002-1011 (citing, *inter alia*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting rights); Griffin v. Illinois, 351 U.S. 12 (1956) (access to courts); Skinner v. Oklahoma, 316 U.S. 535 (1942) (reproductive rights)).

[76] *See* Warren J. Ingber, Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 293-294 (1982).

[77] TRIBE, *supra* note 73, at 994-1000 (citing, *inter alia*, Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947); Williamson v. Lee Optical, 348 U.S. 483 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949)).

[78] TRIBE, *supra* note 73, at 1082-1092 (citing, *inter alia*, Craig v. Boren, 429 U.S. 190 (1976); Trimble v. Gordon, 430 U.S. 762 (1977); Cleveland Board of Education v. LaFleur, 367 U.S. 497 (1961)).

[79] *See* Ingber, *supra* note 76, at 293-94.

[80] *See, e.g.*, Bolton v. Harris, 395 F.2d 642, 647-650 (D.C. Cir. 1968); People v. Lally, 224 N.E.2d 87, 91-92 (N.Y. 1966).

Although the Court in *Baxstrom* found no basis for distinguishing between mentally ill convicts who have served their prison terms and civil committees, it later held the same not to be true of distinctions between civil committees and insanity acquittees.

In *Jones v. United States*,[81] the Court reasoned that a verdict of not guilty by reason of insanity is in itself sufficiently probative of mental illness and dangerousness to justify commitment of the individual for purposes of treatment and the protection of society, and thus obviates the need for the kind of strict adversary process required for civil commitments in *Addington*.[82] The Court also approved of committing such acquittees for an indeterminate duration, subject to periodic review of the acquittee's mental condition.[83]

What the Court did not address until *Foucha*, however, was the standard to be used in determining whether an acquittee should continue to be held upon periodic review or a petition for release by the acquittee. Although the Court found justification for a distinction between civil committees and insanity acquittees in the procedures used for initial commitment, it did not explore possible justifications for differences in the duration of confinement.

C. Statutory Provisions for Release of Insanity Acquittees

Though the minority rule,[84] the standard employed in Louisiana for determining when an insanity acquittee is entitled to release[85] is not unique to that state. The Model Penal Code features the same exclusive

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[81] 463 U.S. 354 (1983).

[82] *Id.* at 367. Examining the Washington, D.C. statute at issue in *Jones*, the Court noted that the requirement that the insanity acquittee first be found beyond a reasonable doubt to have committed the crime establishes dangerousness. As for mental illness, the Court noted that it is the *acquittee himself* who advances the insanity defense and proves that the criminal act was the result of mental illness. *Id.*

[83] *Id* at 368. Because one purpose of commitment following an insanity acquittal is to treat the acquittee's mental illness, and because it is impossible to predict how long it will take for any given individual to recover, the Court found it permissible for Congress to provide for indeterminate commitment of insanity acquittees in the District of Columbia. *Id.*

[84] According to Justice O'Connor, a majority of states have adopted release policies consistent with the Supreme Court's holding in *Foucha*. Foucha v. Louisiana, 112 S.Ct. 1780, 1790 (1992).

[85] Louisiana law requires a determination that the insanity acquittee may be released or discharged "without danger to others or to himself" as a prerequisite to such release or discharge. LA. CODE CRIM. PROC. ANN., art. 657 (West Supp. 1991).

focus on the individual's dangerousness, or lack thereof.[86] Hawai'i's Penal Code likewise provides that a person acquitted by reason of mental defect and subsequently committed to a mental institution may be granted conditional release or discharge only if the court is satisfied, based on psychiatric evaluations or evidence presented in a hearing, that the acquittee can be released without danger to the acquittee or others.[87]

The Hawai'i Office of the State Attorney General has opined that the statute's silence with regard to any requirement that an acquittee's confinement be predicated on continuing mental illness means that mental illness need not be proved by the State to deny an application for release or discharge.[88] Justice Thomas, in his dissent in *Foucha*,

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[86] The Model Penal Code provides in pertinent part:

> If the Court is satisfied by the report filed [by the psychiatrists appointed to examine the committed person] and such testimony of the reporting psychiatrists as the court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary.

MODEL PENAL CODE, § 4.08 (proposed official draft 1962).

The 1985 Explanatory notes to the Code acknowledge that the dangerousness test may not pass constitutional muster. The ALI reporters note: "Constitutional doubts . . . exist about the criterion of dangerousness. If a person committed civilly must be released when he is no longer suffering from mental illness, it is questionable whether a person acquitted on grounds of mental disease or defect excluding responsibility can be kept in custody solely on the ground that he continues to be dangerous. MODEL PENAL CODE, § 4.08, Cmt. 3 (official draft and revised comments 1985).

[87] The statute provides in pertinent part:

> If the court is satisfied by the report [by a panel of examiners appointed by the court] and such testimony of the reporting examiners as the court deems necessary, that the discharge, conditional release, or modification of conditions of release applied for may be granted without danger to the committed or conditionally released person or to the person or property of others, the court shall grant the application and order the relief. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the applicant to prove that the person may safely be released on the conditions applied for or discharged. According to the determination of the court upon the hearing, the person shall thereupon be discharged, or released on such conditions as the court determines to be necessary, or shall be recommitted to the custody of the director of health, subject to discharge or release [upon a subsequent petition and factfinding].

HAW. REV. STAT. § 704-415 (1985).

[88] Op. Att'y Gen. No. 79-5 (1979).

gave the Hawai'i statute the same reading, including it among a list of state laws similar to the Louisiana measure struck down by the Court.[89]

The official commentary to Hawai'i Revised Statutes section 704-412, which spells out the grounds upon which an insanity acquittee or the director of health may apply for the acquittee's discharge or conditional release, notes that a criterion of dangerousness serves two purposes: It prevents the release of someone who remains dangerous because of factors in his personality or background other than mental illness, and it provides a means of control for the occasional defendant who may be dangerous but who successfully feigns mental illness to gain an acquittal.[90] The commentary further notes that previous Hawai'i law provided that a person acquitted of a crime by reason of mental defect "was to be discharged by a circuit court or judge upon proof of termination of his insanity."[91] The new penal code, the commentators add, "focuses on the relevant criterion and specifically provides for procedures which adequately safeguard the interest of the public and the committed person."[92]

However persuasive such commentary may be, a number of states have acknowledged the constitutional difficulties inherent in such a scheme. Of the eleven states with post-acquittal laws similar to Louisiana's,[93] two recently amended their statutes to allow the release of acquittees who no longer suffer from mental illness but who may be dangerous.[94] In addition, the high courts of New Jersey and Delaware have construed their states' statutes, despite the express language therein, as requiring both mental illness and dangerousness for continuing confinement.[95]

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[89] Foucha v. Louisiana, 112 S.Ct. 1780, 1802 n.9 (Thomas, J., dissenting) (1992).

[90] HAW. REV. STAT. § 704-412, advisory committee note (1985).

[91] HAW. REV. STAT. § 711-94 (1968) (repealed 1972).

[92] HAW. REV. STAT. § 704-412 advisory committee note (1985) (emphasis added).

[93] *See* CAL. PENAL CODE § 1026.2(e) (West Supp.1992); DEL. CODE ANN. Tit. 11, § 403(b); HAW. REV. STAT. §.704-415 (1985); Iowa Rule Crim. Proc. 21.8(e); KAN. STAT. ANN. § 22-3428(3) (Supp. 1990); MONT. CODE ANN. § 46-14-301(3) (1991); N.J. STAT. ANN. § 2C:4-9 (West 1982); N.C. GEN. STAT. § 122C-268.1(i) (Supp. 1991); VA. CODE § 19.2-181(3) (1990); WASH. REV. CODE § 10.77.200(2) (1990); WIS. STAT. § 971.17(4) (Supp. 1991).

[94] *See* CAL. PENAL CODE ANN. § 1026.2 (West Supp. 1992) (effective Jan. 1, 1994); VA. CODE § 19.2-182.5 (Supp. 1991) (effective July 1, 1992).

[95] *See* State v. Fields, 390 A.2d 574 (N.J. 1978); *In re* Lewis, 403 A.2d 1115 (Del. 1979).

IV. ANALYSIS

The majority's opinion in *Foucha* measured Louisiana's post-acquittal scheme against constitutional standards of due process and equal protection. Part A of this section covers the Court's due process analysis, both substantive and procedural. Part B reviews the Court's equal protection analysis. Part C deals with Justice O'Connor's concurrence and the limits it applies for *Foucha*'s reach. Parts D and E review the dissenting opinions by Justices Kennedy and Thomas, respectively.

A. Due Process

The *Foucha* Court found three significant "difficulties" in examining the due process implications of Louisiana's post-acquittal release statute. First, the Court concluded that even if it were constitutionally permissible to continue his confinement, keeping Foucha against his will in a mental institution—as opposed to some presumably more appropriate institution—was improper absent a determination of mental illness.[96] Second, if Foucha could no longer be held in a mental institution, he was entitled to "constitutionally adequate" procedures to determine the grounds of his continued confinement.[97] Third, the Court held that the Due Process Clause of the Fourteenth Amendment bars certain "arbitrary, wrongful government actions regardless of the fairness used to implement them,"[98] and that Foucha's continued confinement absent a determination of mental illness *and* dangerousness *or* a criminal conviction was one such action.[99]

1. Relationship between Confinement and its Purpose

The Court concluded in its opinion that involuntary confinement in a mental institution implicates a liberty interest that goes beyond even the individual's ordinary interest in freedom from restraint and imprisonment,[100] suggesting that even if Foucha could somehow be held in the absence of mental illness, he could not be held in a psychiatric

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[96] Foucha v. Louisiana, 112 S.Ct. 1780, 1784 (1992).
[97] *Id.* at 1785.
[98] *Id.* (citing Zinermon v. Burch, 494 U.S. 113, 125 (1990)).
[99] *Id.*
[100] *Id.*

facility.[101] In arriving at its conclusion, the Court relied largely on two earlier cases involving the rights of committees and potential committees, one dealing with the stigma that attaches to involuntary commitment and the other dealing with the relation between the grounds used to justify confining an individual and the nature of that confinement.

In *Vitek v. Jones*,[102] an inmate in a Nebraska prison was threatened with transfer to a state mental hospital under a statute that permitted such transfers upon a finding by a physician that the inmate suffers from a mental disease or defect and cannot receive adequate treatment in the prison.[103] The Court held that transferring the inmate to a mental institution absent a determination in a constitutionally adequate proceeding that he was mentally ill violated his right to due process, notwithstanding the fact that his conviction for a crime extinguished his right to freedom from confinement.[104] The Court held that "[t]he loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."[105]

In *Jackson v. Indiana*,[106] a case involving an incompetent pretrial detainee, the Court held that due process requires that "the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed."[107] The prognosis for the detainee in *Jackson* was one that offered little hope that he would ever be made competent to stand trial.[108] Accordingly, the Court held that he could not be held indefinitely based solely on his lack of capacity. The State was required to either initiate civil commitment

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[101] *Id.*

[102] 445 U.S. 480 (1980).

[103] *Id.* at 483 (citing NEB. REV. STAT. § 83-180(1)).

[104] *Id.* at 493.

[105] *Id.* at 492. The Court regarded as "indisputable" the contention that commitment to a mental hospital can engender adverse social consequences to the individual, and that whether such phenomena are labeled "stigma" or something else, they can have a significant effect on the individual. *Id.*

[106] 406 U.S. 715 (1972).

[107] *Id.* at 738.

[108] *Id.* at 717-720. The Court described the petitioner, who was charged with robbery, as a "mentally defective deaf mute with a mental level of a pre-school child." *Id.* at 717. He could not read, write or otherwise communicate except through limited sign language. Physicians who examined the petitioner testified during his competency hearing that it was unlikely that he would ever develop even rudimentary communication skills and that his prognosis as far as becoming competent to stand trial was "rather dim." *Id.* at 719.

proceedings in accordance with *Addington*,[109] or to release the defendant.[110]

Applying the Court's holdings in *Vitek* and *Jackson* to the case of the petitioner in *Foucha*, the Court reasoned that because mental illness could no longer constitute a ground for the deprivation of Foucha's liberty, his continued confinement in a mental institution bore no relation to whatever grounds might still exist for holding him.[111] As the *Foucha* majority notes, "If he is to be held, he should not be held as a mentally ill person."[112]

2. Procedural Due Process

If an insanity acquittee no longer suffering from mental illness cannot be held in a mental institution, the *Foucha* Court concluded, it is incumbent upon the State to either release the acquittee or afford him or her constitutionally adequate procedures to establish the grounds for the acquittee's continued confinement.[113] Nor does it matter that the acquittee has, after all, been found to have committed a criminal act. The Court took note of its opinion in *Baxstrom v. Herold*,[114] in which it held that an allegedly mentally ill convicted criminal was entitled to release at the end of his term unless the State committed him as a result of a civil commitment proceeding.[115]

The Court did not identify at this point in its analysis just what procedures would be constitutionally adequate, in part perhaps because it never answered head on the question of what substantive basis would suffice for Foucha's continued detention. As is discussed in part 3 of this section, however, the Court referred with approval to the procedural scheme underlying the pretrial detention at issue in *United States v. Salerno*,[116] in which the government was required to show by clear and convincing evidence and in a full-blown adversary hearing that

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[109] *See supra* notes 69-71 and accompanying text.

[110] 406 U.S. at 738.

[111] Foucha v. Louisiana, 112 S.Ct. 1780, 1785 (1992).

[112] *Id.*

[113] *Id.* at 1785.

[114] 383 U.S. 107 (1966). For a fuller discussion of *Baxstrom*, see *supra* note 72 and accompanying text.

[115] *Id.* at 111-112. The Court observed, "There is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.*

[116] 481 U.S. 739 (1987).

the defendant posed a risk to others.[117] The Louisiana law at issue in *Foucha* placed the burden of persuasion on the defendant.[118]

3. Substantive Due Process

Having addressed the procedures necessary to establish the grounds for Foucha's continued confinement, the Court next dealt with whether such grounds existed in Foucha's case. The majority began with the premise that an individual's *substantive* due process rights bar certain government actions in restraint of individual liberty, regardless of the soundness of the procedures used to implement such actions.[119] The Court identified freedom from bodily restraint as being "at the core" of the liberties protected by the Due Process Clause, but noted three circumstances under which state interests may justify interference with that freedom.

First, a state may imprison convicted criminals for purposes of deterrence and retribution.[120] But Louisiana had no such interest in Foucha's case. As the Court noted, Foucha was not convicted, and thus could not be punished.[121] The State itself had exempted Foucha from criminal liability by virtue of its statutory insanity defense.[122]

Second, as the Court noted in *Addington*, a state may confine a mentally ill person if it shows by clear and convincing evidence that the individual is mentally ill and dangerous.[123] In Foucha's case, Louisiana did not even claim that Foucha suffered from mental illness at the time of his petition for release, and thus the State had not carried its burden under *Addington*.[124]

Third, the Court has held that states may subject persons deemed a danger to others to a period of limited confinement in certain narrowly defined circumstances.

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[117] *Id.* at 747. For a fuller discussion of *Salerno*, see *infra* notes 125-132 and accompanying text.

[118] Foucha v. Louisiana, 112 S.Ct. 1780, 1786 (1992).

[119] *Id.* at 1785.

[120] *Id.*

[121] *Id.* Presumably, the petitioner's purported inability to distinguish right from wrong at the time of his offense would also undermine any interest the state might have in deterrence.

[122] *See supra* note 9 and accompanying text.

[123] 112 S.Ct. at 1786.

[124] *Id.*

In *United States v. Salerno*,[125] the Court upheld the Bail Reform Act of 1984,[126] which required courts to detain defendants charged with certain serious felonies if the government demonstrated by clear and convincing evidence during an adversary hearing that no pretrial release conditions would reasonably assure the safety of any other person and the community.[127] The *Salerno* Court found that "the government's interest in preventing crime by arrestees is both legitimate and compelling"[128] and noted that the Bail Reform Act carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes (crimes of violence, offenses punishable by life imprisonment or death, serious drug offenses and certain repeat offenders).[129]

The Court also took note of the procedural safeguards in the Bail Reform Act, including a prompt adversary hearing and the clear and convincing burden of proof to be borne by the government.[130] Moreover, the length of pretrial confinement was strictly limited by the terms of the Speedy Trial Act.[131] Finally, the Bail Reform Act provided that, whenever practicable, pretrial detainees were to be housed separately from convicts.[132]

The Court in *Foucha* found nothing in *Salerno* that could save Louisiana's statutory scheme governing the release of insanity acquittees. The Court noted that none of the limits that defined the parameters of pretrial detention in *Salerno* were to be found in the Louisiana statute.[133]

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[125] 481 U.S. 739 (1987).

[126] 18 U.S.C. § 3142 (1988).

[127] 481 U.S. at 741.

[128] *Id.* at 749.

[129] *Id.* at 747. The statute provided for detention where the offense involved: (A) a crime of violence; (B) an offense for which the maximum sentence is life in prison; (C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act, or section 1 of the Maritime Drug Law Enforcement Act (21 U.S.C. § 955a (1981)). 18 U.S.C. § 3142(f)(1) (1985).

[130] 481 U.S. at 752.

[131] 18 U.S.C. § 3161 (1988).

[132] 481 U.S. at 747-748. The statute provided in pertinent part that detention ordered entered pursuant to the act "direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal." 18 U.S.C. § 3142(i) (1985).

[133] Foucha v. Louisiana, 112 S.Ct. 1780, 1786 (1992).

Foucha was not entitled to an adversary hearing at which the State would have had to prove by clear and convincing evidence that he was a danger to the community. In fact, the Court noted, the State need prove nothing under the Louisiana statute to justify an acquittee's continued confinement.[134] The statute placed the burden on the detainee to prove that he is not dangerous.[135] In Foucha's case, for example, no doctor or other person testified that Foucha would pose such a danger. The doctors who examined Foucha said only that they could not certify that he would not be a danger to the community.[136] Although such testimony was sufficient grounds to deny Foucha release under the Louisiana statute, the Court concluded it was "not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility."[137] Nor was the Court impressed by the allegations that Foucha had been involved in a number of altercations while at the mental facility.[138] If Foucha committed criminal acts, such as assault, while at the facility, the State did not explain why its interest in protecting the public would not be vindicated through ordinary criminal processes.[139] If the State had charged Foucha with assaulting other inmates while he was sane, the Court reasoned, and then sought an enhanced sentence for recidivism, he might have been convicted and incarcerated as any other offender.[140] The public might thus have been protected without treading on Foucha's due process rights.

The confinement at issue in *Salerno* was strictly limited in duration. In *Foucha*, by contrast, the State contended that because Foucha had once committed a criminal act and still had an antisocial personality, he could be held indefinitely.[141] The Court pointed out that Louisiana's rationale would permit the State to hold not only insanity acquittees who are no longer mentally ill, but also a convicted criminal suffering from a personality disorder that may lead to criminal conduct, even if the convict had completed his or her prison term.[142] The Court con-

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 1782-83.
[139] *Id.* at 1786-87.
[140] *Id.*
[141] *Id.* at 1787.
[142] *Id.*

cluded that such a scheme is but "a step away" from substituting confinement for dangerousness for the present system of incarcerating only those—with certain narrowly defined exceptions—who have been proved beyond a reasonable doubt to have committed a crime.[143]

B. Equal Protection

Justice White wrote for a four-member plurality in Part III of the opinion, which assessed the equal protection implications of the Louisiana statute.[144] First, White argued that although *Jones v. United States*[145] established that insanity acquittees may be treated differently in some respects from persons subject to civil commitment, Foucha could no longer be classified as an insanity acquittee because he was no longer thought to be insane.[146] Although Louisiana nonetheless insisted it could detain Foucha indefinitely because he at one time committed a criminal act and could not at the time of his release hearing prove that he was no longer dangerous, Louisiana does not provide for such confinement of other classes of people who have committed criminal acts and cannot later prove that they are not dangerous.[147] The Court noted that criminals who have completed or are nearing completion of their prison terms constitute one such class.[148] Many might be expected to suffer from the same antisocial personality that Foucha was said to exhibit.[149]

White noted that the Louisiana statute discriminates against insanity acquittees not only in their treatment but in the burden of proof to be borne by the State in maintaining their confinement.[150] Under *Addington*, the State must prove both a person's mental illness and dangerousness by clear and convincing evidence.[151] Similarly, under *Baxstrom*, the State must prove insanity and dangerousness to confine a mentally ill convict beyond the end of his or her criminal sentence.[152] Yet, the

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[143] *Id.*

[144] *Id.* at 1788. Joining White were Justices Blackmun, Stevens, and Souter. O'Connor did not join in the plurality's equal protection analysis. *Id.* at 1781.

[145] 463 U.S. 354 (1983). *See supra* notes 81-83 and accompanying text.

[146] 112 S.Ct. at 1788.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] 441 U.S. 418, 431-433 (1979). *See supra* notes 69-71 and accompanying text.

[152] 383 U.S. 107 (1966). *See supra* note 72 and accompanying text.

Louisiana statute provided for Foucha's continued confinement absent evidence of mental illness and solely because he was deemed dangerous, and without the State's even having to prove his dangerousness by clear and convincing evidence.[153]

Finding that freedom from restraint is a fundamental right, and therefore bringing strict scrutiny to bear on the issue, the plurality held that Louisiana had failed to put forward a particularly convincing reason for its discrimination against insanity acquittees who are no longer mentally ill.[154]

C. O'Connor's Concurrence and the Limits of Foucha

Justice O'Connor, who provided one of the five votes to reverse in *Foucha*,[155] wrote a separate concurrence in which she sought to make clear what the majority's opinion *did not* mean.[156] First, O'Connor noted that the facts in *Foucha* did not require the Court to pass judgment on more narrowly drawn statutes providing for the detention of insanity acquittees, or on statutes that provide for the punishment of persons who commit crimes while mentally ill, such as provisions in some state's laws for verdicts of guilty but mentally ill.[157]

More importantly, O'Connor wrote that she did not understand the Court to hold that Louisiana might *never* confine dangerous insanity acquittees after they regain mental health.[158] Although acknowledging on one hand that insanity acquittees may not be incarcerated as criminals or penalized for successfully asserting the insanity defense, she maintained, citing *Jones v. United States*, that the finding of criminal conduct on the part of such acquittees nonetheless sets them apart from ordinary citizens.[159] Apparently rejecting the strict scrutiny test advocated by Justice White in the plurality opinion,[160] O'Connor wrote that the Court should give judicial deference to the Louisiana Legislature's

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[153] 112 S.Ct. at 1789.

[154] *Id.*

[155] Also voting to reverse were Justices White, Blackmun, Stevens and Souter. *Id.* at 1781.

[156] 112 S.Ct. at 1789 (O'Connor, J., concurring).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See supra* notes 144-154 and accompanying text.

judgment that the inference of dangerousness drawn from an insanity acquittal continues even after a clinical finding of sanity.[161]

O'Connor proposed what appears to be a heightened standard of review, albeit one less stringent than strict scrutiny, for state schemes governing the release of insanity acquittees. She concluded that it might be permissible for a state to continue to confine an acquittee who has regained sanity if "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[162] Precisely what form such permissible confinement might take is unclear, as O'Connor had already acknowledged that acquittees may not be incarcerated as criminals and added later that they could not be confined as mental patients "absent some medical justification for doing so," because the necessary connection between the nature and purposes of confinement would be absent.[163] Nor, O'Connor concluded, would it be permissible to treat all insanity acquittees alike. She noted that the government's interest in detention may well vary depending upon the seriousness of the acquittee's crime.[164]

O'Connor further acknowledged that equal protection principles may well limit the confinement of an insanity acquittee who has regained his sanity to a period no longer than a person convicted of like crimes could be imprisoned.[165] It is unclear, however, whether the durational limit suggested by O'Connor would involve maximum sentences (as her use of the phrase "could be imprisoned" suggests), or actual or average sentences, which may be substantially shorter.

Finally, O'Connor emphasized that the Court's holding in *Foucha* placed no new restrictions on the states' freedom to determine whether and to what extent mental illness should serve as a bar to punishment for criminal behavior,[166] provided criminal defendants may still offer evidence of mental illness to negative the state of mind that is an element of an offense.[167] She also noted that the states remain free to not provide an insanity defense or to provide for prison terms after verdicts of "guilty but mentally ill."[168]

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[161] 112 S.Ct. at 1789 (O'Connor, J., concurring).

[162] *Id.*

[163] *Id.* at 1790 (citing *Vitek v. Jones*, 445 U.S. 480, 491-494 (1980)).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

D. *Justice Kennedy's Dissent*

In a dissent joined by Chief Justice Rehnquist, Justice Kennedy rejected the Court's holding and analysis in *Foucha* while nonetheless agreeing with the majority's primary premise, that freedom from restraint is essential to the definition of the liberties protected by the Fifth and Fourteenth Amendments to the United States Constitution.[169] The Court erred, Kennedy contended, by relying on cases, such as *Addington* and *Donaldson*, that define the due process limits for civil commitment.[170] In so doing, Kennedy argued, the Court failed to recognize that the conditions for incarceration imposed by Louisiana in *Foucha* relate to legitimate and traditional state interests regarding the handling of insanity acquittees in criminal cases.[171] Moreover, Kennedy added, the Louisiana statute provided for those interests to be vindicated through "full and fair" procedures.[172]

Kennedy noted that mental illness may relate to criminal responsibility in either of two ways: It may preclude the formation of mens rea, if the effects of the illness prevented the formation of the state of mind required by statute as an element of offense, or it may support the affirmative defense of insanity.[173] The former possibility implicates the State's burden to prove every element of an offense beyond a reasonable doubt, as required by the Court's holding in *In re Winship*.[174] The latter possibility does not, however, implicate the State's burden to prove the offense, as the Court noted in *Leland v. Oregon*[175] in upholding an Oregon statute requiring that a defendant prove insanity beyond a reasonable doubt in order to take advantage of the defense.[176]

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[169] *Id.* at 1791 (Kennedy, J., dissenting).

[170] *See supra* notes 69-71 and notes 64-65 and accompanying text.

[171] 112 S.Ct. at 1791 (Kennedy, J., dissenting).

[172] *Id.*

[173] *Id.*

[174] 397 U.S. 358 (1970). In *Winship*, the appellant challenged a New York statute providing for adjudication of criminal charges against juveniles on the basis of a "preponderance of the evidence" standard. The Court held that the Due Process clause of the Fourteenth Amendment required a finding of proof beyond a reasonable doubt to sustain a conviction in a criminal case. *Id.* at 364.

[175] 343 U.S. 790, 795-796 (1952).

[176] *Id.* at 792 (citing ORE. COMP. LAWS §§ 26-929, 23-122 (1940)). The petitioner in *Leland* was convicted of first-degree murder and sentenced to death after unsuccessfully invoking the insanity defense. *Id.* at 791-792. He contended on appeal that the statute requiring that he prove his insanity beyond a reasonable doubt violated

Kennedy noted that Foucha entered a dual plea of not guilty and not guilty by reason of insanity at his arraignment.[177] The Louisiana Supreme Court held in *State v. Marmillion*[178] that the effect of such a plea is to require a finding beyond a reasonable doubt that the defendant committed the offense before the finder of fact can proceed to determine whether the defendant was sane at the time the offense was committed.[179] Kennedy contends that the State's burden in Foucha's case was unaffected by the fact that he was adjudged not guilty by reason of insanity without a jury trial because Louisiana law requires the trial court to determine, before accepting the insanity plea, that there is a basis for it.[180]

Kennedy argued that because compliance with the standard of proof beyond a reasonable doubt is the "defining, central feature in criminal adjudication," the Court has often applied heightened due process scrutiny to confinement imposed before a judgment is rendered under the standard, as in *Salerno*.[181] But Kennedy argued the same heightened scrutiny is not applicable where the State has met its burden of proof and obtained an adjudication. On the contrary, according to Kennedy, the Court has held that once a state has proven all the elements of an offense beyond a reasonable doubt, it may incarcerate the defendant on any reasonable basis.[182]

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his due process rights by requiring, in effect, that he establish his innocence by disproving elements of the crime beyond a reasonable doubt. *Id.* at 793. The Court disagreed, concluding that the jury might have found the petitioner to have been mentally incapable of the premeditation and deliberation that were elements of the murder charge and yet not have found him to have been legally insane. *Id.* at 794.

[177] 112 S.Ct. at 1792 (Kennedy, J., dissenting).

[178] 339 So.2d 788 (1976).

[179] *Id.* at 796.

[180] 112 S.Ct. at 1792 (Kennedy, J., dissenting). The Louisiana Code of Criminal Procedure provides in pertinent part: "The court may adjudicate a defendant not guilty by reason of insanity without trial, when the district attorney consents and the court makes a finding based upon expert testimony that there is a factual basis for the plea." LA. CODE CRIM. PROC. ANN. art. 558.1 (West Supp. 1992).

[181] 112 S.Ct. at 1792 (Kennedy, J., dissenting) (citing *Salerno v. United States*, 481 U.S. 739, 750-751 (1987)).

[182] *See, e.g.*, Chapman v. U.S., 111 S.Ct. 1919, 1927 (1991), *rehearing denied*, 112 S.Ct. 17 (1991); Williams v. Illinois, 399 U.S. 235, 243 (1970). Of course, American courts recognize a number of affirmative defenses which, if successfully advanced, will absolve a defendant of criminal responsibility despite proof beyond a reasonable doubt of every element of an offense. See, e.g., MODEL PENAL CODE § 2.09 (duress); § 3.02 (choice of evils); § 3.04 (self-defense) (1974).

Accusing the majority of attaching "talismanic significance"[183] to the fact that Foucha was found not guilty by reason of insanity, Kennedy argued that such a verdict is "neither equivalent nor comparable to a verdict of not guilty standing alone."[184] Instead, Kennedy contended, the verdict means the State has met its burden under *Winship* in the adjudication of a criminal matter. Thus cases that define the due process limits of civil commitment, such as *Donaldson* and *Addington* are irrelevant.[185] Rather, Kennedy argued, the Court should look to its holding in *Jones v. United States*, in which it distinguished between criminal and civil commitment, holding that the Due Process clause permits automatic incarceration following a judgment of not guilty by reason of insanity.[186] Kennedy contended that the majority in *Foucha* has in effect overruled *Jones v. United States* by holding that Foucha could not be held absent a determination of mental illness and dangerousness in a proceeding akin to a civil commitment procedure.[187]

Kennedy further noted three important factual and theoretical distinctions between civil and criminal commitment. First, as contended

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[183] 112 S.Ct. at 1793 (Kennedy, J., dissenting). As the majority noted by way of rejoinder, however, the significance that attaches to a verdict of not guilty by reason of insanity is simply that society has found the person not criminally responsible and thus not subject to punishment. *Id.* at 1783-1784 n.4. The Court noted tat although society has no punitive interest in relation to the insanity acquittee, it does have an interest in insuring he receives treatment. But that interest evaporates once the acquittee is no longer mentally ill. Finally, although society has an interest in protecting society from a dangerous acquittee, the Court merely suggested that that interest is no different from that of protecting society from persons convicted of crimes who serve their terms but remain dangerous on release. As the majority notes, Justice Kennedy "cites no authority, but surely would have if it existed, for the proposition that a defendant convicted of a crime and sentenced to a term of years, may nevertheless be held indefinitely because of the likelihood that he will commit other crimes." *Id.*

[184] *Id.* at 1793 (Kennedy, J., dissenting).

[185] *Id.*

[186] *See supra* notes 81-83 and accompanying text.

[187] 112 S.Ct. at 1793 (Kennedy, J., dissenting). The majority flatly rejected the suggestion that it had overruled or even weakened *Jones*, noting that the holding in *Foucha* did nothing to alter the distinction drawn in *Jones* between civil committees and insanity acquittees, a distinction that makes the automatic commitment of the latter constitutionally permissible. Moreover, the majority faulted Kennedy for ignoring another important part of the holding in *Jones*, namely that the period of time during which an insanity acquittee may be held bears no relation to the length of the sentence that might have been imposed had he been convicted. The acquittee is confined in the first place because he is both mentally ill and dangerous. Under *Jones*, that confinement may continue so long as both conditions are satisfied—but not longer. *Id.* at 1783 n.4.

earlier, the procedural protections afforded a criminal committee, in terms of the State's burden in proving the offense alleged, are greater than those afforded the civil committee.[188] Second, proof of criminal conduct in accordance with the beyond a reasonable doubt standard of *In re Winship* eliminates the risk inherent in civil commitment of incarceration for "mere idiosyncratic behavior."[189] Third, the State's rationale for confinement differs. While in civil commitment, the State acts largely out of its *parens patriae* power to protect and provide for an ill individual, criminal commitment is founded largely upon a need to protect society from the mentally ill individual.[190]

But Kennedy found the majority's opinion "troubling" at another level, because it failed to account for the difference between clinical definitions of mental illness and state-law definitions of insanity.[191] Arguing that the states are free to recognize and define the insanity defense as they see fit,[192] Kennedy noted that Louisiana has adopted the traditional *M'Naghten* test,[193] which provides for a finding of insanity where, because of mental disease or defect, the defendant was incapable of distinguishing right from wrong at the time of the offense. Because the test focuses on the question of the offender's sanity at the time of the offense, Kennedy argued the majority is wrong in relying on the fact that Louisiana did not contend that Foucha was insane at the time of his release hearing.[194]

Kennedy contended that the establishment of a criminal act and insanity under *M'Naghten* provides a "legitimate basis" for confine-

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[188] *Id.* at 1793-94 (Kennedy, J., dissenting).

[189] *Id.* at 1794.

[190] *Id.* Justice Kennedy's distinction between civil and criminal commitment is less than convincing. In *O'Connor v. Donaldson*, the Court held that a civil committee could not be held absent a showing of dangerousness. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). Conversely, the Court in *Jackson v. Indiana* held that a criminal defendant found incompetent to stand trial could not be held indefinitely without the initiation of civil commitment proceedings. The evidence indicated that the defendant's illness was untreatable, leading the Court to conclude that his indefinite commitment was not reasonably related to the purpose underlying such commitment, i.e., treatment. 406 U.S. at 737-738.

[191] 112 S.Ct. at 1794 (Kennedy, J., dissenting).

[192] *Id.* In Powell v. Texas, 392 U.S. 514 (1968), the Court refused to "write into the constitution" formulas for mental illness "cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or lawyers." *Id.* at 536-537.

[193] See *supra* notes 36-38 for a discussion of the *M'Naghten* rule.

[194] 112 S.Ct. at 1794 (Kennedy, J., dissenting).

ment.[195] Moreover, just because a state has chosen not to *punish* insanity acquittees, Kennedy argued, it does not follow that the State has surrendered its interest in incapacitative incarceration.[196] Kennedy suggested that if anything, the State's interest in incapacitative incarceration is greater with regard to insanity acquittees, because they have been proven "dangerous beyond their ability to comprehend."[197] Kennedy also contended that the wisdom of such incarceration is demonstrated by its widespread acceptance, noting that every state provides for mandatory or discretionary incarceration of insanity acquittees.[198]

Kennedy also rejected the majority's contention that whether Foucha could continue to be held or not, he could not be held in a mental institution.[199] Kennedy pointed to what he said was an absence of authority in support of the proposition and notes that Foucha's counsel did not rely on the argument.[200] Moreover, Kennedy noted that Foucha's was not a case, as in *Vitek*,[201] where the State had stigmatized an individual by placing him in a mental institution.[202] Rather, it was Foucha who raised the insanity defense and who thus invited whatever stigma might follow from a verdict of not guilty by reason of insanity.[203]

Finally, Kennedy noted that Foucha had been incarcerated for less than a third of the statutory maximum for the offenses he committed. As such, Kennedy argued the majority's repeated references to "indefinite detention" should have no bearing on the case.[204] When considered in light of Foucha's failure to prove his nondangerousness and the possibility that Foucha may have feigned mental illness in the

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[195] *Id.* at 1795.

[196] *Id.*

[197] *Id.* Insofar as Justice Kennedy means to suggest that past behavior is a sufficient basis upon which to predict future unlawful behavior and thus to justify incapacitative incarceration, his position may lack empirical support. What studies exist suggest that the recidivism rate among insanity acquittees is actually lower than among ex-convicts, who of course are not subjected to indefinite incapacitative confinement. *See* James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 986 (1986) (citing Steadman & Braff, *Defendants Not Guilty By Reason of Insanity*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 109, 118-119 (1983), and studies therein).

[198] 112 S.Ct. at 1795 (Kennedy, J., dissenting).

[199] *Id.*

[200] *Id.* at 1796.

[201] *See supra* notes 102-105 and accompanying text.

[202] 112 S.Ct. at 1796 (Kennedy, J., dissenting).

[203] *Id.*

[204] *Id.*

first place,[205] this fact led Kennedy to conclude that it would be difficult to imagine a less compelling case for the imposition of the constitutional commands adopted by the majority.[206]

E. Justice Thomas' Dissent

Justice Thomas began his dissent with the argument that the statutory scheme struck down by the Court is "not some quirky relic of a bygone age" but rather mirrors the current provisions of the American Law Institute's Model Penal Code.[207] Thomas contended that nothing in the Constitution, the Court's precedents or American tradition authorized the Court to invalidate the Louisiana scheme.[208]

As Kennedy did, Thomas argued that the majority erred by equating a verdict of not guilty by reason of insanity with a simple verdict of not guilty.[209] In addition, however, Thomas faulted the majority's constitutional analysis, or lack thereof. What the Court styles a procedural due process analysis, Thomas said, is in fact an equal protection analysis. The argument that if Foucha can no longer be held as an insanity acquittee he is entitled to procedures such as those used in civil commitment proceedings is, Thomas argued, an equal protection argument (there being no rational distinction between persons A and B, the State must treat them the same).[210] The Court, he added, does not even pretend to examine the fairness of the procedures provided by the Louisiana statute.[211]

The majority's analysis fails, Thomas contended, because it did not recognize a real and legitimate distinction between insanity acquittees and civil committees, namely that the former have been found in a judicial proceeding to have committed a criminal act.[212] Thomas argued

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[205] *Id.* at 1797. The medical panel that reviewed Foucha's request for release stated that there had been no evidence of mental illness since admission. *Id.* at 1782.

[206] *Id.* at 1797.

[207] *Id.* The American Law Institute has acknowledged constitutional problems with the Model Penal Code's release provisions. *See supra* note 86.

[208] 112 S.Ct. at 1797 (Thomas, J., dissenting).

[209] *Id.*

[210] *Id.* at 1800.

[211] *Id.* This assertion is somewhat bewildering given the amount of ink expended by the majority on the inadequacies of the procedural provisions of the Louisiana statute, particularly in comparing the procedural provisions at issue in *Foucha* with those of the Bail Reform Act in Salerno v. United States, 481 U.S. 739 (1987). *See* 112 S.Ct. at 1786.

[212] *Id.* at 1800 (Thomas, J., dissenting).

that the Court's holding amounts to a declaration that "the State's interest in treating insanity acquittees differently evaporates the instant an acquittee 'becomes sane.'"[213] Thomas rejected the conclusion, noting the danger of treating as precise a clinical determination that an acquittee has regained sanity.[214] Moreover, Thomas argued a state is not required to ignore an acquittee's criminal act just because the State has renounced its punitive interest by virtue of the acquittal.[215] The State maintains an interest in protecting the public from an acquittee, and that interest justifies a procedure whereby the acquittee must prove his nondangerousness to gain release.

Thomas next attacked the majority's contention that Louisiana's statute violates Foucha's substantive due process rights.[216] He faulted the majority for departing from its traditional analysis of substantive due process claims, first for not explaining whether it is dealing with a fundamental right, and second, for not disclosing what standard of review applies to the analysis.[217]

Thomas accused the Court of first identifying the liberty interest at stake in *Foucha* as the right to freedom from bodily restraint and then shifting gears and identifying the interest as freedom from indefinite confinement in a mental institution.[218] As to the standard of review, Thomas noted the majority first contended that the nature of confinement must bear some "reasonable relation" to the purpose for which the individual is committed, and then later faulted the Louisiana scheme because its provisions were not "sharply focused" or "carefully limited."[219] The reasonable relation test denotes a deferential standard of review, while the demand for a sharply focused and carefully limited scheme is characteristic of heightened scrutiny.[220]

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[213] *Id.* As the majority noted, however, such clinical determinations are regarded as reliable enough to justify a verdict of not guilty by reason of insanity and to commit the acquittee afterwards. *Id.* at 1783 n.3. Moreover, the Court has held that the unreliability of psychiatric predictions of future dangerousness does not preclude the use of such predictions in support of claims of aggravation in death penalty cases. Barefoot v. Estelle, 463 U.S. 880, 896-903 (1983).

[214] 112 S.Ct. at 1801 (Thomas, J., dissenting).

[215] *Id.*

[216] *Id.* at 1804.

[217] *Id.*

[218] *Id.*

[219] *Id.* at 1805.

[220] *See supra* notes 73-78 and accompanying text.

Thomas contended that there is no basis in American history or the Court's precedents to support the existence of a general fundamental right to freedom from bodily restraint "applicable to all persons in all contexts."[221] More specifically, Thomas added, there is no evidence that society has ever recognized a fundamental right on the part of insanity acquittees to be free from physical restraint.[222] Thomas noted that the Court had never applied strict scrutiny to state laws involving the involuntary commitment of the mentally ill, much less to statutes involving the confinement of insanity acquittees.[223] Previously, Thomas argued, the Court had invalidated such laws only where the State failed to demonstrate any legitimate interest to justify the statute or where a law's provisions bore no reasonable relation to its purported purpose.[224]

Thomas also accused the majority of misreading *Jones* to hold that an insanity acquittee must be released when he has recovered his sanity or is no longer dangerous.[225] Rather, Thomas noted, the portion of *Jones* quoted by the Court dealt with whether it was permissible for a state to hold an insanity acquittee for a period longer than the maximum period of incarceration to which the acquittee could have been sentenced if convicted,[226] a question the Court in *Jones* in fact answered in the affirmative.[227]

As did the majority, Thomas distinguished the pretrial detention of criminal suspects upheld in *Salerno* from the confinement of insanity acquittees at issue in *Foucha*, but he put a decidedly different spin on that distinction. Unlike pretrial detainees, Thomas noted, insanity acquittees have *had* their day in court, and have been found to have

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[221] 112 S.Ct. at 1805 (Thomas, J., dissenting). In fact, the majority came to no such sweeping conclusion. The Court acknowledged that a state may confine individuals convicted of crimes and may confine an individual who is mentally ill and shown by clear and convincing evidence to be dangerous. *Id.* at 1785-1786.

[222] *Id.* at 1806 (Thomas, J., dissenting).

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.* at 1806-1807; *see also supra* notes 81-83 and accompanying text. In *Jones*, the Court noted that the congressional purpose underlying the commitment of insanity acquittees in the District of Columbia, that is treatment for the acquittee's mental illness and the protection of society and the acquittee from his or her dangerousness, is distinct from the punitive purposes underlying incarceration following conviction for an offense. Thus, the Court held, the length of the acquittee's hypothetical criminal sentence is irrelevant to the purposes of his commitment. Jones v. United States 463 U.S. 354, 368 (1983).

committed the acts for which they were charged.[228] Thomas argued the same distinction applies to *Jackson v. Indiana*, in which the Court rejected the indefinite confinement of defendants deemed not to have the capacity to stand trial.[229] Thomas complained that the majority seemed determined to ignore the fact that insanity acquittees stand in a fundamentally different position from persons who have not been found beyond a reasonable doubt to have committed criminal acts.[230] Thomas contended that as a result of its failure to recognize this distinction, the Court applies the same level of scrutiny to the statute in *Foucha* that it brought to the scrutiny of confinement of pretrial detainees in *Salerno* and *Jackson*.[231] While conceding that the level of scrutiny applied by the Court in the past to laws affecting insanity acquittees is unclear,[232] Thomas expressed alarm that *Foucha* might be read as subjecting all restrictions on freedom from bodily restraint to strict scrutiny.[233] If so, he warned, the Court has wrought a revolution in the treatment of the mentally ill.[234] He argued that civil commitment statutes would almost certainly fall for failure to survive such scrutiny, because only in the rarest of circumstances would the State be able to show a "compelling interest," and one that can be served in no other way than by involuntarily institutionalizing a person.[235]

Thomas also took issue with the majority's characterization of Louisiana's post-acquittal commitment statute as providing for the "indefinite" commitment of insanity acquittees. He noted that Louisiana's statute entitles acquittees to an annual release hearing and, like the statute at issue in *Jones*, provides for indefinite commitment only to

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[228] 112 S.Ct. at 1807 (Thomas, J., dissenting).

[229] *Id.*; *see also supra* notes 106-110 and accompanying text.

[230] 112 S.Ct. at 1807 (Thomas, J., dissenting).

[231] *Id.*

[232] *Id.* Thomas noted in a footnote that the Court had not been entirely precise in defining just what standard of review it has applied to statutes involving the commitment and release of insanity acquittees. *Id.* at 1807 n.15. He noted that some cases have used the language of rationality analysis (*e.g.*, *O'Connor*), while others (*e.g.*, *Jackson*) have used the language of reasonableness, implying a "somewhat" heightened standard of review. What *is* clear from cases before *Foucha*, Thomas contended, is that the appropriate level of scrutiny is highly deferential, not strict. *Id.*

[233] *Id.* at 1807.

[234] *Id.*

[235] *Id.* at 1807-1808. Thomas' warning may be unduly alarmist, given that even the broadest reading of the majority's holding is that a state *may* hold an insanity acquittee or civil committee so long as he or she is both mentally ill and dangerous, though not longer.

the extent that an acquittee is unable to satisfy the statute's substantive standards for release.[236] Thomas noted that Foucha, at the time his case was considered by the Court, had been confined for just eight years, while the maximum term had he been convicted of the crimes for which he was charged would have been 32 years.[237] Thus, Thomas described as "odd" Justice O'Connor's suggestion in her concurrence that *Foucha* might have been decided differently had Louisiana's statute limited confinement to the period for which the person might have been imprisoned if convicted.[238] More importantly for Thomas, the Court's holding in *Jones v. United States* appeared to reject the contention that the Constitution requires a cap on the duration of an acquittee's confinement.[239]

Finally, Thomas rejected the majority's contention that even if Foucha's continued confinement were somehow permissible he could no longer be held in a mental institution absent a continuing diagnosis of mental illness. Thomas complained that neither the Court nor Foucha presented any evidence that states have traditionally transferred acquittees deemed sane but dangerous to other detention facilities,[240] and that there is therefore no basis for the Court to recognize a "fundamental right" for a sane insanity acquittee to be transferred out of a mental institution.[241] He noted the Court in guiding interpretation of the Due Process clause in the past has insisted not only that "the interest denominated as a 'liberty' be 'fundamental,' a concept that in isolation is hard to objectify, but also that it be an interest traditionally protected by our society."[242] Thomas concluded that although removing sane insanity acquittees from mental institutions may make "eminent sense" as a policy matter, nothing in the Constitution mandates such removal.[243]

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[236] *Id.* at 1808.

[237] *Id.* (citing LA. REV. STAT. ANN. § 14.60 and § 14.94 (West 1986)).

[238] *Id.*

[239] *Id.* In fact, although *Jones* sets no absolute time limit on an insanity acquittee's confinement, it does provide that a committed acquittee "when he has recovered his sanity or is no longer dangerous." *Jones*, 463 U.S. at 368.

[240] 112 S.Ct. at 1809 (Thomas, J., dissenting).

[241] *Id.*

[242] *Id.* (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion)).

[243] *Id.* Thomas conceded in a footnote that under particular circumstances it may be unconstitutional to confine a sane person in a mental institution. Such circumstances might include being forced to share cell with an insane person, or being subjected to unnecessary treatment for a condition from which the person has already recovered. *Id.* at 1809 n.18.

V. Impact

A. Discerning the Limits of Foucha

Although the Court in Foucha rejected Louisiana's scheme for the continuing confinement of insanity acquittees, it is unclear just what, if any, mechanism for protecting the public from dangerous, albeit sane, insanity acquittees would pass constitutional muster. The Court's analysis does, however, hint at acceptance of some limited confinement of sane insanity acquittees for the purpose of protecting the public, provided the State bears the burden of proving the acquittees' dangerousness, and provided their confinement takes place in a facility other than a mental hospital or conventional penal institution.

The majority devoted substantial attention to what it regarded as the important distinctions between the unconstitutional confinement scheme in Foucha and the constitutionally permissible confinement of pretrial detainees upheld in *Salerno*,[244] suggesting the possibility that a release statute with some of the virtues of the challenged provisions of the Bail Reform Act of 1984[245] might meet with the Court's approval.[246]

The Court in *Salerno* found that the government had a legitimate and compelling interest in preventing crime by arrestees.[247] The statute required the confinement of arrestees charged with only the most serious crimes and was thus narrowly focused in relation to the government's stated interest.[248] The procedural safeguards afforded arrestees in *Salerno* were considerably greater than those afforded insanity acquittees in Louisiana. In addition to requiring a showing of probable cause, the Bail Reform Act required the government to prove by clear and convincing evidence and in a "full-blown adversary hearing" that no conditions of release could reasonably assure the safety of the community or any person.[249] Once detained, the arrestee's confinement was limited in duration by provisions of the Speedy Trial Act.[250] Finally,

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[244] *See supra* notes 81-83 and accompanying text.
[245] 18 U.S.C. § 3142(e) (1988).
[246] 112 S.Ct. at 1786-1787.
[247] Salerno v. United States, 481 U.S. 739, 749 (1987).
[248] *Id.* at 747-750.
[249] *Id.* at 751.
[250] 18 U.S.C. § 3161 et seq. (1988).

the Court in *Salerno* noted that the Bail Reform Act required that detainees be housed, to the extent practicable, in facilities separate from those housing persons awaiting or serving sentences or confined pending appeal.[251]

Justice O'Connor's concurrence offers an even stronger suggestion that a narrowly focused scheme for confinement of sane but dangerous insanity acquittees might prevail even after *Foucha*. "It might be permissible," she wrote, "for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[252] There were a few caveats, however. O'Connor agreed with the Court that acquittees could not be confined as mental patients absent some medical justification, because to do so would violate the requirement in *Jackson* that the nature of a person's confinement be related to its purpose.[253] O'Connor also concluded it would not be permissible to treat all insanity acquittees alike. The strong liberty interest of a person acquitted of a nonviolent crime by reason of insanity and then later found sane might well outweigh the government's interest in continued detention.[254] Finally, O'Connor said she doubted whether holding an insanity acquittee longer than a person convicted of the same crimes could be imprisoned would be permissible under the Equal Protection Clause of the Fourteenth Amendment.[255]

O'Connor noted that three of the ten states, including Louisiana, which at the time of the opinion retained laws permitting the confinement of sane but dangerous insanity acquittees limited the maximum duration of criminal commitment to reflect the acquittee's specific crimes and provided for the acquittees to be held in facilities appropriate to their mental condition.[256] She said she did not read the Court's

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[251] *Salerno*, 481 U.S. at 747-748.

[252] 112 S.Ct. at 1789 (O'Connor, J., concurring).

[253] *Id.* at 1789-1790.

[254] *Id.*

[255] *Id.*

[256] *Id.* The states are New Jersey, Washington and Wisconsin. The New Jersey Code of Criminal Justice provides in pertinent part:

> The defendant's continued commitment . . . shall be established by a preponderance of the evidence, during the maximum period of imprisonment that could have been imposed, as an ordinary term of imprisonment, for any charge on

opinion as invalidating such statutes.[257] Of the remaining six states, two do not require proof of the mens rea elements of a crime for commitment of insanity acquittees,[258] and thus, O'Connor speculated, would fail even under the theories advanced by Kennedy and Thomas.[259]

O'Connor did not discuss whether the release statutes of the remaining five states, including Hawai'i, are salvageable, but her silence suggests that only a wholesale revision instituting the substantive and procedural virtues of the statute upheld in *Salerno* and her suggested prohibition on the confinement of sane acquittees in a mental institution will save the post-acquittal schemes of these states.

B. Reforming Hawai'i's Release Statute

As noted in Part II above, Hawai'i's statute governing the conditional release or discharge of insanity acquittees uses dangerousness as its sole criterion.[260] The burden is on the acquittee to prove he or she may safely be released.[261] Moreover, Hawai'i law neither sets a limit on the duration of an acquittee's confinement nor prohibits the state from confining a sane insanity acquittee in a mental institution.[262] In short, Hawai'i's statute, like the Louisiana law under attack in *Foucha*,

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which the defendant has been acquitted by reason of insanity.
N.J. STAT. ANN. § 2C:4-8(b)(3) (West 1982).

Washington's penal code likewise provides that an insanity acquittee's commitment may not "exceed the maximum possible penal sentence for any offense charged[.]" WASH. REV. CODE § 10.77.020(3) (West 1990). Wisconsin's post-acquittal commitment statute limits an acquittee's confinement to a period not exceeding two thirds of the maximum term of imprisonment that could be imposed on an offender convicted of the same crime. If the maximum term of imprisonment is life, the commitment term specified by the court may be life. WIS. STAT. ANN. § 971.17(1) (West Supp. 1991).

[257] 112 S.Ct. at 1790.

[258] KAN. STAT. ANN. § 22-3428 (Supp. 1990) (stating that: "A finding of not guilty by reason of insanity shall constitute a finding that the acquitted person committed the act charged . . . , except that the person did not possess the requisite criminal intent"); MONT. CODE ANN. § 46-14-301(1)(1991) (providing for commitment of persons "found not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged").

[259] 112 S.Ct. at 1790-1791 (O'Connor, J., concurring).

[260] HAW. REV. STAT. § 704-415 (1985); *see also supra* notes 87-92 and accompanying text.

[261] HAW. REV. STAT. § 704-415 (1985).

[262] *Id.*

has none of the features the Court suggested might have saved Louisiana's law.

One option that would appear to be open to Hawai'i is to allow the state's courts to simply read into Hawai'i's release statute a requirement that continuing confinement of insanity acquittees be predicated on mental illness as well as dangerousness, as have the high courts of two other states,[263] and that the State and not the acquittee bear the burden of proving both elements. This course would certainly seem to be simpler than attempts at complex legislative reform, but it carries with it the perils, both practical and political, associated with the release of dangerous but sane insanity acquittees. Although few would welcome the prospect of setting free dangerous individuals, the criminal justice system releases other dangerous individuals because the Constitution and public policy—as evidenced, for example, by the application of the exclusionary rule in cases of Fourth and Fifth Amendment violations—require that they go free.[264] Individual liberties cannot be protected without some risk to society.

The precise extent of the risk to be borne by society is difficult to quantify, but what data exists suggest it may not be as great as might be feared. In 1982, the Hawai'i Crime Commission reviewed criminal cases in Honolulu's First Circuit in which mental health issues were raised.[265] Of 264 such cases, 53 (or 20.1%) ended in acquittals stemming from a defense motion on the basis of mental disease, defect or disorder, and another 14 cases ended in acquittal although no defense motion was made.[266] Although even this percentage may seem high, the number of insanity acquittals was actually quite minuscule in comparison with the total number of cases involving serious crimes. There were 6,356 such cases during the four-year period of the study.[267] Thus in only 4.1% (264) of the cases was mental health even an issue. Only 1% (67) of the cases resulted in an insanity acquittal.

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[263] *See supra* note 91. At the time of this writing, one suit had already been filed in the First Circuit Court in Honolulu challenging Hawaii's post-acquittal release law on the basis of *Foucha*. The challenge was brought by an insanity acquittee accused of stabbing a woman to death 13 years earlier. Thomas Kaser, *State Insanity Laws Challenged; Two Sentenced to State Hospital Seek Release*, HONOLULU ADVERTISER, Oct. 17, 1992, at A3.

[264] *See* Ellis, *supra* note 197, at 989.

[265] HAWAII CRIME COMM'N, THE MENTALLY ILL AND THE CRIMINAL JUSTICE SYSTEM 30 (1982).

[266] *Id.*

[267] *Id.* at 31.

Assuming that dangerous but sane acquittees comprise an even smaller subgroup within the larger group of insanity acquittees, adding a mental illness criterion to Hawai'i's post-acquittal release statute is unlikely to loose an army of dangerous acquittees onto Hawai'i's streets.

Legislative reform that would meet the mandates of *Foucha* while at the same time allowing for some form of limited confinement of dangerous but sane insanity acquittees is more problematic. As noted above, the Court did not choose to spell out precisely what provisions would meet with approval from the Court. Some minima with regard to procedural and substantive due process can, however, be pieced together from the majority and concurring opinions. First, a sane acquittee whom the State seeks to hold on the basis of dangerousness must be entitled to an adversary proceeding in which the State bears the burden of proving dangerousness by clear and convincing evidence. Current Hawai'i law imposes upon the acquittee the burden of showing that he or she is no longer dangerous.[268] The confinement must be reasonably related, both in its nature and duration, to its purpose, i.e., society's protection. The precise parameters of the durational requirement are unclear, although O'Connor's concurrence suggests that a sane acquittee may not be confined for a longer period than he or she could have been if convicted.[269] Hawai'i law now sets no absolute durational limit on confinement.[270]

Although it is clear from both the majority and concurring opinions that the State cannot continue to hold a sane acquittee in a mental institution, it is unclear just what facility would be appropriate. The Court's prohibition on the punishment of insanity acquittees would seem to preclude confinement in a conventional penal institution, such as a prison or jail, except perhaps in segregation from convicted offenders.[271]

The State could, of course, dodge the issue of *Foucha's* impact by eliminating the insanity defense altogether. At least with regard to future acquittees, this option would answer the pleas of those worried about the release of dangerous acquittees. On the downside, however, is the moral dilemma posed by society's incarceration of individuals lacking in criminal responsibility. Society must make the choice between an imperfect system that protects individual liberties while permitting

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[268] *See* HAW. REV. STAT. § 704-415 (1985).
[269] 112 S.Ct. at 1790.
[270] HAW. REV. STAT. § 704-415 (1985).
[271] 112 S.Ct. at 1786.

a small number of dangerous persons back on the streets and a system that sacrifices the unconvicted but dangerous in the name of protecting society.

VI. Conclusion

The Court's holding in *Foucha* should serve as a wake up call of sorts to the judicial system that it may no longer subject acquittees to the uncertainty of indeterminate confinement regardless of the mental health of the acquittee. The perceived dangerousness of an acquittee is not enough, particularly when state statutes require that the acquittee attempt to prove his nondangerousness—a formidable if not largely impossible task. While declining to provide absolute rules to which the states must conform, the Court makes clear that at a minimum, society's interest in protection must be balanced against the individual's considerable interest in his own liberty.

David R. Harada-Stone

Ardestani v. INS: Unequal Access to Justice

I. Introduction

Mrs. Rafeh-Rafie Ardestani, a sixty-eight year old Iranian woman of the Bahai faith, applied for asylum in the United States.[1] The Immigration and Naturalization Service ("INS") denied her application because of an inaccurate assumption that she was a resident of a third country.[2] Mrs. Ardestani responded with proof that she was not a resident of a third country.[3] The INS, however, ignored her response and initiated deportation proceedings against Mrs. Ardestani in an effort to expel her from the United States.[4] The basis for Mrs. Ardestani's asylum application was never at issue; she had a well founded fear of persecution[5] should she return to Iran. Because of the INS's unjustified action,[6] Mrs. Ardestani sought an award of attorney fees authorized by the Equal Access to Justice Act ("EAJA").[7]

Congress enacted the EAJA to curb miscarriages of justice by the United States government against small parties[8] who lack the financial

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[1] Ardestani v. INS, 112 S. Ct. 515, 517 (1991).

[2] *Id.*; *see* 8 C.F.R. §§ 208.14(c)(2), 208.15 (1992) (stating not eligible for asylum if firmly resettled in any third country).

[3] 112 S. Ct. at 517.

[4] *Id.*

[5] *See* Immigration and Nationality Act ("INA") § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1990) (requiring that to be eligible for asylum, the applicant must meet the definition of a refugee: "[A]ny person who is outside any country of such person's nationality . . . and is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of . . . religion . . . .").

[6] 112 S. Ct. at 517 (finding by the immigration judge which was uncontested by the INS).

[7] 5 U.S.C. § 504 (1990) (governing agency proceedings), 28 U.S.C. § 2412 (1990) (governing judicial actions).

[8] Individuals whose net worth is $2,000,000 or less or businesses or organizations whose net worth is $7,000,000 or less and have fewer than 500 employees. 5 U.S.C. § 504(b)(1)(B) (1990). *See infra* note 101.

resources to contest or defend against unjust governmental actions.[9] The EAJA authorizes a limited waiver of sovereign immunity.[10] Attorney fees may be awarded to a prevailing party against the United States in an adversary "adjudication under section 554"[11] of the Administrative Procedure Act ("APA")[12] when the government's position lacks substantial justification.[13]

The immigration judge granted Mrs. Ardestani asylum (defeating the INS's deportation efforts),[14] determined that the INS's position lacked substantial justification, and awarded Mrs. Ardestani attorney fees pursuant to the EAJA.[15] This was a clear case of the EAJA in action and justice being served—or was it? The United States Supreme Court, in *Ardestani v. INS*, held that Mrs. Ardestani was not entitled to the award of attorney fees because "administrative deportation proceedings are not adversary adjudications 'under section 554'" of the APA and thus, are not covered by the EAJA.[16]

Meritless deportation proceedings are precisely the type of agency abuse Congress sought to deter.[17] The Supreme Court, however, decided to rely on a hypertechnical statutory interpretation advanced by the INS in holding that the EAJA does not cover deportation proceedings.[18] This interpretation denies aliens the benefits Congress sought to provide and shields the INS from the consequences of its unjust actions.

This note will review the events leading to the Court's decision in *Ardestani*, address the implications of this decision, and urge congressional action to amend the EAJA so that it applies to deportation proceedings. Part II will outline the facts in *Ardestani*. Part III will

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[9] H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5, 6, 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4984, 4988-4989.

[10] 5 U.S.C. § 504(a)(1) (1990). Without such specific statutory authorization, attorney fee awards may not be imposed against the government. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 269-271 (1975).

[11] 5 U.S.C. § 504(b)(1)(C) (1990). See *infra* note 100 for a statutory definition of adversary adjudication.

[12] 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5662, 7521 (1990).

[13] 5 U.S.C. § 504(a)(1), (b)(1)(C) (1990).

[14] *See* 8 C.F.R. § 208.22(a) (1992) (stating in part, "An alien who has been granted asylum may not be . . . deported . . . .").

[15] 112 S. Ct. at 517.

[16] *Id.* at 521.

[17] *See* H.R. Rep. No. 1418, *supra* note 9, at 9-10.

[18] 112 S. Ct. at 522 (Blackmun, J., dissenting).

review the historical relationship between the APA and deportation proceedings and will chronicle events leading to the EAJA's enactment. Additionally, Part III will examine the EAJA, particularly the interpretation of an adversary "adjudication under section 554" by various courts as applied to deportation proceedings and to other agencies' proceedings. Part IV will review the United States Supreme Court's analysis of the issue in *Ardestani*. Finally, Part V will address the implications of *Ardestani* and will call on Congress to amend the definition of adversary adjudication to one which includes deportation proceedings.

II. FACTS

Mrs. Ardestani, an Iranian citizen of the Bahai faith, entered the United States as a visitor in 1982.[19] In 1984, she applied to the INS for asylum.[20] At that time, the INS relied heavily upon evaluations from the United States Department of State concerning conditions in the home country and the likelihood of persecution should the asylum applicant return home.[21] The State Department determined that Mrs. Ardestani's fear of persecution, should she return to Iran, was well

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[19] 112 S. Ct. at 517.

[20] *Id.*

[21] *See* THOMAS A. ALEINIKOFF AND DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY, 831 (2d ed. 1991). Prior to the 1990 INA reforms, the State Department's analysis of an asylum application was required. It was the only source outside the Immigration & Naturalization Service ("INS") for information about conditions in the home country and the individual applicant's fear of persecution claim.

The 1990 reforms revamped the entire asylum application process, moving initial adjudication from INS District Offices to a separate office with officers who specialize in asylum cases. This new office reports to the INS Central Office of Refugees, Asylum and Parole and to the Deputy Attorney General's Asylum Policy and Review Unit. 8 C.F.R. § 208.1 (1992). Mandated in the regulations is a documentation center separate from the depositories of the State Department. *Id.* Additionally, the regulations provide specific authorization to rely on other credible sources, such as international organizations, private voluntary agencies, or academic institutions. 8 C.F.R. § 208.12 (1992).

The State Department is still involved; it receives copies of all asylum applications and provides comments if it so chooses. However, the INS need not wait for this response prior to adjudicating an asylum application. 8 C.F.R. §§ 208.4(a), 208.11, 236.3(b), 242.17(c)(3) (1992).

founded.[22] Typically, the INS agrees with the State Department evaluation, but the final decision rests with the INS.[23]

In Mrs. Ardestani's case, the INS denied her asylum application, arguing that she had reached a safe haven in Luxembourg and had established residency there prior to her arrival in the United States.[24] Mrs. Ardestani notified the INS that she was in Luxembourg for only three days. She stayed in a hotel while awaiting an appointment at the United States Consulate and did not apply for or establish residency in Luxembourg.[25] The INS did not respond to her submission of this information; rather, it issued an Order to Show Cause, essentially a notification that deportation proceedings against her had begun.[26] Mrs. Ardestani reapplied for asylum before the immigration judge at her deportation hearing.[27]

The sole ground for denying Mrs. Ardestani's original asylum application was based on incorrect information regarding whether she had resettled in Luxembourg prior to arriving in the United States.[28] The INS decided to pursue deportation even though it had information which would have resolved the resettlement issue.[29] The deportation hearing lasted a few minutes during which time the immigration judge granted her asylum, declared her to be the prevailing party, determined that the INS's position in pursuing deportation was not substantially justified, and awarded her $1,071.85 in attorney fees pursuant to the EAJA.[30] The INS did not contest asylum or the immigration judge's findings that Mrs. Ardestani was the prevailing party and that the INS's position was not substantially justified. The INS fought only the

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[22] 112 S. Ct. at 517.

[23] *See* ALEINIKOFF & MARTIN, *supra* note 21, at 827, ("[I]mmigration judges . . . have been careful to recite in opinions denying asylum that they were not influenced by a negative advisory opinion from State, instead reaching their own conclusions . . . . And occasionally there have been cases where a decision runs counter to the State Department recommendation.").

[24] 112 S. Ct. at 517. Asylum can be denied if the applicant resettled in another country prior to entering the United States. Establishing residence is a form of resettlement. 8 U.S.C. § 1157(c)(1) (1990); 8 C.F.R. §§ 208.13(c)(2), 208.15 (1992).

[25] 112 S. Ct. at 517.

[26] *Id.*

[27] *Id.*; *see* 8 C.F.R. § 208.18(b) (1992).

[28] 112 S. Ct. at 517.

[29] *Id.*

[30] *Id.*; *see also* Susan Freinkel, *Immigration Bar Watches Supreme Court Fee Battle*, THE RECORDER, Oct. 7, 1991, at 1.

award of attorney fees under the EAJA.[31] On administrative appeal, the Board of Immigration Appeals denied the award stating the Attorney General determined that the EAJA does not apply to deportation proceedings.[32] Mrs. Ardestani appealed to the Court of Appeals for the Eleventh Circuit.[33] The court denied her appeal, holding deportation proceedings are not within the scope of the EAJA.[34] The Supreme Court granted certiorari[35] to consider an appeal of the Eleventh Circuit's decision.

On appeal to the United States Supreme Court, the essential issue in *Ardestani* was whether deportation proceedings are "adversary adjudications under section 554" of the APA and are thus, covered by the EAJA.[36] Two conflicting interpretations of the phrase "under section 554" emerged. If the phrase meant adjudications which are of the type "defined by" section 554, the fee shifting provisions of the EAJA would apply to deportation proceedings. Conversely, if it meant adjudications which are "governed by" section 554, the EAJA would not cover deportation proceedings. Mrs. Ardestani argued that "under section 554" should be interpreted to mean "defined by," while the INS argued for a "governed by" interpretation.[37]

III. History of the Law

A. The Relationship Between the APA and Deportation Hearings

1. The Administrative Procedure Act

Congress passed the Administrative Procedure Act[38] in 1946 to create "greater uniformity of procedure and standardization of administrative practice among the diverse agencies . . . [and] to curtail and change the practice of embodying in one person or agency the duties of

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[31] 112 S. Ct. at 517.

[32] *Id.*

[33] Ardestani v. Dept. of Justice, INS, 904 F.2d 1505 (11th Cir. 1990).

[34] *Id.* at 1514.

[35] 904 F.2d 1505 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 1101 (U.S., Mar. 4, 1991) (No. 90-1141).

[36] 112 S. Ct. at 518.

[37] *Id.* at 519.

[38] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5662, 7521 (1990)).

prosecutor and judge."[39] In addition, Congress wanted to require agencies to formulate policies that adhere to standard procedures, thereby eliminating the "inherently arbitrary nature of unpublished ad hoc determinations"[40] that affect individual rights. Congress was concerned about the rapid expansion of federal agencies and their ability to conduct adjudications without adequate supervision.[41] Soon after the APA was enacted, the Supreme Court, in *Wong Yang Sung v. McGrath*,[42] decided that administrative hearings in deportation cases must conform to the requirements of the APA.[43] Congress disagreed and overturned *Wong Yang Sung* by attaching a rider to the Supplemental Appropriations Act of 1951[44] exempting deportation proceedings from specific procedural sections of the APA.[45]

2. *The Immigration and Nationality Act*

Shortly thereafter, Congress enacted the Immigration and Nationality Act of 1952 ("INA")[46] to "create a comprehensive and revised immigration and nationality law."[47] The INA provided specific procedures for deportation hearings and repealed the rider to the Supplemental Appropriations Act.[48] The Supreme Court, in *Marcello v. Bonds*,[49]

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[39] Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).

[40] Morton v. Ruiz, 415 U.S. 199, 232 (1974).

[41] *Wong Yang Sung*, 339 U.S. at 36-37.

[42] 339 U.S. 33 (1950). Wong Yang Sung, a citizen of China, stayed in the United States beyond the time authorized by the INS. *Id.* at 35. A deportation hearing was held before an immigration inspector who recommended deportation. *Id.* Wong Yang Sung brought a habeas corpus action to secure release from custody on the ground that the deportation hearing was not conducted in conformity with the requirements of the APA. *Id.* The specific procedure at issue was the use of an immigration inspector as the presiding official which conflicts with the APA requirement that the same person not function as prosecutor and judge. *Id.*

[43] *Id.* at 53.

[44] Pub. L. No. 843, 64 Stat. 1044, 1048 (1950).

[45] Congress exempted deportation proceedings from 5 U.S.C. §§ 554, 556, 557 (1990), which are procedural sections pertaining to adjudications, hearings, and initial decisions by agencies.

[46] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1503, 18 U.S.C. §§ 1114, 1429, 1546, 22 U.S.C. §§ 618, 1446, 31 U.S.C. § 530, 49 U.S.C. §§ 1, 177, 50 U.S.C. Appx. §§ 1952-1955, 1961 (1990)).

[47] H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 55 (1952).

[48] 8 U.S.C. § 1252(b) (1990); H.R. Rep. No. 1365, *supra* note 47, at 55.

[49] 349 U.S. 302 (1955). Petitioner was convicted of a violation of the Marihuana

declined to hold that Congress intended to reinstate the Court's holding in *Wong Yang Sung* by enacting the INA and repealing the rider.[50] The legislative history of the INA supports this decision: "The exemption of deportation proceedings from certain of the provisions of the [APA] contained in the Supplemental Appropriations Act, 1951 . . . is specifically repealed since the special procedures in this bill make such exemption no longer necessary."[51] The *Marcello* Court determined that the INA "expressly supersedes the hearing provisions" of the APA.[52] Additionally, the Court stated that the APA's provisions separating prosecutorial and judicial functions are not applicable because, where the detailed and specific INA procedures differ from the APA, the INA controls.[53] The Court noted that Congress used the APA as a model, but because the hearing procedures were detailed in the INA, it was clear Congress was taking general provisions of the APA and creating a specialized procedure for the specific needs of deportation cases.[54]

Currently, the APA and regulations applicable to deportation proceedings provide for the separation of prosecutorial and judicial functions.[55] The Attorney General promulgated new regulations in October, 1981, creating the Executive Office for Immigration Review to govern judicial functions.[56] This change was partly due to the appearance of impropriety as reported by the Select Commission on Immigration and Refugee Policy: "[i]mmigration judges are administratively dependent upon officials (INS district directors) who are involved in an adversary capacity in proceedings before the judges[.]"[57] The report identified

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Tax Act and was sentenced to serve one year in prison. This conviction rendered him deportable. A deportation hearing was held pursuant to § 242(b) of the INA. Section 242(b) authorizes a special inquiry officer, who also performs investigative and prosecuting functions under the supervision and control of the INS, to preside over deportation hearings. 8 U.S.C. § 242(b). Petitioner brought suit on the ground that the deportation hearing failed to comply with the APA requirement that prosecutorial and judicial functions not be embodied in one person. 349 U.S. at 303-04. The Court disagreed holding the INA expressly supersedes the hearing provisions of the APA. *Id* at 310.

[50] 349 U.S. at 310.

[51] H.R. Rep. No. 1365, *supra* note 47, at 55; *see also Marcello*, 349 U.S. at 310.

[52] 349 U.S. at 310.

[53] *Id.* at 308.

[54] *Id.*

[55] 5 U.S.C. § 554(d) (1990); 8 C.F.R. §§ 2.1, 3.0, 100.1-100.2 (1992).

[56] 8 C.F.R. §§ 2.1, 3.0, 100.1-100.2 (1992) (effective February 1983).

[57] SELECT COMM. ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT 246 (1981).

the power that INS District Directors had over the budgetary and staffing needs of immigration judges and implied a probable bias in immigration judges' decisions toward pleasing the District Directors.[58] The Executive Office for Immigration Review reports to the Associate Attorney General and oversees both the Board of Immigration Appeals and immigration judges from outside the INS hierarchy.[59]

A meaningful difference no longer exists between the INA's and the APA's provisions regarding the separation of prosecutorial and judicial functions in an agency.[60] Consequently, the continuing validity of *Marcello*'s holding, that the APA does not apply to deportation proceedings, has been questioned.[61] The Supreme Court in *Ardestani*, however, reaffirmed the prevailing view that *Marcello* stands for the proposition that deportation proceedings are exempt from the APA.[62]

To fully appreciate the issue in *Ardestani*, the debate over whether the APA applies to deportation proceedings must be expanded to include the EAJA and congressional intent behind its passage. The next section examines events that led Congress to enact the EAJA.

B. Events Leading to the Enactment of the EAJA

1. The American rule

In the United States, each party in litigation bears the cost of attorney fees. Known as the American rule,[63] this doctrine reflects "the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit."[64] The courts, however, may award attorney fees when justice so requires.[65] Awards are typically granted under one of the following two common law

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[58] *Id.* at 246, 346; *see* ALEINIKOFF & MARTIN, *supra* note 21, at 554.

[59] 8 C.F.R. §§ 2.1, 3.0 (1992).

[60] *See* Escobar Ruiz v. INS, 838 F.2d 1020, 1025 (9th Cir. 1988).

[61] *Id.* (interpreting *Marcello* to hold that the APA controls generally and that the INA controls only when INA and APA provisions differ).

[62] 112 S. Ct. at 519.

[63] Griffin & Dickson v. United States, 21 Cl. Ct. 1, 1 (1990); *see also* Louise L. Hill, *An Analysis And Explanation Of The Equal Access To Justice Act*, 19 ARIZ ST. L.J. 229, 231 n.14 (1987).

[64] H.R. Rep. No. 1418, *supra* note 9, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4988.

[65] *Id.* at 8, *reprinted in* 1980 U.S.C.C.A.N. at 4986; *see also* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 245 (1975) (stating the two common law exceptions used most often when justice so requires).

exceptions to the American rule. The "bad faith" exception applies when the losing party "willfully disobey[s] a court order or act[s] in bad faith . . . ."[66] The "common benefit" exception applies when a party's legal action "creates or preserves a fund of money or other assets for the benefit of others as well as himself."[67] Any other exception must be granted statutorily.[68] An award of attorney fees against the United States is prohibited by statute unless another statute specifically authorizes such awards.[69]

One purpose of the American rule is to encourage litigation of meritorious claims by eliminating any fear that the loser must bear the cost of both parties' legal fees.[70] Congress realized, however, that the reverse was true when the United States government was a party. Litigants were discouraged from bringing a claim against or defending an action by the government because the costs of such suits were too high. Thus, instead of encouraging meritorious litigation, the American rule had a deterrent effect,[71] enabling the government "with its greater resources and expertise . . . [to] in effect coerce compliance with its position[s]."[72]

2. The private attorney general exception

The courts attempted to create another exception to the American rule when the United States was a party. They awarded attorney fees to a prevailing party who acted as a private attorney general. To qualify, a party had to assert a legal theory in the public interest.[73] The Supreme Court, however, rejected this practice in *Alyeska Pipeline*

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[66] S. Rep. No. 253, 96th Cong., 1st Sess. 3 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4987; *see also Alyeska*, 421 U.S. at 245.

[67] S. Rep. No. 253, *supra* note 66, at 3, *reprinted in* 1980 U.S.C.C.A.N. at 4987; *see also Alyeska*, 421 U.S. at 245.

[68] S. Rep. No. 253, *supra* note 66, at 4, *reprinted in* 1980 U.S.C.C.A.N. at 4987.

[69] 28 U.S.C. § 2412 (1990); *see* S. Rep. No. 253, *supra* note 66, at 4, *reprinted in* 1980 U.S.C.C.A.N. at 4987.

[70] H.R. Rep. No. 1418, *supra* note 9, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4988.

[71] *Id.* at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4988.

[72] *Id.* at 10, *reprinted in* 1980 U.S.C.C.A.N. at 4988.

[73] Mark J. Frenz, Comment, *United States Liability For Attorneys' Fees Under The Equal Access To Justice Act*, 12 WM. MITCHELL L. REV. 805, 811 (1986); *see also* Hill, *supra* note 63, at 231 n.14.

Service Co. v. Wilderness Society,[74] by limiting the courts' power to award attorney fees to the two common law exceptions or to express statutory exceptions.[75] Congress responded to *Alyeska* by passing the Civil Rights Attorney's Fees Awards Act of 1976,[76] which enables prevailing parties in certain civil rights actions to receive an award of attorney fees.[77]

3. The Equal Access to Justice Act

In 1980, Congress created a broader exception to the American rule by passing the Equal Access to Justice Act.[78] The EAJA expanded the United States government's liability for attorney fees in both civil actions and administrative proceedings.[79] The EAJA was enacted on a trial basis for a three-year period.[80] Debate over extending the EAJA indefinitely and clarifying some of the statutory language continued[81] until Congress finally extended the EAJA making it permanent in 1985.[82] The 1980 version amended 28 U.S.C. § 2412 to authorize a partial waiver of sovereign immunity, thereby giving courts the discretion to make attorney fees awards against the government to prevailing

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[74] 421 U.S. 240 (1975). Respondents, Wilderness Society Environmental Defense Fund, Inc. and Friends of the Earth, brought suit to prevent the government from issuing permits required for construction of the trans-Alaska pipeline. Respondents' position was based on their assertion that the permits would violate existing mineral and environmental statutes. After respondents prevailed, Congress amended the existing statutes to allow issuance of the permits. The sole issue left on appeal to the Supreme Court was whether the lower court had appropriately awarded attorney fees under the private attorney general exception. *Id.* at 241-46. The Supreme Court ended the judiciary's use of the private attorney general exception by determining that it was not an appropriate exception to the American rule. *Id.* at 269-71.

[75] *Id.* at 260-62.

[76] Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (1990)); *see also* H.R. Rep. No. 1418, *supra* note 9, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984; Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

[77] H.R. Rep. No. 1418, *supra* note 9, at 6, *reprinted in* 1980 U.S.C.C.A.N. at 4984

[78] Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified as amended at 5 U.S.C. § 504 (1990); 28 U.S.C. § 2412 (1990)).

[79] H.R. Rep. No. 1418, *supra* note 9, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4988.

[80] 5 U.S.C. § 504 (1990); 28 U.S.C. § 2412 (1990). Initially, the EAJA was an addition to the Small Business Export Expansion Act, Pub. L. No. 96-481, §§ 203, 204, 94 Stat. 2321 (1980). The bill would be repealed automatically if Congress did not vote an extension. *Id.* §§ 203(c), 204(c), 94 Stat. at 2329.

[81] Griffin & Dickson v. United States, 21 Cl. Ct. 1, 1 (1990).

[82] Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 6, 99 Stat. 183, 186 (1985) (repealing §§ 203(c), 204(c) of 1980 EAJA).

parties under the same common law exceptions that apply to other civil litigants.[83] This change effectuated Congress's intent that "the United States should be held to the same standards in litigating as private parties."[84] Additionally, it created a general statutory exception to the American rule by authorizing the award of attorney fees to a prevailing party unless the government's position[85] is substantially justified or circumstances would make an award unjust.[86]

The fundamental purpose of the EAJA was to enable certain parties to challenge or defend against unjust governmental actions.[87] Specifically, Congress sought to remedy the effect of the American rule on individuals and small businesses which had little choice but to suffer an injustice because they were effectively foreclosed from litigation by a lack of financial resources.[88] Congress believed the EAJA would improve access to the judiciary and to administrative proceedings by providing a remedy to small parties who suffer from governmental injustice.[89] A second goal of the EAJA was to deter unjust governmental action by assessing attorney fees against the culpable agency.[90] Finally, Congress wished to subject governmental actions and regulations to adversarial testing to insure fair laws and policies.[91] Congress believed this would be accomplished with a "concrete, adversarial test of Government regulation"[92] that would "provide a vehicle for developing . . . more precise rules."[93]

C. The EAJA and Its Scope

The EAJA authorizes an award of attorney fees to a prevailing party[94] in an adversary adjudication under section 554 of the

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[83] H.R. Rep. No. 1418, *supra* note 9, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4987.

[84] *Id.*

[85] See *infra* note 103 for an expanded definition of the government's position.

[86] H.R. Rep. No. 1418, *supra* note 9, at 9, *reprinted in* 1980 U.S.C.C.A.N. at 4987.

[87] *Id.*, *reprinted in* 1980 U.S.C.C.A.N. at 4988.

[88] *Id.* at 9-10, *reprinted in* 1980 U.S.C.C.A.N. at 4988 (stating that "for many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process.")

[89] *Id.* at 12, *reprinted in* 1980 U.S.C.C.A.N. at 4991.

[90] *Id.* The EAJA allows "recovery of fees from the agencies . . . . [and] provid[es] payment for 'bad faith' actions by the agency involved." *Id.*

[91] *Id.* at 10, *reprinted in* 1980 U.S.C.C.A.N. at 4989.

[92] *Id.*

[93] *Id.*

[94] 5 U.S.C. § 504(a)(1) (1990). Congress's definition of prevailing party is "con-

APA[95] and in court proceedings[96] when the government's position[97] is not substantially justified,[98] unless circumstances would make an award unjust.[99] Congress considered the award of attorney fees in administrative adjudications separately from awards in court proceedings; therefore, 5 U.S.C. § 504 covers adversary adjudications and 28 U.S.C. § 2412 covers court proceedings. *Ardestani* involved an adversary adjudication, so only section 504 will be examined.[100] The EAJA was

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sistent with the law that has developed under existing statutes." H.R. Rep. No. 1418, *supra* note 9, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4990. In addition to winning a final judgment, a favorable settlement, requested dismissal of a groundless complaint, and a partial decision (even if not all issues prevail) are all included in Congress's definition of a prevailing party. *Id.*

[95] 5 U.S.C. § 504(a)(1) (1990).

[96] 28 U.S.C. § 2412(d)(1)(A) (1990).

[97] 5 U.S.C. § 504(b)(1)(E) (1990).

[98] 5 U.S.C. § 504(a)(1) (1990).

[99] *Id.*

[100] Pertinent sections of 5 U.S.C. § 504 (1990) include:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

. . . .

(b)(1) For purposes of this section-

(A) fees and other expenses includes . . . reasonable attorney . . fees . . .;

(B) 'party' means a party . . . who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or

(ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . .;

(C) 'adversary adjudication' means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or

enacted to assist small parties to litigate on more equal footing with the government; thus, its remedial effects are limited to individuals whose net worth is $2,000,000 or less, or to small businesses or organizations whose net worth is $7,000,000 or less and have 500 or fewer employees.[101]

The 1980 version of the EAJA defined an adversary adjudication as one "under section 554 of [the APA] in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of granting or renewing a license."[102] Congress included several amendments clarifying sections of the EAJA when it extended the EAJA indefinitely in 1985. Chief among those

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otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section of that Act (41 U.S.C. 607) and (iii) any hearing conducted under chapter 38 of title 31.

. . . .

(E) 'position of the agency' means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based . . . .

. . . .

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.

. . . .

(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

[101] 5 U.S.C. § 504(b)(1)(B) (1990). These figures represent an increase from the $1,000,000 and $5,000,000 figures in the 1980 version. *Id.*

[102] 5 U.S.C. § 504(b)(1)(C) (1990). 5 U.S.C. § 554(a) (1990) states:

This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except [an] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

amendments was clarification of some definitions, including the position of the United States,[103] substantial justification,[104] final judgment,[105] and prevailing party.[106] More important for this discussion, however, are the changes that specifically enabled social security administrative hearings and appeals under the Contract Disputes Act of 1978[107] to be covered by the EAJA.

The 1980 version of the EAJA excluded social security administrative proceedings from its scope, but included civil actions under the Social Security Act.[108] The legislative history in the 1985 version clarifies that the EAJA covers adversary adjudications defined in the report as "an adjudication under section 554 of title 5, in which the position of the United States is 'represented by counsel' or otherwise."[109] Congress noted that social security administrative hearings are usually excluded from the EAJA.[110] Congress, however, declared that if an "agency does take a position at some point in the adjudication, the adjudication would then become adversarial, and thus be subject to the [EAJA]."[111]

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[103] 5 U.S.C. § 504(b)(1)(E) (1990); *see* H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. 1, 11 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 140 (reporting that "position of the United States" includes agency actions and omissions that form the basis of the litigation as well as the agency's litigation position).

[104] H.R. Rep. No. 120, *supra* note 103, at 9, *reprinted in* 1985 U.S.C.C.A.N. at 137 (noting that while the language "substantially justified" did not change, the legislative history prior to the 1985 amendments clarifies congressional intent that substantial justification means more than mere reasonableness).

[105] 5 U.S.C. § 504(a)(2) (1990) (requiring that if the government appeals an administrative decision on the merits, the appeal must be decided before a fee decision may be made).

[106] H.R. Rep. No. 1418, *supra* note 9, at 11, *reprinted in* 1980 U.S.C.C.A.N. at 4990 (stating "prevailing party" includes one who obtains full judgment, a favorable settlement, or a dismissal of a groundless complaint even if that party does not prevail on all issues).

The Supreme Court broadened that interpretation to include a party who succeeds on any significant issue that results in a benefit sought by the litigation. Hensley v. Eckerhart, 461 U.S. 424 (1983) (involving six claims of unconstitutional treatment and conditions at a state hospital where Respondents prevailed in five of the six claims). Because *Hensley* was decided before Congress amended the EAJA, congressional silence is interpreted as approval of the *Hensley* standard. *See* Hill, *supra* note 63, at 248.

[107] 41 U.S.C. §§ 601-613 (1990).

[108] H.R. Rep. No. 1418, *supra* note 9, at 12, *reprinted in* 1980 U.S.C.C.A.N. at 4991.

[109] H.R. Rep. No. 120, pt. 1, *supra* note 103, at 10, *reprinted in* 1985 U.S.C.C.A.N. at 138.

[110] *Id.*

[111] *Id.*

During the debates prior to the 1985 amendments, Congress did not discuss whether social security hearings are governed by the Social Security Act or section 554 of the APA; rather, the discussion centered only on whether the adjudication involved was adversarial and whether the government was represented.[112] Therefore, social security hearings in which the Secretary of Health and Human Services is represented are covered by the EAJA.

The definition of adversary adjudication was also amended to include appeals pursuant to the Contract Disputes Act.[113] Under the Contract Disputes Act, a contractor with a complaint could pursue a remedy either in claims court or before an agency board. Congress did not want the Contract Disputes Act's intent to be frustrated if contractors could only receive EAJA awards by pursuing a remedy in claims court.[114]

In 1986, Congress amended the definition of adversary adjudication again[115] by adding claims pursuant to the Program Civil Remedies Fraud Act of 1986.[116] Some courts inappropriately cited this amendment to show that Congress readily changes the definition of an adversary adjudication.[117] The Program Civil Remedies Fraud Act did not exist prior to 1986; therefore, this amendment did not reflect a change to include proceedings previously thought to be outside of the EAJA's scope. This amendment was merely an addition to include a newly authorized proceeding. Such distinctions are important because courts have scrutinized the legislative history and the statutory language of the EAJA in their efforts to define "adversary adjudication under section 554." The following section examines the efforts of some courts in more detail.

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[112] *Id.* at 10, *reprinted in* 1985 U.S.C.C.A.N. at 138-39.

[113] 5 U.S.C. § 504(b)(1)(C)(ii) (1990) (amended in 1985).

[114] H.R. Rep. No. 120, pt. 1, *supra* note 103, at 15, *reprinted in* 1985 U.S.C.C.A.N. at 144 (responding to the Supreme Court's holding in Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), that Congress must explicitly authorize an award of fees against the government and that the Contract Disputes Act did not do so; thus validating EAJA awards only in cases brought before the claims court).

[115] 5 U.S.C. § 504(b)(1)(C)(iii) (1990) (amended in 1986).

[116] 31 U.S.C. § 3801 (1990).

[117] *See Ardestani*, 112 S. Ct. at 521; *see also* Hodge v. U.S. Dept. of Justice, 929 F.2d 153, 157 (5th Cir. 1991); Escobar v. U.S. INS, 935 F.2d 650, 654 (4th Cir. 1991); Hashim v. INS, 936 F.2d 711, 715 (2d Cir. 1991); Clarke v. INS, 904 F.2d 172, 178 (3rd Cir. 1990).

D. A Sampling of Interpretations of "Adversary Adjudication Under Section 554"

1. Escobar Ruiz v. INS

The Ninth Circuit was the first court to decide whether deportation proceedings fall within the EAJA's scope. In a trilogy of opinions, the court held that the EAJA covers deportation proceedings conducted by the INS and court proceedings reviewing any deportation decision.[118] In *Escobar Ruiz I*,[119] the court determined that the EAJA applies to immigration proceedings before the immigration judge and the Board of Immigration Appeals, thereby rejecting the government's argument that section 292 of the Immigration and Naturalization Act precludes such an award.[120] Section 292 states that individuals have the right to be represented in deportation proceedings at no expense to the government.[121] Upon rehearing, in *Escobar Ruiz II*,[122] the INS argued that EAJA awards are precluded because deportation proceedings are not adversary adjudications within the meaning of the EAJA.[123] The Ninth Circuit found that deportation proceedings meet the EAJA's requirements for adversary adjudications.[124] *Escobar Ruiz III*[125] was heard to determine whether the EAJA applies to deportation proceedings. The Ninth Circuit determined that it does.[126]

In *Escobar Ruiz III*, the INS argued that deportation proceedings are not governed by section 554 of the APA; therefore, they do not meet

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[118] Escobar Ruiz v. INS ("Escobar Ruiz I"), 787 F.2d 1294 (9th Cir. 1986); Escobar Ruiz v. INS ("Escobar Ruiz II"), 813 F.2d 283 (9th Cir. 1987); Escobar Ruiz v. INS ("Escobar Ruiz III"), 838 F.2d 1020 (9th Cir. 1988) (*en banc*). An immigration judge found Escobar Ruiz deportable for entering the United States without inspection. 838 F.2d at 1022. A series of appeals and motions to reopen deportation proceedings followed. The Board of Immigration Appeals ultimately granted the INS its motion to reopen after denying the same motion from Escobar Ruiz. *Id.* During this process the INS apparently failed to notify Escobar Ruiz of various hearings and failed to inform him of his rights, in violation of its own regulations. Escobar Ruiz moved for attorney fees under the EAJA. *Id.*

[119] 787 F.2d 1294 (9th Cir. 1986).

[120] *Id.* at 1296-97.

[121] 8 U.S.C. § 1362 (1990).

[122] 813 F.2d 283 (9th Cir. 1987).

[123] *Id.* at 285-87.

[124] *Id.* at 291-93.

[125] 838 F.2d 1020 (9th Cir. 1988).

[126] *Id.* at 1030.

the definition of an adversary adjudication under the EAJA.[127] The INS urged an interpretation of the phrase "adjudication under section 554" to mean "governed by" or "conducted under," while Escobar Ruiz urged an interpretation to mean "defined by" or "under the meaning of."[128] The court found both meanings plausible and looked to the legislative history to determine the correct meaning.[129]

The *Escobar Ruiz III* majority cited the conference committee report on the 1980 version of the EAJA where the first definition of adversary adjudication was "an agency adjudication *defined under* the [APA] where the agency takes a position through representation by counsel or otherwise."[130]

They also emphasized the APA definition of adjudication sufficient for its purposes as one that is "required by statute to be determined on the record after opportunity for an agency hearing."[131] The court looked at the procedures used in deportation hearings, compared them to the APA guidelines, and found that it was not necessary to determine whether the APA governed deportation hearings.[132]

The majority found further support for its interpretation in the Administrative Conference of the United States commentary to the model rules it promulgated.[133] The EAJA requires agencies to promulgate standard procedures to award fees under the EAJA in consultation with the Administrative Conference of the United States.[134] The Administrative Conference of the United States proposed a broad reading of "adjudications under section 554," and urged agencies to determine whether "a party has endured the burden and expense of a formal hearing—rather than technicalities"[135] to determine the applicability of the EAJA.

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[127] *Id.* at 1023.

[128] *Id.*

[129] *Id.*

[130] *Id.* (citing H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980)) (emphasis added).

[131] *Id.* (citing APA 5 U.S.C. § 554(a)). There are some exceptions specifically enumerated in 5 U.S.C. § 554. None of them apply to deportation proceedings and more significantly, deportation proceedings are not one of the exceptions Congress specifically wished to be exempt from the APA definition. *See* 5 U.S.C. § 554(a) (1990).

[132] 838 F.2d at 1023.

[133] *Id.* at 1024 (citing 46 Fed. Reg. 32900 (1981)).

[134] 5 U.S.C. § 504(c)(1) (1990).

[135] 838 F.2d at 1024 (citing 46 Fed. Reg. at 32901 (1981)).

The court found that the INA section 242(b) requires deportation hearings to be determined only upon the record made during such proceeding.[136] Deportation proceedings, therefore, meet the APA definition of adjudication.[137] The majority also called into question the continuing validity of *Marcello*[138] to exempt the INA from APA provisions.[139] They read *Marcello* to hold that when the INA and APA are different, the INA controls.[140] The court did not read *Marcello* to hold that deportation proceedings are exempt from the APA.[141]

Finally, the court found support for its position from the treatment of social security proceedings under the EAJA.[142] The court cited *Richardson v. Perales*[143] to show that the Supreme Court did not find it necessary to determine whether the APA applies to social security administrative proceedings because both procedures are similar. Therefore, it is unclear whether social security proceedings are "governed by" the APA or are "defined by" the APA.

In either case, the EAJA applies to social security proceedings, provided the government has a position and is represented by counsel.[144] The majority determined Congress was not concerned with the technicality of "governed by" or "defined by" section 554, but rather looked to whether the government has a position and is represented by counsel to determine the EAJA's applicability to administrative proceedings.[145] The court had no trouble deciding that the EAJA covers deportation proceedings.[146] The majority found its interpretation of the EAJA to be in line with Congress's objectives much more than the "hypertechnical, highly restrictive interpretation proposed by the [INS]."[147]

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[136] *Id.*

[137] *Id.*

[138] *See supra* note 49.

[139] 838 F.2d at 1025.

[140] *Id.*

[141] *Id. But see Ardestani*, 112 S. Ct. at 522 (finding *Marcello* did hold deportation proceedings exempt from the APA). For further discussion, see *infra* notes 182-84 and accompanying text.

[142] 838 F.2d at 1026.

[143] 402 U.S. 389, 409 (1971) (involving a denied disability claim under the Social Security Act).

[144] H.R. Rep. No. 120, pt. 1, *supra* note 103, at 10, *reprinted in* 1985 U.S.C.C.A.N. at 138; *see* 838 F.2d at 1026.

[145] 838 F.2d at 1027.

[146] *Id.*

[147] *Id.*

The court quickly dismissed the INS's claim that section 292 of the INA precludes EAJA awards and stated that it only applies to representation of aliens at deportation hearings.[148] The phrase "at no expense to the government" allows aliens the right to an attorney without creating an obligation for the government to pay for such representation. This does not conflict with the EAJA, which is a fee-shifting statute; therefore, section 292 does not preclude the EAJA's applicability to deportation hearings.[149]

2. Owens v. Brock

Escobar Ruiz III was heavily criticized by other circuits,[150] starting with the Sixth Circuit in *Owens v. Brock*.[151] In *Owens*, the Sixth Circuit articulated the arguments and criticisms of *Escobar Ruiz III* adopted by other circuits which have decided that the EAJA does not cover deportation proceedings.[152] The *Owens* court interpreted the phrase "adjudication under section 554." A different statute, the Federal Employee Compensation Act,[153] however, was at issue.[154] In *Owens*, the issue was whether benefit determinations under the Federal Employee

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[148] *Id.* at 1028.

[149] *Id.*

[150] *See* Clarke v. INS, 904 F.2d 172 (3rd Cir. 1990); Hashim v. INS, 936 F.2d 711 (2nd Cir. 1991); Escobar v. U.S. INS, 935 F.2d 650 (4th Cir. 1991); Hodge v. U.S. Dept. of Justice, 929 F.2d 153 (5th Cir. 1991) (each holding that the EAJA is not applicable to deportation proceedings).

[151] 860 F.2d 1363 (6th Cir. 1988). Owens injured his back at work, was terminated from his job, and given temporary total disability benefits. *Id.* at 1634. His benefits were terminated later that year. *Id.* Owens requested a hearing before the Office of Worker's Compensation Programs. The Office of Worker's Compensation Programs upheld the termination of benefits. The Employment Compensation Appeals Board remanded for more factual findings. On remand the Office of Worker's Compensation Programs reaffirmed the denial of benefits. The Employment Compensation Appeals Board reversed and ordered benefits restored. Owens moved for an award of attorney fees. The district court affirmed the Employment Compensation Appeals Board's denial of attorney fees holding proceedings under the Federal Employee Compensation Act were not adversary adjudications under section 554. Additionally, the court noted that the Federal Employee Compensation Act specifically excludes workers' compensation proceedings from coverage under section 554. *Id.* The Sixth Circuit affirmed. *Id.* at 1369.

[152] *See supra* note 150.

[153] 5 U.S.C. §§ 8101-8103, 8105-8107, 8110, 8114-8124, 8126, 8128-8135, 8138, 8145-8149 (1990).

[154] 860 F.2d at 1364.

Compensation Act are adversary adjudications for purposes of the EAJA. Owens relied primarily upon *Escobar Ruiz III* for his argument.[155] The Sixth Circuit criticized the Ninth Circuit's interpretation stating that the Ninth Circuit ignored the principle that the court must construe a statute narrowly when analyzing whether Congress waived sovereign immunity.[156]

Additionally, the *Owens* court criticized the Ninth Circuit's interpretation of legislative history. The court took particular issue with the Ninth Circuit's reliance on the Administrative Conference of the United States report, showing that the report also stated "there remains, however, the difficult question of what proceedings are 'under section 554.' Where it is clear that certain categories are governed by this section, agencies should list the types of proceedings in their rules."[157] In contrast, the Sixth Circuit interpreted the Administrative Conference of the United States report as one that encouraged a broad reading of the EAJA, yet at the same time accepted the narrow reading of the phrase "under section 554" advanced by the government.[158] This ambiguity in conjunction with the requirement to construe a waiver of immunity narrowly compelled the Sixth Circuit to hold that "under section 554" must mean "governed by."[159]

The *Owens* court did distinguish its case from *Escobar Ruiz III*, however, noting that the INS's procedures are not specifically excepted from section 554 as are the Federal Employee Compensation Act procedures.[160]

3. Clarke v. INS

After *Owens*, six circuits decided the EAJA does not cover deportation proceedings.[161] The Third Circuit, the first of these six, relied heavily

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[155] *Id.* at 1365.

[156] *Id.* at 1366.

[157] *Id.* (citing 46 Fed. Reg. at 32901).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 1366-67 (citing 5 U.S.C. § 8124(b)(2) (specifically excluding workers' compensation proceedings from coverage under 5 U.S.C. § 554)). The INA § 242(b) requires that it be the sole and exclusive procedure for determining deportability, 8 U.S.C. § 1252(b) (1990), but under the Ninth Circuit's reading of *Marcello*, this applies only where there are differences between the INA and the APA. Escobar Ruiz III, 838 F.2d at 1025. Whenever the APA covers an area not covered by the INA, the APA could still control. *But see* Clarke, 904 F.2d at 175 (INA § 242(b) "sole and exclusive" language just as clear as the language in 5 U.S.C. § 8124(b)(2) exempting those procedures from the APA).

[161] Hashim v. INS, 936 F.2d 711 (2d Cir. 1991); Escobar v. U.S. INS, 935 F.2d

on the *Owens* court's analysis in its *Clarke v. INS*[162] decision. *Clarke* is representative of the decisions in other circuits.[163] The majority noted that Congress could have amended the definition of adversary adjudication in the 1985 amendment extending the EAJA as a response to the Attorney General's 1984 regulations.[164] In 1984, the Attorney General determined deportation proceedings are not covered by the EAJA.[165] The court did not presume that Congress ratified the Attorney General's regulations, but could not agree with the Ninth Circuit that the legislative history showed an intention to overturn those regulations.[166]

The Third Circuit also noted that Congress amended the definition of adversary adjudication, once in 1985 to include appeals under the Contract Disputes Act, and again in 1986 adding proceedings under the Program Civil Remedies Fraud Act.[167] Finally, the court hesitated to imply congressional intent to include deportation proceedings under the EAJA's scope when Congress previously amended the definition of adversary adjudications to include specific proceedings previously thought to be outside of the EAJA's scope.[168]

4. The EAJA as applied to other agency proceedings

The trend in the courts is to find various proceedings outside the scope of the EAJA. The exclusion of these proceedings, however, is easier to justify than the exclusion of deportation proceedings. For example, Merit Systems Protection Board proceedings are not usually

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650 (4th Cir. 1991); Hodge v. U.S. Dept. of Justice, 929 F.2d 153 (5th Cir. 1991); Full Gospel Portland Church v. Thornburgh, 927 F.2d 628 (D.C. Cir. 1991); Ardestani v. U.S. Dept. of Justice, INS, 904 F.2d 1505 (11th Cir. 1990); Clarke v. INS, 904 F.2d 172 (3rd Cir. 1990).

[162] 904 F.2d 172 (3rd Cir. 1990). The INS instituted deportation proceedings against Clarke alleging that he was convicted of intentionally and knowingly possessing a controlled substance. *Id.* at 173. The immigration judge dismissed the proceedings because the INS did not have a record of conviction and the INS conceded that the conviction was not a deportable offense. Clarke applied for an award of attorney fees which were subsequently denied. *Id.*

[163] *See supra* note 161.

[164] 904 F.2d at 177.

[165] *Id.* (citing 28 C.F.R. § 24.103 (1992)).

[166] *Id.*

[167] *Id.* at 178.

[168] *Id.*

found to be adversary adjudications because they involve tenure of employees, an exception stated in the statute.[169] Additionally, they are not proceedings required to be determined upon the record, as required by statute.[170] Age Discrimination Employment Act proceedings before the Equal Employment Opportunity Commission are not adversary adjudications because the Age Discrimination Employment Act provides a right to trial de novo in federal court and involves tenure.[171] The EAJA does not apply to Securities and Exchange Commission proceedings because the agency action is not required to be on the record after opportunity for a hearing.[172] National Transportation Safety Board and Federal Aviation Administration license proceedings are not within the EAJA's scope because the definition of adversary adjudication excludes adjudications granting licenses.[173] Finally, labor certification proceedings are not adjudications governed by section 554 because a hearing is not required by statute.[174] The Seventh Circuit disagreed that departmental regulations permitting a hearing were sufficient to bring these proceedings within the EAJA's scope.[175]

All of the above proceedings are barred from the EAJA's scope because of clear exceptions expressly contained in statutes.[176] The two proceedings involving an analysis most similar to deportation proceed-

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[169] 5 U.S.C. § 554(a)(2) (1990); *see* Hoska v. U.S. Dept. of Army, 694 F.2d 270, 273 (D.C. Cir. 1982) (involving an Army specialist who prevailed over the Merit Systems Protection Board and was ordered reinstated with back pay).

[170] 5 U.S.C. § 554(a) (1990); *see* Clarkson v. Office of Personnel Management, 19 M.S.P.R. 235 (M.S.P.B., 1984), 1984 MSPB LEXIS 3292, at *2 (involving a successful challenge to a denial by the Office of Personnel Management of disability retirement).

[171] 5 U.S.C. § 554(a)(1), (a)(2) (1990); *see* D'Angelo v. Dept. of Navy, 593 F. Supp. 1307, 1310 (E.D. Pa. 1984) (involving a Naval engineer who successfully claimed he had been denied a promotion because of his age).

[172] 5 U.S.C. § 504(b)(1)(C) (1990); *see* Family Television, Inc. v. SEC, 608 F. Supp. 882, 883-84 (D.D.C. 1985) (involving an investigation by the SEC against petitioners without any resulting enforcement action).

[173] 5 U.S.C. § 504(b)(1)(C) (1990); *see* Bullwinkel v. U.S. Dept. of Transp., FAA, 787 F.2d 254, 256 (7th Cir. 1986) (involving a private pilot who successfully challenged the FAA's denial of a new airman medical certificate).

[174] 5 U.S.C. § 554(a); *see* Smedburg Mach. & Tool, Inc. v. Donovan, 730 F.2d 1089 (7th Cir. 1984) (finding statute does not provide for administrative review of Secretary of Labor's decision denying or granting labor certifications).

[175] 730 F.2d at 1092.

[176] *See generally* Annotation, *What Constitutes "Adversary Adjudication" By Administrative Agency Entitling Prevailing Party To Award Of Attorney's Fees Under Equal Access To Justice Act (5 U.S.C.S. § 504)*, 96 A.L.R. Fed. 336 (1990).

ings are Federal Employment Compensation Act proceedings and social security proceedings. In the 1985 EAJA amendments, Congress determined that the EAJA covers social security proceedings.[177] The focus in the legislative history was clearly on the adversarial nature of the hearings.[178] Federal Employment Compensation Act proceedings and deportation proceedings would be within the EAJA's scope if the same standard used in social security proceedings were permitted.

IV. ANALYSIS

In *Ardestani*, the United States Supreme Court, by a 6-2 vote, agreed with the majority of circuits[179] and held that "under section 554" means "governed by". The Court found that the plain language of the statute compelled this result,[180] and furthermore, that the plain language was not rebutted by the legislative history.[181] The Court clarified its *Marcello* decision, stating it had held deportation proceedings are not governed by the APA.[182] *Marcello* did not hold that the APA would govern deportation proceedings if the procedures specified by both the APA and the INA were identical.[183] It did not matter to the Court that the Attorney General promulgated regulations that modified deportation procedures to mirror the APA requirements.[184]

The Court rebutted Ardestani's primary argument, that section 554 defines adjudications as those "required by statute to be determined on the record," and as such, deportation proceedings meet this definition. The plain meaning, as the majority determined it to be, would not allow such an interpretation.[185] Ardestani argued that a functional interpretation of the EAJA was needed to further the statute's goals.[186] The Court recognized the hardship to Mrs. Ardestani that the INS's actions had caused and agreed that the legislative purpose of the EAJA would be served better if deportation proceedings were covered.[187] The

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[177] *See* H.R. Rep. 120, *supra* note 103, at 10.
[178] *Id.*
[179] *See supra* note 161 and accompanying text.
[180] *Ardestani*, 112 S. Ct. at 519-20.
[181] *Id.* at 520.
[182] *Id.* at 519.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at 521.
[187] *Id.*

Court, however, did not believe that it had the power to make that decision.[188] The justices decided that the plain language as they and the INS interpreted it, along with the need for strict construction of a waiver of sovereign immunity, would not allow the decision urged by Ardestani, even though such a holding would further the EAJA's purpose.[189] Rather, the Court found that Congress would be better suited to amend the EAJA to clarify whether it covers deportation proceedings.[190] Because Congress amended the definition of adversary adjudication twice previously, the Court saw no reason why Congress could not do it again.[191]

Justice Blackmun, in his dissent, found fault with the Court's rush to find plain meaning.[192] He did not find the statutory language to be so plain and urged a plausible alternative meaning, one that would support Mrs. Ardestani's interpretation.[193] Finding an alternative meaning,[194] Justice Blackmun examined the legislative history and the broad purposes of the EAJA. He found clear support in the sources the Ninth Circuit cited to urge inclusion of deportation proceedings within EAJA's scope.[195] He then protested the majority's reliance on the need for a narrow interpretation in favor of the sovereign when interpreting a waiver of immunity:[196]

> For good reason, this argument has not been accepted in any other EAJA case decided by this Court. The purposes of the canon are to protect the public fisc and to provide breathing space for legitimate Government action that might be deterred by litigation. But these purposes are already fulfilled by the EAJA's requirement that even prevailing parties may not be awarded fees unless the Government's position lacked substantial justification.[197]

He argued that Congress already safeguarded the sovereign in the statute, so the Court did not need to be overly protective.[198]

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[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id. But see supra* text accompanying note 117.

[192] 112 S. Ct. at 522 (Blackmun, J., dissenting).

[193] *Id.* at 523.

[194] *Id.* (finding "adjudication under section 554" could plausibly mean an "adjudication defined under section 554").

[195] *Id.* at 523-24.

[196] *Id.* at 525-26.

[197] *Id.*

[198] *Id.* at 526.

V. IMPACT

The majority in *Ardestani* avoided an opportunity to further general congressional intent, deciding instead to focus on the plain meaning of the statute, words detached from any human context. The Court rejected the argument that a functional analysis should be used in statutory construction.[199] When the goals of the EAJA are placed within the deportation context, the Court's rejection of a functional analysis of the EAJA is difficult to accept. Deportation proceedings are incredibly complex,[200] necessitate competent counsel,[201] (particularly since all decisions must be made upon the record),[202] and pose great risks to aliens. An alien risks "life or death in the asylum context."[203] Short of death, the risk is one of "banishment or exile"[204] from friends, family and jobs. Denial of asylum and the resulting deportation results in a loss of liberty, "property and life[,] or of all that makes life worth living."[205]

In *Wong Yang Sung v. McGrath*,[206] the Court recognized that in deportation proceedings:

> [W]e frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused. Nothing in the nature of the parties or proceedings suggests that we should strain to exempt deportation proceedings from reforms in administrative procedure applicable generally to federal agencies.[207]

Even though the Court was legislatively overruled by Congress over the applicability of the APA to deportation proceedings (prior to the enactment of the INA), these arguments are still persuasive when

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[199] *Id.* at 521.

[200] *See* Castro-O'Ryan v. U.S. Dept. of Immigration and Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (comparing the INA as "second only to the Internal Revenue Code in complexity").

[201] *See, e.g.*, David A. Robertson, Comment, *An Opportunity To Be Heard: The Right To Counsel In A Deportation Hearing*, 63 WASH. L. REV. 1019 (1988).

[202] 8 U.S.C. § 1252(b) (1990).

[203] *Ardestani*, 112 S. Ct. at 522 (Blackmun, J., dissenting).

[204] Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

[205] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[206] 339 U.S. 33 (1950). *See supra* note 42 and accompanying text.

[207] 339 U.S. at 46 (applying the APA to deportation proceedings).

applied to statutory construction. The Court should have been more careful than to throw a "voteless class of litigants"[208] back to the mercy of Congress.

Immigration hearings are civil proceedings, not criminal,[209] but the potential consequences that result from these civil proceedings are often harsher than criminal punishments. The Court addressed the human costs of its decision by acknowledging very briefly that the EAJA's purposes would be served by making it applicable to deportation hearings.[210] The majority noted Mrs. Ardestani had borne great financial and emotional burdens to defend herself in a setting which is highly complex.[211] The justices, however, chose to insulate their decision from such concerns and adhered to an unnecessarily strict statutory interpretation. The Court should have embraced a functional analysis in statutory construction of the EAJA in light of the extreme consequences of deportation.

The Court embraced such a functional analysis and advanced a compelling argument for doing so in *Wong Yang Sung*, forty-one years earlier:

> The Act thus represents a long period of study . . . and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. . . . But it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear.[212]

When *Wong Yang Sung* was decided, the Court grappled with whether the language of the APA itself exempted deportation proceedings from its scope.[213] Two conflicting interpretations were offered.[214] The statu-

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[208] *Id.*

[209] Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952).

[210] *Ardestani*, 112 S. Ct. at 521.

[211] *Id.*

[212] 339 U.S. at 40-41 (applying the APA to deportation proceedings).

[213] "[T]he remaining question is whether the exception of § 7(a) of the [APA] exempts deportation hearings held before immigrant inspectors." 339 U.S. at 51 (quoting APA § 7(a) which provides that "nothing in this Act shall supersede the conduct of specified classes of proceedings . . . by or before boards or other officers specially provided for by or designated pursuant to statute."). *Id.*

[214] The INS argued that immigrant inspectors were "specially provided for by or designated pursuant to § 16 of the Immigration Act." 339 U.S. at 51-52. The Court, however, held that the Immigrant Act did *not* specially provide that such inspectors shall conduct deportation hearings. *Id.*

tory language was ambiguous.[215] Yet, the approaches by each Court are radically different. The major difference between the approaches is that the *Wong Yang Sung* Court embraced a functional analysis, devoting half of its opinion to a discussion of the purposes of the APA.[216] The *Ardestani* Court significantly retreated from a functional approach, devoting a mere half page to the broad purpose of the EAJA.[217]

The Court should not have turned its back on its earlier views. When congressional purpose is clear but the statutory language is not, the majority now appears more interested in delaying justice by sending legislation back to Congress for small changes before a statute will be given effect. Unfortunately, the Court turned its back on its earlier views and appears unlikely to give greater deference to broad congressional objectives when analyzing statutory construction in the future.

Congress had a clear objective when it passed the EAJA and did not single out INS proceedings the way it expressly excluded other types of adjudications in the statute.[218] Comprehensive statutes such as the EAJA may not fulfill their original purpose if the Court sends legislation back to Congress for seemingly minor modifications. The EAJA was enacted to provide a remedy for agency abuses by attempting to equalize the resources between agencies and small parties, thereby encouraging meritorious litigation.[219] The Court had a choice: to give effect to those remedial purposes, which it could have done under the current version of the EAJA, or to follow a hypertechnical argument advanced by the government that exempts the INS from the consequences of its actions and policies. The INS is an agency known and criticized for its abuses.[220] Unfortunately for all of the potential Mrs. Ardestanis, victims of abusive actions and policies of the INS, the Court chose the latter view.

The Court expressed concern that a contrary ruling in *Ardestani* would not have adequately protected the sovereign.[221] The Court,

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[215] *Id.* at 54 (Reed, J., dissenting) ("[I]t seems to me obvious that the exception provided in [the APA] § 7(a) covers immigrant inspectors . . . .").

[216] *Id.* at 36-45.

[217] 112 S. Ct. at 521.

[218] *See supra* text accompanying notes 169-76.

[219] *See supra* text accompanying notes 87-93.

[220] *See* Watson, *No More Independent Operators*, Legal Times, May 14, 1990, at 2 (quoting William Cook, then INS General Counsel, that "I have been told that some of my offices appeal every adverse decision regardless of the merits . . . ."); John P. Stern, Note, *Applying The Equal Access To Justice Act To Asylum Hearings*, 97 YALE L.J. 1459, 1471 (1988); 112 S. Ct. at 522, 525 (Blackmun, J., dissenting).

[221] 112 S. Ct. at 517.

however, should not extend additional protection to the sovereign unnecessarily. As Justice Blackmun noted, the EAJA has safeguards placed there by Congress to protect the United States.[222] The EAJA limits an award of attorney fees to small parties[223] and is only applicable when the government's actions are not substantially justified.[224] Congress included such restrictions specifically to prevent "a 'chilling effect' on proper Government enforcement efforts."[225] Presumably, in the vast majority of situations, the government's position will be substantially justified.[226]

It is not the Court's place to increase protection of the sovereign beyond what Congress provided in its legislation. Nor is it proper for the Court to protect the pocketbook of the United States government when Congress appropriates money for a specific purpose. The Court itself could not have made a better argument against such protection than that voiced in 1950 in *Wong Yang Sung*:

> Nor can we accord any weight to the argument that to apply the Act to such hearings will cause inconvenience and added expense to the Immigration Service. Of course it will, as it will to nearly every agency to which it is applied. But the power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high. The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter.[227]

Congress initially appropriated $92 million annually for EAJA awards between 1981 and 1984,[228] of which only $3.9 million was awarded by courts.[229] In 1984, Congress chastised the courts for their penurious awards and overly strict interpretations.[230] Congress estimated the annual cost of EAJA awards for fiscal year 1990 would be $7 million,

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[222] *Id.* at 526 (Blackmun, J., dissenting).

[223] 5 U.S.C. § 504(b)(1)(B) (1990).

[224] 5 U.S.C. § 504(a)(1) (1990).

[225] S. Rep. No. 253, *supra* note 66, at 2, *reprinted in* 1980 U.S.C.C.A.N. 4987.

[226] See *infra* note 232 for a discussion of the small fraction of EAJA attorney fee applications received by the INS between 1981-89 compared to the large number of deportation orders generally issued.

[227] 339 U.S. at 46-47 (applying the APA to the Immigration Service).

[228] H.R. Rep. No. 1418, *supra* note 9, at 20, *reprinted in* 1980 U.S.C.C.A.N. at 4999.

[229] H.R. Rep. No. 120, pt. 1, *supra* note 103, at 8, *reprinted in* 1985 U.S.C.C.A.N. at 137.

[230] *Id.* at 9-10, *reprinted in* 1985 U.S.C.C.A.N. at 137-38.

up from $3 million in 1986.[231] Between 1981 and 1989, the INS received only thirty-two applications for EAJA awards, of which immigration judges granted five and the Board of Immigration Appeals denied all.[232]

Despite these low numbers, as recently as 1992, the INS was worried about the possibility of large EAJA awards assessed against it. In a midwinter 1992 address to the American Immigration Lawyers Association, William Cook, then INS General Counsel, admitted that:

> Due to the large number of EAJA claims and the possibility of having fairly large monetary judgments assessed against them he had directed

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[231] H.R. Rep No. 120, 99th Cong., 1st Sess., pt. 2, 3 (1985), *reprinted in* 1985 U.S.C.C.A.N. at 153.

[232] Freinkel, *supra* note 30, at 1. William Cook, then Acting INS General Counsel, reported in a Feb. 1, 1990 memo to the Deputy Assistant Attorney General that eighteen EAJA cases were pending before the Board of Immigration Appeals. Brief Amicus Curiae of the American Bar Association for Petitioner at 21-24, Ardestani v. INS, 112 S. Ct 515 (1991) (No. 90-1141). Additionally, as of Feb. 1, 1990, the Board of Immigration Appeals had received eight appeals (comprising seventeen cases) from respondents whose EAJA requests were denied by immigration judges, four EAJA motions filed directly with the Board of Immigration Appeals, one EAJA request in connection with a case remanded from the court of appeals, and one appeal on the merits with an EAJA request pending. *Id.* Seventeen of these appeals or direct motions to the Board of Immigration Appeals were from the INS Western Region (which includes the Ninth Circuit). *Id.*

Thirty-two requests received by the Board of Immigration Appeals (comprising 41 cases) amount to a fraction of the number of deportation proceedings held each year. Between fiscal years 1986-1989, during which time EAJA awards applied to deportation proceedings in the Ninth Circuit, immigration judges issued deportation orders to 95,696 aliens. U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1989 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 111 (1990). Clearly, the Executive Office for Immigration Review was not flooded with EAJA requests after *Escobar Ruiz*.

In response to an argument that allowing aliens to receive EAJA awards reduces benefits to United States citizens, denying the small number of EAJA applications in connection with deportation proceedings would not amount to appreciable savings. Applying the EAJA to deportation proceedings would not raise government costs anywhere near the $92 million per year initially appropriated by Congress to cover EAJA awards. Additionally, numerous studies show that aliens contribute more to the United States' economy than they take out over their lifetimes. *See e.g.*, James Fallows, *Immigration How It's Affecting Us*, ATLANTIC MONTHLY at 45, 45-106 (Nov. 1983); Stephen Moore, *Social Scientists' Views On Immigrants And U.S. Immigration Policy: A Postscript*, ANNALS AM ACAD. POL. & SOC. SCI. at 213, 213-217 (1986); JULIAN L. SIMON, CENTER FOR IMMIGRATION POLICY AND REFUGEE ASSISTANCE, GEORGETOWN UNIVERSITY, HOW DO IMMIGRANTS AFFECT US ECONOMICALLY? (1985).

> the INS Regional counsels to institute "quality control" review proceedings of the cases being brought in their region and of appeals to the Board of Immigration Appeals which had little if any merit.[233]

Mr. Cook essentially admitted that the EAJA was responsible for deterring unjustified INS action, precisely as Congress intended.

Finally, it may be tempting to think that the exclusion of deportation proceedings from the EAJA's coverage does not really harm aliens. Once an alien is a prevailing party in a deportation proceeding, the remaining EAJA claim concerns only attorney fees. As a result of *Ardestani*, however, it will be much more difficult for aliens to obtain adequate representation in deportation proceedings. Many aliens are represented by attorneys on a pro bono basis. The inability of attorneys to collect fees through the EAJA will have a chilling effect on an indigent asylum applicant's ability to obtain counsel.[234] Attorneys dedicated to representing aliens in deportation proceedings must invest time and energy at great financial cost to themselves without the possibility of an EAJA award. While some aliens will continue to be represented, many attorneys will shy away from complex cases or cases presenting an opportunity to advance novel legal theories.[235] Such defenses would require far too much time and money.

Attorneys who receive funding from the Legal Services Corporation are ineligible to represent nonresident aliens[236] like Mrs. Ardestani. Many pro bono organizations which provide legal services for indigent aliens receive funding from the Legal Services Corporation. In order to represent aliens such as Mrs. Ardestani, attorneys would have to be very careful to charge the costs of such representation to other sources of funding. As a consequence, not only will individuals in need of representation be harmed, but the EAJA's goals of adversarial testing of governmental policies will be thwarted. The public interest will be harmed by a reduction in cases challenging INS abuse.[237]

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[233] Interview with Ronald T. Oldenburg, Immigration Attorney and American Immigration Lawyers Association Member (who was present for Mr. Cook's address) in Honolulu, HI (Apr. 12, 1992).

[234] Freinkel, *supra* note 30, at 1 (quoting Robert Rubin who administers a pro bono immigrant program in San Francisco).

[235] Interview with William Hoshijo, Executive Director, Na Loio No Na Kanaka, The Lawyers for the People of Hawaii, in Honolulu, HI (Apr. 3, 1992). Na Loio No Na Kanaka is an organization which provides legal services for indigent immigrants in Hawaii.

[236] *See* 45 C.F.R. §§ 1626.3, 1626.4 (1992).

[237] Stern, *supra* note 220 at 1470.

Congress is now left to amend the EAJA so that it covers deportation proceedings.[238] Unlike the agencies, aliens have no representation in Congress. The Supreme Court should have followed its own lead[239] and defended a voteless group of individuals. In the event of an error, the agencies could easily lobby Congress to make necessary changes. Now, a group of people without representation must rely on Congress to address a small correction to a comprehensive act. Of all agency proceedings, Congress chose to discuss only social security proceedings prior to enacting any amendments. Not surprisingly, these proceedings affect most of the population in the United States; therefore, Congress had a vested interest in giving these procedures special attention.

Because the majority in *Ardestani* did not find definitive language in the legislative history to assume that Congress intended deportation proceedings to be evaluated similarly to social security hearings, Congress must act. After *Escobar Ruiz III* was decided, legal scholars published articles discussing the application of the EAJA to deportation proceedings.[240] These articles are available to help Congress pinpoint the difficulties courts are having applying the EAJA to deportation hearings.

The INS must not be allowed to avoid paying attorney fees authorized by the EAJA simply because deportation proceedings *conform* to the APA

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[238] The focus of this Note is on the applicability of the EAJA to deportation hearings; however, the criticisms of *Ardestani* and suggestions for future action apply equally to other INS proceedings, particularly exclusion and rescission proceedings. *See* 8 U.S.C. §§ 1225, 1226, 1256 (1990). Exclusion and rescission proceedings are not likely to be covered under the EAJA after *Ardestani* because the procedures are specified in the INA. *Id.*

Ardestani's holding will not affect some other INS proceedings. For example, the EAJA would not apply to antidiscrimination proceedings because a decision may be heard *de novo* by a United States court of appeals. 8 U.S.C. § 1324b (1990). On the other hand, the EAJA will continue to apply to employer sanction and document fraud proceedings because these hearings "shall be conducted in accordance with the requirements of section 554 of Title 5." 8 U.S.C. §§ 1324a, 1324c (1990).

[239] *See Wong Yang Sung*, 339 U.S. at 46.

[240] *See, e.g.* Frenz, *supra* note 73; Thomas W. Holm, Note, *Aliens' Alienation From Justice: The Equal Access To Justice Act Should Apply To Deportation Proceedings*, 75 MINN. L. REV. 1185 (1991); James P. Jeffry, Note, *If An Alien Stays, The Government Pays!: Applying the Equal Access To Justice Act To Deportation Proceedings*, 67 NOTRE DAME L. REV. 151 (1991); Khurshid K. Mehta, Note, *Ardestani v. United States Department of Justice: Applying the Equal Access to Justice Act to Deportation Proceedings—Exalting Technicalities Over Justice?*, 16 N.C. J. INT'L LAW & COM. REG. 435 (1991); Stern, *supra* note 220. *See generally* David O. Stewart, *The Equal Access To Justice Act: A Failure In Agency Proceedings?*, NAT'L L.J., May 21, 1984, at 20, col. 1 (discussing problems associated with application of the EAJA to agency proceedings).

requirements but are not *governed by* them.[241] The EAJA should apply to administrative proceedings that are required to be on the record after an opportunity for a hearing whenever the United States takes a position and is represented by counsel. Congress should refer to its own discussions over the EAJA's relationship to social security hearings where the determining factor was the adversarial nature of a proceeding. This standard, used to determine coverage of social security proceedings, would include deportation proceedings within the scope of the EAJA.

Specifically, Congress should amend the definition of adversary adjudication by deleting "under section 554 of this title." The amended definition would read: "Adversary adjudication means (i) an adjudication in which the position of the United States is represented by counsel or otherwise, . . . (ii) any appeal of a decision made pursuant to section 6 of the [Contract Disputes Act] . . . before an agency board of contract appeals . . . : and (iii) any hearing conducted under the [Program Civil Remedies Fraud Act]." This change would allow the courts to focus on the adversarial nature of the adjudication, as Congress intended,[242] and not on whether the APA's procedures govern the proceeding. It is only just that Congress act to keep the EAJA a viable remedy for small parties who desperately need it by amending the definition of adversary adjudication to cover deportation proceedings.

VI. Conclusion

Congress began imposing requirements on government agencies in earnest with the passage of the Administrative Procedure Act in 1946.[243] The APA detailed standardized procedures that all agencies must follow.[244] Since then, agencies, such as the Immigration and Naturalization Service, have looked for ways to avoid compliance with the APA requirements. Congress continued to enact legislation affecting the pol-

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[241] *See also* Freinkel, *supra* note 30, at 1.

[242] H.R. Rep. No. 120, pt. 1, *supra* note 103, at 8, *reprinted in* 1985 U.S.C.C.A.N. at 136 (reporting that "the [EAJA] expanded the liability of the United States for the payment of attorney's fees and other expenses when another party prevailed over the United States in either an 'adversary' adjudication (i.e., *when the United States is represented by counsel or otherwise*) or in a civil action. The United States could only escape liability if (1) it demonstrated that the position of the United States was substantially justified or (2) if special circumstances would make an award unjust" (emphasis added)).

[243] *See supra* notes 38-41 and accompanying text.

[244] *Id.*

icies and actions of agencies with the Civil Rights Attorney's Fees Awards Act of 1976[245] and more recently, the Equal Access to Justice Act.[246]

Con ss, the Supreme Court, and the INS traded interpretations of the ap,,icability of these statutes to deportation proceedings over a period of decades,[247] culminating in the Supreme Court's *Ardestani* decision.[248] Presently, neither the APA nor the EAJA apply to deportation proceedings conducted by the INS.[249] Consequently, the INS is largely uncontrolled and unaccountable for its actions.

The EAJA was enacted to encourage small parties who suffer an injustice at the hands of an agency to challenge such abuses in litigation.[250] The EAJA holds agencies accountable for their actions by authorizing attorney fees awards to prevailing parties and forcing these awards to come from agency accounts.[251] Additionally, the EAJA was enacted to ensure fairness as a result of adversarial testing of agency regulations.[252] The INS need not bother with such concerns because the Supreme Court determined that deportation proceedings are outside of the EAJA's scope.[253] The Court relied on an overly narrow statutory interpretation that does not further the EAJA's broad goals.[254]

Now it is imperative that Congress amend the EAJA to apply to deportation proceedings. Deportation proceedings are precisely the type of proceeding for which the EAJA was designed to cover.[255]

Mrs. Ardestani was fortunate to get competent counsel in her deportation proceeding. Without a change to the EAJA, other Mrs. Ardestanis will find it much more difficult to get such representation. Congress must act quickly to close this important loophole that the Court preserved for the INS, at the expense of all the Mrs. Ardestanis.

Joedy L.C. Hu

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[245] *See supra* note 76.
[246] *See supra* note 78.
[247] *See supra* notes 42-53 and accompanying text.
[248] *See supra* notes 179-84 and accompanying text.
[249] *Ardestani*, 112 S. Ct. at 519, 521.
[250] *See supra* notes 87-93 and accompanying text.
[251] *See supra* notes 83, 90 and accompanying text.
[252] *See supra* notes 91-93 and accompanying text.
[253] *Ardestani*, 112 S. Ct. at 521.
[254] *See supra* note 18.
[255] *See supra* note 17.

State v. Quino: The Hawai'i Supreme Court Pulls Out All the "Stops"

I. Introduction

In an effort to fight the war on drugs, law enforcement officials have stationed officers in airports, train stations, and bus depots for the purpose of conducting surveillance.[1] The officers routinely approach individuals, either randomly or on little more than a hunch, and ask potentially incriminating questions.[2] Recognizing these police procedures as legitimate, the United States Supreme Court has stated:

> [T]he Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.[3]

In Hawai'i, the Honolulu Police Department Narcotics-Vice Airport Detail (HPD) has a program that employs these police tactics for the purpose of reducing the flow of drugs carried through the Honolulu International Airport.[4] The program is referred to as the "walk and talk" drug interdiction program.[5] Officers in the program are trained to engage in so-called "consensual encounters" with airline passengers.[6] In order to conduct a constitutionally permissible encounter, officers are instructed to: (1) observe passengers arriving from a drug source city;[7] (2) approach passengers at random and identify themselves as

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[1] *See* Florida v. Bostick, 111 S.Ct. 2382, 2384 (1991).

[2] *Id.*

[3] *Id.*

[4] *See* State v. Quino, 74 Haw. 161, 163-65, 840 P.2d 358, 360 (1992), *cert denied*, 113 S.Ct. 1849 (1993).

[5] *See id.*

[6] *Id.*

[7] A drug source city is a label for a city that is a major source for drug trafficking. United States v. Sokolow, 490 U.S. 1, 5 (1989).

police officers; (3) ask permission to talk; (4) inquire whether the passengers disembarked from the targeted flight; (5) request to see passengers' identification and airline tickets; (6) ask if the passengers are carrying narcotics; (7) request to search passengers' luggage; and (8) inquire whether passengers are carrying narcotics on their persons and request to pat them down.[8] Under Hawai'i's "walk and talk" program, passengers are not approached because the officer feels that the person fits a "drug courier profile"[9] or because the officer has a reasonable suspicion of criminal activity.[10] Instead, passengers are randomly selected or are picked out by the officers on little more than a hunch.[11] In addition, the officers are taught to talk in a conversational manner throughout the encounter.[12]

In 1991, Ferdinand Quino was convicted of promoting a dangerous drug in the first degree[13] based on evidence obtained from him as a result of a "walk and talk" encounter.[14] Despite the unquestionable approval of similar drug interdiction programs by the United States Supreme Court, the Hawai'i Supreme Court, in *State v. Quino*,[15] reversed Quino's conviction holding that the HPD's utilization of the "walk and talk" drug interdiction program violated Quino's right, granted by the Constitution of the State of Hawai'i, to be secure against unreasonable seizures.[16] Furthermore, the Hawai'i Supreme Court's holding appears to be broad rather than narrow.[17] The strong language in *Quino*, criticizing the "walk and talk" program as a whole, suggests that the court will not allow the government to use any evidence obtained by means of a "walk and talk" encounter in Hawai'i state courts.[18]

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[8] *Quino*, 74 Haw. at 164-65, 840 P.2d at 360.

[9] *Id.* The drug courier profile is a list of characteristics, created by the Drug Enforcement Administration (DEA), believed to be associated with people who are carrying drugs. These characteristics include paying cash for airplane tickets, taking short trips to or from cities known to be centers for drug trafficking, nervousness, wearing a particular type of clothing, and possessing only carry-on luggage. *Sokolow*, 490 U.S. at 5.

[10] For an explanation of reasonable suspicion, see *infra* notes 111-12 and accompanying text.

[11] *See id.*

[12] *Id.*

[13] HAW. REV. STAT. § 712-1241(1)(a)(i) (Supp. 1991).

[14] *Quino*, 74 Haw. at 163, 840 P.2d at 360-61.

[15] 74 Haw. 161, 840 P.2d 358 (1992), *cert. denied* 113 S.Ct. 1849 (1993).

[16] *Id.* at 175-76, 840 P.2d at 365.

[17] *See id. See also infra* notes 387-88 and accompanying text.

[18] *See infra* part VI.

This casenote begins in Part II with a description of the facts of the *Quino* case. The legal history in Part III examines the treatment of unreasonable seizures of the person in both the United States Supreme Court, under the Fourth Amendment to the Constitution of the United States, and in the Hawai'i Supreme Court, under article I, section 7, of the Hawai'i State Constitution. Part IV analyzes the holding in *Quino*, and Part V comments on the court's reasoning. Finally, Part VI discusses the legal and practical effects of the *Quino* decision.

II. Facts

On April 3, 1990, Officer Tanya Tano and Officer Harold Sumaoang, working in plain clothes,[19] were assigned to monitor an American Airlines flight arriving from San Diego.[20] The two officers observed Ferdinand Q. Quino, Henry Tugcay Galinato, and Raul Centorna Cachola among the deplaning passengers.[21] Officer Tano noticed an unnatural bulge on Galinato's back at about the level of his beltline.[22] Officer Sumaoang also saw the bulge,[23] but did not suspect any criminal activity at that time.[24] The officers followed Quino, Galinato, and Cachola, who were walking in single file along the concourse.[25]

After watching the three men from a distance, the officers approached them.[26] Officer Sumaoang initiated conversation with Galinato while, separately, Officer Tano walked up to Quino and Cachola.[27] Officer

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[19] The facts as stated by the Hawai'i Supreme Court do not indicate that the officers were in plain clothes, but that fact is indicated elsewhere and was not in dispute. *See* Opening Brief for Appellant at 2, *Quino* (No. 15239); Answering Brief for State of Hawai'i at 4, *Quino* (No. 15239); Application for Writ of Certiorari for Appellant at 2, *Quino* (No. 15239).

[20] *Quino*, 74 Haw. at 165, 840 P.2d at 360.

[21] *Id.*

[22] *Id.*

[23] Answering Brief of the State of Hawai'i at 5, *Quino* (No. 15239).

[24] *Quino*, 74 Haw. at 165 n.4, 840 P.2d at 360 n.4.

[25] *Id.* at 165, 840 P.2d at 360.

[26] *Id.* The court stated that the officers "approached and stopped them." However, a "stop" is a legal term of art used in the area of search and seizures to denote a "seizure" within the meaning of the Fourth Amendment to the United States Constitution and article I, section 7 of the Hawai'i Constitution. *See infra* note 102 and accompanying text. As such, a "stop" is a legal conclusion that, in the recitation of the facts, probably does not aid in understanding the scenario.

[27] *Id.*

Tano identified herself as a police officer, and requested permission to speak with the two men.[28] They agreed.[29] Officer Tano asked: (1) if they had arrived on the American Airlines flight from San Jose, (2) if they had been to Hawai'i before, (3) if they would mind her looking at their airline tickets, and (4) if she could see some identification.[30] Officer Tano did not offer an explanation for the questioning until Quino asked her, while she was inspecting their tickets, what was the purpose of the inquiry.[31] Officer Tano informed them that she was investigating possible drug trafficking at the airport.[32]

Officer Tano then inquired if either Quino or Cachola were carrying any narcotics.[33] Quino replied that he knew nothing about narcotics,[34] after which Officer Tano requested permission to search both Quino and Cachola's carry-on bags.[35] Quino showed Officer Tano the contents of his bag, which did not contain narcotics.[36] At this point, Officer Tano did not have a reasonable suspicion[37] that she was talking to

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[28] *Id.* The characterization of the events that took place were in dispute. Quino asserted that, when Officer Tano approached Cachola and him, she showed her badge to him and identified herself as a police officer. Opening Brief for Appellant at 3, *Quino* (No. 15239); Application for Writ of Certiorari at 3, *Quino* (No. 15239). After looking at the badge, both men stopped walking. Opening Brief for Appellant at 3, *Quino* (No. 15239); Application for Writ of Certiorari at 3, *Quino* (No. 15239).

The State argued, however, that Officer Tano approached Quino and Cachola by walking along side them. Answering Brief of the State of Hawai'i at 6, *Quino* (No. 15239). They were walking together in the same direction with Quino in between Tano and Cachola. *See id.* As they were walking, Officer Tano showed Quino her badge and identified herself. *Id.* Cachola could not see what Tano was doing while she was talking so he moved ahead of and in front of Quino to see what she was doing. *Id.* Officer Tano and Quino stopped walking, the State claimed, because Cachola was in their way. *See id.* at 7.

[29] *Quino*, 74 Haw. at 165, 840 P.2d at 360.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 165-66, 840 P.2d at 360.

[33] *Id.* at 166, 840 P.2d at 360.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] The court stated, "Officer Tano had no reasonable suspicion that any of the individuals was [sic] carrying narcotics." Although "reasonable suspicion," like the term "stop," is a term of art and a legal conclusion, the State did not dispute Quino's argument that Officer Tano did not have a reasonable suspicion during the approach and questioning. *Id.* at 163 n.1, 840 P.2d at 359 n.1.

drug couriers, but was beginning to think as much because of both men's "body language."[38]

After looking in Cachola's bag, Officer Tano asked Quino and Cachola if either of them were carrying narcotics on their person.[39] Both men said, "no."[40] Officer Tano then requested permission to pat them down.[41] Both men again responded, "no."[42] At about that point in time, Officer Tano heard Galinato say to Officer Sumaoang, "give me a break."[43] Immediately after Galinato made that statement, the three men ran with the officers in pursuit.[44] During the chase, Officer Sumaoang saw both Galinato and Quino drop packages, which were later found to contain drugs, into potted plants.[45]

Officer Tano and Officer Sumaoang arrested Quino and charged him with promoting a dangerous drug in the first degree in violation of Hawai'i Revised Statutes § 712-1241(1)(a)(i).[46] The circuit court denied Quino's pre-trial motion to suppress the evidence recovered as a result of the chase because the court felt that the police officers' initial approach and questioning were constitutional.[47] Subsequently, a jury found Quino guilty.[48] Quino appealed the circuit court's order denying his motion to suppress the evidence.[49] The Intermediate Court

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[38] *Id.* at 166, 840 P.2d at 360-61.

[39] *Id.*, 840 P.2d at 361.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 167, 840 P.2d at 361. Cachola and Galinato were also charged with promoting a dangerous drug in the first degree. *See id.* HAW. REV. STAT. § 712-1241 (Supp. 1992) in relevant part reads:

> (1) A person commits the offense of promoting a dangerous drug in the first degree if he knowingly:
>
> (a) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
>
> (i) One ounce or more, containing methamphetamine, heroine, morphine, or cocaine or any of their respective salts, isomers, and salts or isomers.

Id.

[47] *Quino*, 74 Haw. at 167, 840 P.2d at 361.

[48] *Id.* The circuit court sentenced Quino to incarceration for twenty years. *Id.* at 163, 840 P.2d at 359. Galinato was also convicted of the same charge. *Id.* at 167, 840 P.2d at 360. Cachola was not convicted because he "skipped" out of town. *Id.* at 167 n.6, 840 P.2d at 361 n.6.

[49] *Id.* at 167, 840 P.2d at 361. Galinato separately appealed. *Id.*

of Appeals of Hawai'i (ICA) affirmed Quino's conviction.[50] Quino then prayed for a writ of certiorari to review the ICA's decision, which the Hawai'i Supreme Court granted.[51]

III. Legal History

The United States Supreme Court has recognized that a state may impose greater restrictions on police activity under its own law than those required under federal constitutional standards.[52] Therefore, as long as the minimum safeguards of the United States Constitution are not violated, the Hawai'i Constitution may mandate its own protections against unreasonable searches and seizures.[53] The Fourth Amendment to the United States Constitution grants people the right to be secure against "unreasonable searches and seizures."[54] Article I, section 7 of the Constitution of the State of Hawai'i contains identical language to that found in the Fourth Amendment, and, in addition, explicitly

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[50] *Id.* In Hawai'i, all appeals from decisions in the state courts are filed with the Hawai'i Supreme Court, which assigns cases as it sees fit to the ICA. *Quino* was assigned to the ICA.

[51] *See* State v. Quino, 833 P.2d 84 (1992). Galinato's application for writ of certiorari to the Hawai'i Supreme Court was denied because it was untimely filed. *Quino*, 74 Haw. at 167 n.6, 840 P.2d at 361 n. 6.

[52] Oregon v. Hass, 420 U.S. 714, 719 (1975).

[53] *See* Cooper v. California, 386 U.S. 58, 62 (1967); Sibron v. New York, 392 U.S. 40, 60-61 (1968). A majority of states have also provided greater protection than that mandated by the United States Constitution. *See* Jerold H. Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. Mich. J.L. Ref. 465, 467 (1982). *See also* State v. Glass, 583 P.2d 872 (Alaska 1978); People v. Oates, 698 P.2d 811 (Colo. 1985); State v. Reeves, 427 So.2d 403 (La. 1982); District Attorney for the Plymouth District v. Coffey, 434 N.E.2d 1276 (Mass. 1982); People v. Smith, 360 N.W.2d 841 (Mich. 1984); State v. Koppel, 499 A.2d 977 (N.H. 1985); State v. Novembrino, 519 A.2d 820 (N.J. 1986); State v. Caraher, 653 P.2d 942 (Or. 1982); State v. Atkinson, 669 P.2d 343 (Or.App. 1983); Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979) *cert. denied* 444 U.S. 1032 (1980); State v. Opperman, 247 N.W.2d 673 (S.D. 1976); State v. Gunwall, 720 P.2d 808 (Wash. 1986); State v. Doe, 254 N.W.2d 210 (Wis. 1977).

[54] U.S. Const. amend. IV reads:

> 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.

Id.

provides citizens in Hawai'i the right to be safe from "invasions of privacy."[55] As the "final arbiter of the meaning of the provisions of the Hawai'i Constitution,"[56] the Hawai'i Supreme Court has "final, unreviewable authority" to interpret article I, section 7 as affording greater protection to citizens in Hawai'i.[57] The Hawai'i Supreme Court, however, cannot construe federal constitutional law as prohibiting police conduct when the United States Supreme Court has specifically refused to impose such restrictions.[58]

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[55] HAW. CONST. art. I, §7 in relevant part 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.

Id. (emphasis added).

Prior to 1968, article I, section 5 contained the same language as the Fourth Amendment. State v. Roy, 54 Haw. 513, 517, 510 P.2d 1066, 1068 (1973). In 1968, however, the delegates to the Constitutional Convention amended the Hawai'i Constitution added the phrase "invasions of privacy." *Id.* at 517, 510 P.2d at 1068-69. Article I, section 5 was changed to article I, section 7.

[56] State v. Santiago, 53 Haw. 254, 265, 492 P.2d 657, 664 (1971); *Roy*, 54 Haw. at 517, 510 P.2d at 1068.

[57] State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58 (1974). *Accord* State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985); *Santiago*, 53 Haw. at 265, 492 P.2d at 664.; State v. Texeira, 50 Haw. 138, 142, 433 P.2d 593, 597 (1967).

[58] *Hass*, 420 U.S. at 719.

A critical distinction in the area of constitutional interpretation is that the state courts can only construe its own state laws as dictating greater safeguards than the Fourth Amendment. *Id.* In contrast, a state court may not interpret the Fourth Amendment and federal precedent as establishing restrictions that the United States Supreme Court has specifically refused to impose on the government. *See id.* While this may seem obvious, state courts must make clear in their opinions whether the basis for restricting police conduct is state or federal law. *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983). In addition to cases in which a state court interprets state law as providing less than the minimum protection mandated by the Fourth Amendment, the United States Supreme Court will also review a state court ruling where: 1) the state court "fairly appears" to base its decision primarily on, or interwoven with, federal law, *id.* at 1040, and, 2) the "adequacy and independence" of a state law ground is unclear from face of the opinion, *id.* at 1040-41.

This rule represents a balance between allowing state courts to develop their own jurisprudence without federal interference, and maintaining the integrity of federal law. *Id.* at 1041. Under the approach taken by the Court, the need for the Court to examine state law is eliminated while the Court preserves its right to step in when federal law appears influential in the outcome of the case. *See id.* The reason for the

In the past, the Hawai'i Supreme Court has analyzed search and seizure issues under article I, section 7 both separately and in conjunction with the Fourth Amendment.[59] While the court has declined to define the exact meaning of the term "invasions of privacy,"[60] the court has interpreted article I, section 7's other provisions which are identical to provisions in the Fourth Amendment as providing greater protection against unreasonable searches.[61] The court, however, adhered

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second requirement, that the Court will only review a state court decision if the adequacy and independence of the state law is unclear, is to avoid rendering advisory opinions. *Id.* at 1041-42. If the state court would not decide the case differently after the Court corrected the state court's views on federal laws, then the Court would be issuing an advisory opinion. *Id.* at 1042.

The Court first articulated this policy in *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, the Court held that the Michigan Supreme Court's decision did not rest on independent state grounds. There, the Michigan State Supreme Court's decision relied solely on *Terry v. Ohio*, *see infra* notes 117-28 and accompanying text, and other federal cases without a single reference to a Michigan case. *Id.* at 1043. Furthermore, the Michigan state constitution was only mentioned twice, in a footnote citing both the state and federal constitutions and in the holding where the court ruled that the Fourth Amendment and the Michigan constitution were violated. *Id.* at 1037 n.3. In contrast, the United States Supreme Court has cited *Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974), as an example of a state properly affording greater protection to its citizens. *See Hass*, 420 U.S. at 719.

In *Kaluna*, a matron discovered a piece of folded tissue paper in Kaluna's brassiere, during a search incident to an arrest conducted at the police station. *Kaluna*, 55 Haw. at 362, 520 P.2d at 58-60. The matron unfolded the paper and found barbiturates. *Id.* at 362-63, 520 P.2d at 54. While the court recognized that the United States Supreme Court had interpreted the Fourth Amendment as allowing the opening of the tissue paper without a warrant, the court noted its authority to afford greater protection against unreasonable searches than the Fourth Amendment. *Id.* at 369-70, 520 P.2d at 58-59. The court then held that article I, section 7 required a warrant. *Id.* at 371-72, 520 P.2d at 59-60.

[59] *See Tanaka*, 67 Haw. 658, 701 P.2d 1274 (1985)(holding that police conduct did not constitute a "search" under Fourth Amendment, but was a "search" under article I, section 7); *Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974)(search allowable under the Fourth Amendment but not under article I, section 7); State v. Tsukiyama, 56 Haw. 8, 525 P.2d 1099 (1974)(framing the issue as whether the police conduct constituted a "seizure" under Fourth Amendment *and* article I, section 7); State v. Patterson, 58 Haw. 462, 571 P.2d 745 (1977)(citing to both Hawai'i Supreme Court and United States Supreme Court precedent on law of search pursuant to consent).

[60] *Kaluna*, 55 Haw. at 369 n.6, 520 P.2d at 58 n.6. *See Tanaka*, 67 Haw. at 662, 701 P.2d at 1276.

[61] *See Tanaka*, 67 Haw. 658, 701 P.2d 1274 (while Fourth Amendment does not recognize a legitimate expectation of privacy in garbage, the article I, section 7 does);

to United States Supreme Court precedent in evaluating seizures of the person—until *Quino*.[62]

Quino breaks new ground in several areas but its impact can only be appreciated when viewed in light of relevant precedent. Section A presents an introduction to how Fourth Amendment and article I, section 7 rights are protected. Seizures of the person are defined in section B by surveying United States Supreme Court and Hawai'i Supreme Court precedent. Section C examines how both the United States Supreme Court and the Hawai'i Supreme Court have applied the consent exception to article I, section 7 and Fourth Amendment violations. Section D describes the effect that an illegal seizure has on a subsequent consent to not exercise one's constitutional rights. Finally, section E ends part III by briefly summarizing the legal history discussion.

A. Protection Against Unreasonable Searches and Seizures

Although the Fourth Amendment grants individuals the right to be secure against unreasonable searches and seizures, the Fourth Amendment, in and of itself, does not enforce this right.[63] The right is given effect through the "exclusionary rule" which prohibits the use, in a criminal proceeding, of any evidence obtained in violation of the Fourth Amendment against the person whose right was invaded.[64] In Hawai'i, the exclusionary rule applies in cases involving either the Fourth Amendment, enforceable against the States through the Due Process Clause of the Fourteenth Amendment,[65] or article I, section 7, which the Hawai'i Supreme Court has adopted to protect the rights granted to Hawai'i's citizens.[66]

Kaluna, 55 Haw. 361, 520 P.2d 51 (although opening of a piece of folded tissue paper obtained by search incident to arrest was allowable under the Fourth Amendment without a warrant, Hawai'i Constitution required a warrant). For a discussion of *Kaluna*, see *supra* note 67.

[62] *See, e.g.*, State v. Tsukiyama, 56 Haw. 8, 525 P.2d 1099 (1974)(finding of no seizure under the Fourth Amendment); State v. Barnes, 58 Haw. 333, 568 P.2d 1207 (1977)(citing Terry v. Ohio, 392 U.S. 1 (1967), throughout); State v. Joao, 55 Haw. 601, 525 P.2d 580 (1974)(also following *Terry*). *See infra* part III.B.2 and accompanying notes.

[63] *See* United States v. Leon, 468 U.S. 897, 906 (1984).

[64] Weeks v. United States, 232 U.S. 383, 393 (1914); Mapp v. Ohio, 367 U.S. 643, 648 (1961); United States v. Calandra, 414 U.S. 338, 347 (1974).

[65] *Mapp*, 367 U.S. at 655.

[66] State v. Pokini, 45 Haw. 295, 308-309, 367 P.2d 499, 506 (1961).

Because neither the United States Constitution nor the Hawai'i Constitution explicitly attach adverse consequences to police conduct that violates the Fourth Amendment or article I, section 7, respectively, these constitutional guarantees would be nothing more than a "form of words" without the exclusionary rule.[67] The exclusionary rule, however, does not operate as a constitutionally guaranteed personal right of the victim of an illegal search or seizure.[68] Rather, the rule is a "judicially created remedy" primarily designed to protect Fourth Amendment rights by deterring future lawless conduct by the police.[69] In addition, the rule is also viewed as "imperative of judicial integrity."[70] The notion is that, if a court were to allow the prosecution to use illegally obtained evidence against a defendant, the court would legitimize the illegal conduct and become a party to the unjustified invasion of constitutionally guaranteed rights.[71]

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[67] *Mapp*, 367 U.S. at 648; Terry v. Ohio, 392 U.S. 1, 12 (1967).

[68] *Leon*, 468 U.S. at 906.

[69] *Id.* Notwithstanding some language in previous decisions to the contrary, the Court unequivocally rejected the notion that the exclusionary rule is a necessary corollary of the Fourth Amendment. *Id.* at 906-907.

Regarding an unreasonable search, the Court has explained:

> 'The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> 'The ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.'
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:
>
> 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'
>
> In sum, the rule is 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.

Calandra, 414 U.S. at 347-48 (citations omitted).

[70] *Terry*, 392 U.S. at 12-13; Brown v. Illinois, 422 U.S. 590, 599 (1975). A discussion of judicial integrity, however, was noticeably absent in one of the United States Supreme Court's more recent cases discussing the applicability of the exclusionary rule. *See Leon*, 468 U.S. 897 (1984)(holding that a court should not apply exclusionary rule to bar prosecution's use of evidence obtained by police acting in reasonable reliance on a defective warrant issued by a neutral magistrate because application of the rule in that type of case would not further the rule's primary goal of deterring future police conduct).

[71] *Terry*, 392 U.S. at 13.

The exclusion applies to evidence directly obtained as a result of an illegal search or seizure, as well as evidence indirectly acquired.[72] The direct and indirect evidence that result from the lawless conduct of the police is commonly referred to as the "fruit of the poisonous tree."[73] The "fruit of the poisonous tree", however, does not necessarily include all indirectly obtained evidence that the police would not have discovered "but for" the illegality.[74] If the connection between the evidence and the illegal police conduct becomes "so attenuated as to dissipate the taint," then the prosecution can use the evidence.[75] The question is "whether . . . the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[76] *Wong Sun v. United States*[77] best illustrates the basic mechanics of the exclusionary rule.

During a narcotics investigation, federal agents illegally broke into petitioner James Wah Toy's apartment.[78] After the agents entered, Toy made a statement to the police accusing Johnny Yee of selling drugs.[79] The agents went immediately to Yee's apartment, where they found Yee with heroin.[80] Within an hour, the agents took Toy and Yee to their office.[81] There, Yee stated that he had bought the heroin from Toy and "Sea Dog."[82] Toy identified "Sea Dog" as petitioner Wong Sun.[83] The agents then went to Wong Sun's home and illegally arrested him.[84] Toy and Wong Sun were arraigned and released on their own

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[72] Wong Sun v. United States, 371 U.S. 471, 484 (1963); Silverthorne Lumber v. United States, 251 U.S. 385 (1920).

[73] *See* Nardone v. United States, 308 U.S. 338, 341 (1939); *Wong Sun*, 371 U.S. at 487-88; State v. Kitashiro, 48 Haw. 204, 216, 397 P.2d 558, 565 (1964).

[74] *Wong Sun*, 371 U.S. at 487-88.

[75] *Wong Sun*, 371 U.S. at 471.

[76] *Id.* at 488. Other exceptions to the exclusionary rule include: 1) the independent source exception, Segura v. United States, 468 U.S. 796 (1984), 2) the inevitable discovery rule, Nix v. Williams, 467 U.S. 431 (1984), 3) good faith exception regarding a defective warrant, *Leon*, 468 U.S. 897 (1984).

[77] 371 U.S. 471 (1963).

[78] *Id.* at 473-74.

[79] *Id.* at 474.

[80] *Id.* at 474-75.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.* The Court of Appeals for the Ninth Circuit determined that Wong Sun's arrest was illegal because the arrest was not based on probable cause. *Id.* at 477-78. The United States Supreme Court agreed. *Id.* at 491.

recognizance.[85] Within a few days, Wong Sun went back to the station where he was interrogated after being informed of his right to remain silent and his right to an attorney.[86] Wong Sun made a confession at that time.[87]

The Court held that Toy's statements made immediately after the illegal entry into his apartment could not be used against Toy because there was nothing to "purge the primary taint of the unlawful invasion."[88] Having established that Toy's statements were illegally obtained, the Court also held that the prosecution could not use the drugs seized from Yee against Toy because the narcotics were "come at by exploitation of that illegality."[89]

The prosecution, however, could use the drugs seized from Yee against Wong Sun.[90] Because the drugs were found through the use of the statements obtained in violation of Toy's rights, the drugs could not be used against Toy.[91] The actual surrender of the evidence by Yee, however, did not invade any of Wong Sun's constitutional rights; therefore, Wong Sun had no grounds to object to introduction of that evidence.[92]

The Court also found that Wong Sun's confession was properly admitted because the connection between the illegal arrest and the statement had become "so attenuated as to dissipate the taint."[93] The Court stressed that Wong Sun had been released on his own recognizance after a lawful arraignment and that he voluntarily returned to make the confession a few days later.[94] Because all of the evidence that the police obtained stemmed from the initial illegality of breaking into Toy's apartment but not all of that evidence was suppressed, *Wong Sun* provides an elementary example of the parameters of the exclusionary rule.

Obviously, however, a court will not even get to the fruit of the poisonous tree analysis unless there is an illegality. Because *Quino*

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[85] *Id.* at 475-76.
[86] *Id.* at 476.
[87] *Id.* at 476-77.
[88] *Id.* at 486.
[89] *Id.* at 487-88.
[90] *Id.* at 492.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 491.
[94] *Id.*

involves an illegal seizure of Quino under article I, section 7 of the Hawai'i Constitution, what follows is an overview and case discussion of how the United States Supreme Court and the Hawai'i Supreme court has viewed seizures of the person.

B. Seizures of the Person

While a police officer does not have to arrest someone in order to "seize" that person within the meaning of the Fourth Amendment and article I, section 7,[95] not every contact between an officer and an individual results in a seizure.[96] A seizure of a person only occurs if an officer, by means of physical force or show of authority, in some way restrains an individual's liberty.[97] The United States Supreme Court and the Hawai'i Supreme Court have both held that the amount of restraint necessary to constitute a seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[98] The focus of this "free to leave" test is on how a "reasonable person" would have viewed the encounter; the test, therefore, is an objective one.[99]

Utilizing the "free to leave" test, the United States Supreme Court has articulated three levels of police-citizen encounters: (1) "consensual encounters,"[100] (2) "investigative stops,"[101] also referred to as "stops,"[102]

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[95] Terry v. Ohio, 392 U.S. 1, 19 (1967)

[96] *Id.* at 19 n.16; State v. Tsukiyama, 56 Haw. 8, 11, 525 P.2d 1099, 1102 (1974).

[97] *Terry*, 392 U.S. at 19 n.16 ; *Tsukiyama*, 56 Haw. at 12, 525 P.2d at 1102.

[98] United States v. Mendenhall, 446 U.S. 544, 554 (1980)(Stewart, J., opinion). *Accord* INS v. Delgado, 466 U.S. 210, 216 (1984); *Tsukiyama*, 56 Haw. at 12, 525 P.2d at 1102 ("[w]e must evaluate the totality of the circumstances and decide whether or not a reasonably prudent person would believe he was free to go."). Like the Hawai'i Supreme Court, the United States Supreme Court also has used the phrase "totality of the circumstances" synonymously with "in view of all the circumstances surrounding the incident." *See* United States v. Cortez, 449 U.S. 411, 417 (1981); United States v. Sokolow, 490 U.S. 1, 8 (1989).

[99] Michigan v. Chesternut, 486 U.S. 567, 574 (1988); *Tsukiyama*, 56 Haw. at 12, 525 P.2d at 1102.

[100] INS v. Delgado, 466 U.S. 210, 215 (1984); Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984).

[101] United States v. Sokolow, 490 U.S. 1, 11 (1989); Alabama v. White, 496 U.S. 325, 331 (1990).

[102] *See* Terry, 392 U.S. at 10.

or "investigatory detention,"[103] and (3) arrests. While investigatory stops and arrests are seizures, consensual encounters are not.[104]

The Court has labeled police-citizen contacts in which a reasonable person would feel free to leave "consensual encounters."[105] By definition, therefore, a consensual encounter is not a seizure.[106] Consequently, the Court will not exclude any evidence otherwise legally obtained during the conversation.[107]

The difference between an investigative stop and arrest is one of degree.[108] Although both types of seizures involve restraint by an officer of an individual's liberty to walk away, an investigative stop involves

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[103] Cupp v. Murphy, 412 U.S. 291, 294 (1973).

[104] *Compare* Cupp v. Murphy, 412 U.S. 291, 294 (1973)("Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detention.'") *with* Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984)("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest.").

[105] INS v. Delgado, 466 U.S. 210, 215 (1984); *Rodriguez*, 469 U.S. at 4.

[106] In Florida v. Bostick, 111 S.Ct. 2382 (1991), the Court stated: "[s]o long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *Id.* at 2386 (citations omitted).

Also, in *Delgado*, 466 U.S. 210, the Court wrote: "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *Id.* at 216.

Similarly, in *Rodriguez*, 469 U.S. 1, the Court held: "[t]he initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest." *Id.* at 5-6.

[107] *See Rodriguez*, 469 U.S. at 5-6 (1984). Of course, the Court could exclude the evidence on other grounds. For instance, if the officer conducts an illegal search during the conversation, the fruits of the search will be excluded notwithstanding the legality of the encounter.

[108] *See* Florida v. Royer, 460 U.S. 491, 502-503 (1983)(plurality opinion)(officer had reasonable suspicion of criminal activity, but the seizure required probable cause); United States v. Mendenhall, 446 U.S. 544, 574-75 (1980)(White, J., dissenting)(while three justices in the majority felt that the defendant was justifiably seized based on reasonable suspicion, the dissent felt that the prosecution needed to prove probable cause because the defendant was in effect under arrest); Dunaway v. New York, 442 U.S. 200, 212 (1979)(the detention of the defendant contrasted with the lesser intrusions involved in Terry and its progeny).

a narrower, less restrictive intrusion upon that liberty.[109] Because an investigative stop is a lesser intrusion on a person's liberty than an arrest, police officers can effectuate a stop on less than probable cause.[110] If, based on the totality of the circumstances, an officer has a reasonable suspicion that criminal activity is afoot, the officer may stop a suspect without violating the Fourth Amendment and article I, section 7.[111] At trial the seizing officer must support this reasonable suspicion by pointing to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[112]

Prior to *Quino*, the Hawai'i Supreme Court had followed the United States Supreme Court's classifications of police-citizen encounters[113] Although *Quino* has somewhat changed that,[114] both courts agree that the distinction between a seizure and a nonseizure[115] is determined by

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[109] *Dunaway*, 442 U.S. at 212. For a full discussion of the differences between stops and arrests, see 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1 (2d ed. 1987 & Supp. 1993); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1, § 9.2 (2d ed. 1987 & Supp. 1993).

[110] Arrests require probable cause. Probable cause exists if, based on the facts and circumstances within the officers' knowledge at the time of the arrest, a reasonable man of caution could believe the suspect had committed or was committing an offense. Carroll v. United States, 267 U.S. 132 (1957); State v. Barnes, 58 Haw. 333, 335, 568 P.2d 1207, 1209-10 (1977).

[111] United States v. Sokolow, 490 U.S. 1, 7-8 (1989); Florida v. Rodriguez, 469 U.S. 1, 5 (1984); *Barnes*, 58 Haw. at 338, 568 P.2d at 1211.

[112] Terry v. Ohio, 392 U.S. 1, 21 (1967); *Barnes*, 58 Haw. at 338, 568 P.2d at 1211.

[113] *See* State v. Tsukiyama, 56 Haw. 8, 525 P.2d 1099 (1974); *Barnes*, 58 Haw. 333, 568 P.2d 1207 (1977). *See also infra* part III.B.2 and accompanying notes.

[114] In *Quino*, the Hawai'i Supreme Court appears to create a new classification of a "consensual seizure," i.e. a seizure that a person freely, voluntarily, and intelligently consented to. Thus, the Hawai'i Supreme Court may allow a police officer to justify an investigatory stop with either reasonable suspicion or consent. Although the *Quino* court did not specifically use the phrase "consensual seizure," the way in which the court framed the second issue and the analysis of that issue suggests that the label accurately describes the type of encounter the court was referring to. The second issue was: "assuming a seizure occurred, whether it was consensual." *Quino*, 74 Haw. at 163, 840 P.2d at 359. For a discussion of the court's analysis of this issue, see *infra* part IV.B and accompanying notes.

[115] As a point of clarification, throughout this casenote, what the United States Supreme Court has defined as a "consensual encounter," i.e. a situation in which a reasonable person would feel free to leave, will be referred to as a "nonseizure." This is just to prevent confusion with the terms "consensual encounter" and "consensual seizure."

application of the "free to leave" test.[116] While articulating the test is not difficult, applying it to a set of facts gives rise to much debate. What follows is a discussion of the history of the "free to leave" test, the policies underlying it, and how the United States Supreme Court and the Hawai'i Supreme Court have applied it prior to *Quino*.

1. Federal seizures of the person

The United States Supreme Court first recognized that a brief detention short of an arrest can come under the purview of the Fourth Amendment in *Terry v. Ohio*.[117] There, an Officer McFadden suspected Terry and another man, Chilton, of "casing a job" in preparation for an armed robbery.[118] McFadden approached them, identified himself as a police officer, and asked them for their names.[119] When the men just mumbled something in response, McFadden grabbed Terry and patted down the outside of Terry's clothing.[120] Feeling a gun in Terry's left breast pocket, McFadden took off Terry's overcoat and grabbed the gun.[121] The prosecution used the gun as evidence against Terry at trial, where the court found Terry guilty of carrying a concealed weapon.[122]

On appeal, the United States Supreme Court held that police conduct short of an arrest may trigger the protections of the Fourth Amend-

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[116] *See* part III.B.1 and accompanying notes and part III.B.2 and accompanying notes.

[117] 392 U.S. 1, 16 (1967).

[118] *Id.* at 5-6. Officer McFadden first saw Terry and Chilton, just standing on the street corner. *Id.* at 5. Although McFadden could not specifically say what drew his attention to them, he took up a post of observation. *Id.* at 5-6. He saw one of the men, from the corner, walk down the street, pause in front of a store window, go a little further down the street, turn around, head back toward the corner, stop again to look into the same store window, then briefly talk with the other man at the corner. *Id.* at 6. After meeting at the corner, the next man would go through the same ritual. *Id.* Terry and Chilton did this alternately five to six times each. *Id.* At one point, another man, Katz, briefly stopped to talk to them then left with two other men. *Id.* After Katz left, Terry and Chilton continued their routine for about 10 to 12 minutes, then left in the direction that Katz had gone. *Id.*

[119] *Id.* at 6-7. McFadden followed Terry and Chilton until they caught up with Katz. *Id.* at 6. McFadden approached Terry, Chilton, and Katz while they were talking. *Id.* at 6-7.

[120] *Id.* at 7.

[121] *Id.*

[122] *See id.* at 7-8.

ment.[123] The Court noted, however, that not all police-citizen encounters are seizures.[124] The Court stated that, when an officer, by means of physical force or show of authority,[125] restrains an individual's freedom to walk away, the officer has "seized" that person.[126] Although the Court felt that it could not, with any certainty, call Officer McFadden's initial approach a seizure,[127] it held that McFadden unquestionably seized Terry when McFadden grabbed hold of Terry and searched him.[128]

Despite being the first case to recognize that some police conduct short of an arrest must undergo Fourth Amendment scrutiny, *Terry* did not precisely define when a person's liberty to walk away is restrained short of an arrest. Thus, Justice Stewart introduced the "free to leave" test in *United States v. Mendenhall*,[129] for the purpose of defining restraint, and the Court subsequently adopted Justice Stewart's test in *Florida v. Royer*.[130]

In *Mendenhall*, two plainclothes Drug Enforcement Agency (DEA) agents, who were assigned to Detroit Metropolitan Airport for the purpose of detecting drug smugglers, watched Mendenhall as she disembarked from an airplane.[131] Because Mendenhall fit the "drug courier profile," the agents approached her on the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket.[132] After asking further questions, one of the agents, Anderson, then specifically identified himself as a narcotics agent.[133]

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[123] *Id.* at 19.

[124] *Id.* at 19 n.16.

[125] *Id.*

[126] *Id.* at 16.

[127] *Id.* at 19 n.16.

[128] *Id.* at 19. The Court also stated that there was no question that Officer McFadden's pat down of Terry was a search. The Court, however, found that the seizure and search was reasonable under the Fourth Amendment because Officer McFadden had a reasonable suspicion that criminal activity was afoot and that Terry was armed and dangerous thereby justifying the seizure and search. *See id.* at 30-31.

[129] 446 U.S. 544 (1980).

[130] 460 U.S. 491 (1983).

[131] *Id.* at 547.

[132] *Id.* at 547-48. For an explanation of the "drug courier profile," see *supra* note 9.

[133] *Id.* at 548. While Mendenhall's driver's license bore her actual name, her airline ticket had another name. *Id.* at 547-48. When asked about the discrepancy, Mendenhall's explanation for having different name on the ticket was that she "just felt like using that name." *Id.* at 548. Mendenhall also indicated that she had been in California for only two days. *Id.*

At this point, Mendenhall became extremely nervous and had difficulty speaking.[134] Upon returning the identification and ticket, Anderson asked Mendenhall if she would accompany the agents to the airport DEA office for further questioning.[135] Mendenhall agreed and also allowed a female officer to conduct a search of Mendenhall's person.[136] Heroin was found as a result of the search.[137]

Justice Stewart[138] felt that Mendenhall was never seized during the entire encounter.[139] He acknowledged that a brief detention can constitute a seizure, and that a seizure violates the Fourth Amendment if the officer does not provide an objective justification for it.[140] Justice Stewart, however, also noted that some police-citizen encounters do not fall under the ambit of the Fourth Amendment.[141] As an illustration, he cited *Terry*, highlighting the fact that the Court assumed that Officer McFadden did not seize Terry prior to grabbing hold of him because the Court did not feel that enough evidence existed on the record to find a seizure.[142] Justice Stewart felt that such an assumption was correct because the Fourth Amendment does not, nor was it intended to, prohibit police officers from asking people questions on the streets.[143] Police can ask questions because the person being addressed usually has the right to ignore the officer and walk away.[144] The purpose of the Fourth Amendment is only to prevent "arbitrary and oppressive interference by law enforcement officials with the privacy and personal

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[134] *Id.*

[135] *Id.*

[136] *Id.* At the office, Agent Anderson asked Mendenhall if he could search her person and handbag and informed her that she had the right to refuse the search. *Id.* Mendenhall responded, "Go ahead." *Id.* A female officer conducted the search of Mendenhall's person in a private room. *Id.* After the female officer confirmed with Mendenhall that she did consent the search, Mendenhall removed her clothing, took two small packages from her undergarments, and handed the packages to the female officer. *Id.* Because one of the packages appeared to contain heroin, the agents arrested Mendenhall for possessing heroin. *Id.*

[137] *Id.*

[138] *Id.* at 546. Justice Stewart, who announced the judgment of the Court and delivered an opinion, was joined by then-Justice Rehnquist. *Id.*

[139] *Id.* at 555 (Stewart, J., opinion). Justice Stewart also held that Mendenhall consented to the search. *Id.* at 559-60.

[140] *Id.* at 551-52.

[141] *Id.* at 551-52.

[142] *Id.* at 553.

[143] *Id.* at 553.

[144] *Id.*

security of individuals."[145] Therefore, in Justice Stewart's view, determining if restraint existed, either by means of physical force or show of authority, was the key question because as long as a person is free to ignore an officer's questions and walk away, the officer has not intruded upon the person's liberty or privacy.[146]

Justice Stewart's "free to leave" test defines the kind of restraint required to trigger a Fourth Amendment analysis, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[147] Arbitrary interference is prevented because once the Court establishes that an individual's liberty was restrained through this test, the seizing officer must articulate an objective justification for the action taken.[148] Justice Stewart provided examples of situations that might lead a court to find a seizure occurred: (1) the threatening presence of police officers, (2) a display of weapons, (3) any physical contact by the officers, or (4) the use of language and tone of voice to compel compliance.[149] Under this test, the subjective intention of an officer to detain a person if the person attempts to leave is only relevant to the extent that the intention may be conveyed to the person.[150]

The facts in *Mendenhall* that Justice Stewart found significant were that the agents did not wear uniforms or display their weapons.[151] The agents did not call Mendenhall to them, but approached her and identified themselves.[152] Furthermore, the agents asked to see her ticket and identification, instead of demanding to do so.[153] On these facts, Justice Stewart ruled that Mendenhall did not have any objective reason to believe that she was not free to leave; therefore, she was not seized.[154]

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[145] *Id.* at 554-55.

[146] *See id.*

[147] *Id.* at 554.

[148] *See id.* at 551.

[149] *Id.* at 554.

[150] *Id.* at 554 n.6.

[151] *Id.* at 555.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 555. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, mentioned that the question of whether a reasonable person would have felt free to walk away when the agents asked Mendenhall for identification and her airline ticket was "extremely close." *Id.* at 560 n.1 (Powell, J., Opinion) The three justices,

Three years later in a plurality opinion, *Florida v. Royer*,[155] a majority of the Court adopted the "free to leave" test, but were split on its application. The facts in *Royer* are very similar to those in *Mendenhall*. Two plainclothes detectives approached Royer after he bought his airline ticket and was walking to the boarding area at Miami International Airport.[156] The detectives believed that Royer fit the "drug courier profile."[157] They identified themselves as policemen and asked if he had a "moment" to speak with them, to which he replied "yes."[158] They asked if they could see his airline ticket and driver's license and he gave both to them.[159] After further questioning, during which time he became noticeably more nervous, the detectives informed Royer that they were narcotics investigators and that they had reason to suspect him of carrying narcotics.[160] Without returning Royer's

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however, did not reach the question of whether Mendenhall was seized because they assumed that the agents seized Mendenhall when the agents approached her. *Id.* at 560. They felt that, even assuming Mendenhall was seized, the seizure did not violate the Fourth Amendment because the agents had a reasonable suspicion justifying the initial stop and questioning of Mendenhall. *Id.* at 565. Furthermore, the justices felt that Mendenhall consented to the search. *Id.* at 560.

Justice White, joined in dissent with Justices Brennan, Marshall, and Stevens, also did not address Justice Stewart's test. *Id.* at 567-71. Like the three concurring justices, the dissent assumed that Mendenhall was seized sometime during the initial encounter. *Id.* at 571. The dissent, however, did not think that the agents had a reasonable suspicion justifying the seizure. *Id.* at 573. Furthermore, the dissent compared Mendenhall's situation after the detective asked her if she would accompany him to the DEA office with a traditional arrest. *Id.* at 574. The dissent found that the intrusion to which the detective subjected Mendenhall amounted to an arrest requiring probable cause, which did not exist. *Id.* at 575.

[155] 460 U.S. 491 (1983).

[156] *Id.* at 493-94.

[157] *Id.* at 494. For an explanation of the "drug courier profile," see *supra* note 9. The *Royer* plurality listed the facts that attracted the detectives attention:

> (a) Royer was carrying American Tourister luggage, which appeared to be heavy, (b) he was young, apparently between 25-35, (c) he was casually dressed, (d) he appeared pale and nervous, looking around at other people, (e) he paid for his ticket in cash with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address, and telephone number, he wrote only a name and the destination.

Id. at 494 n. 2.

[158] *Id.* at 494.

[159] *Id.*

[160] *Id.* The baggage identification tags had the name "Holt" while Royer's driver's license had "Royer." *Id.* Royer's explanation for the difference was that a friend had made the reservation.

airline ticket and identification, the detectives asked Royer to accompany them to a room about forty feet away.[161]

Royer followed the officers without orally responding to their request.[162] Pursuant to Royer's consent the detective opened one of Royer's suitcases and found marijuana.[163]

Although the plurality felt that asking for and examining the airline ticket and driver's license was permissible, he cited Justice Stewart's "free to leave" test to find that Royer was indeed seized.[164] The plurality held that the seizure occurred when the officers identified themselves as narcotics agents, told him that they suspected him of carrying narcotics, and asked him to accompany them to the room, while holding his ticket and identification and failing to tell him that he was free to leave.[165] While the plurality conceded that the agents had a reasonable suspicion of criminal activity to support the seizure at this point in time,[166] they nonetheless found the seizure unreasonable because they viewed the detention and search in the room as tantamount to arrest requiring probable cause.[167]

While Justice Brennan agreed with the plurality that the detention exceeded the permissible bounds of an investigative stop,[168] he felt Royer was seized when the officers asked for Royer's airline ticket and identification.[169] Justice Brennan also felt that the officers lacked a reasonable suspicion of criminal activity at that point.[170] Therefore, a majority of the court agreed that Royer was seized, at the latest, when the officers asked Royer to accompany them to the room while holding Royer's ticket.

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[161] *Id.*

[162] *Id.* Without Royer's consent one of the detectives got Royer's suitcases from the airline and took to the room, described as a large storage closet with a table and two chairs, where Royer and the other detective were waiting. *Id.* One of the detectives then asked if he could search Royer's luggage. *Id.* Royer unlocked one of the suitcases with a key but said nothing. The detective opened the suitcase and found marijuana. *Id.*

[163] *Id.*

[164] *Id.* at 501-502 (White, J., plurality opinion).

[165] *Id.*

[166] *Id.*

[167] *Id.* at 502-503.

[168] *Id.* at 509 (Brennan, J., concurring).

[169] *Id.* at 511.

[170] *Id.* at 512.

Justice Blackmun, dissenting, approved of the "free to leave" test and conceded that at some point Royer was seized.[171] Justice Blackmun contended, however, that Royer was not under arrest and that the agents had reasonable suspicion to justify Royer's brief detention.[172]

Because *Royer* was divided decision, determining whether a particular police action does or does not trigger Fourth Amendment scrutiny is difficult. Subsequent United States Supreme Court cases as well as federal court cases, however, have revealed that certain specific types of conduct are clearly permissible as long as officers do not state or imply that compliance is required. The plurality in *Royer* suggested that asking for and examining an airline ticket and identification is permissible conduct.[173] The Court has since confirmed this[174] and has allowed police to briefly question people who are willing to answer.[175]

The opinions in *Royer* also suggest that officers can go beyond merely asking for identification and ask to search a person's luggage without necessarily implicating the Fourth Amendment.[176] The federal courts have permitted police officers to make such a request[177] and the Court

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[171] *Id.* at 514 (Blackmun, J., dissenting).

[172] *Id.* at 515-16. Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor in a separate dissent, thought that the agents at least had a reasonable suspicion and that Royer was not arrested. *Id.* at 530-32 (Rehnquist, J., dissenting).

[173] *Id.* at 510. Retaining the identification and/or ticket while asking further questions, however, may convert the encounter into a seizure. *See supra* note 164 and accompanying text. *See also supra* note 398.

[174] INS v. Delgado, 466 U.S. 210, 216 (1984).

[175] *Id.* at 216. *See also* Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984)("[I]nitial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."). *But see* Dunaway v. New York, 442 U.S. 200 (1979) (questioning of defendant after being transported to the station and placed in an interrogation room amounted to an arrest and violated the Fourth Amendment).

[176] The plurality acknowledges that, if Royer was not illegally seized and he voluntarily consented to the search, then the prosecution could use the evidence in court. *Id.* at 502. Justice Blackmun would have admitted the evidence suppressed by the majority because he felt that Royer's was not seized when he voluntarily consented to the search of his luggage. *Id.* at 516 (Blackmun, J., dissenting).

[177] *See* United States v. Glover, 957 F.2d 1004 (2nd Cir. 1992); United States v. Evans, 937 F.2d 1534 (10th Cir. 1991); United States v. Dennis, 933 F.2d 671 (8th Cir. 1991); United States v. Williams, 945 F.2d 192; (7th Cir. 1991); United States v. Gordon, 895 F.2d 932 (4th Cir. 1990) *cert. denied* 498 U.S. 846 (1990); United States v. Cooke, 915 F.2d 250 (6th Cir. 1990); United States v. Johnson, 903 F.2d 1219 (9th Cir. 1990) *cert. denied* 498 U.S. 985 (1990); United States v. Maragh, 894 F.2d 415 (D.C. Cir. 1990) *cert. denied* 498 U.S. 880 (1990); United States v. Mancini,

has approved of this practice.[178] Furthermore, the federal courts have allowed the practice of police officers requesting to pat down individuals.[179] In fact, the "free to leave" test has become a difficult threshold for defendants to overcome. *INS v. Delgado*,[180] which was the first case in which a majority of the Court agreed on the application of the "free to leave" test, appears to indicate that the Court will refuse to restrict police conduct as long as the conduct falls short of physical restraint or an explicit statement that compliance is required.

In *Delgado*, Immigration and Naturalization Service (INS) agents, who were investigating possible employment of illegal aliens in two factories, placed agents near the factories' exits while other agents walked through the factories questioning employees.[181] The agents approached individuals, identified themselves as INS agents, and asked one of three questions about the employee's citizenship.[182] Although a credible reply ended the questioning, an unsatisfactory answer resulted in a request to produce immigration papers.[183] After acknowledging the "free to leave" test as applicable, the Court held that neither the entire work forces in the factories[184] nor the individuals questioned were seized during these encounters.[185] The Court did not even consider

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802 F.2d 1326 (11th Cir. 1986).

However, some federal courts of appeals generally do not permit officers to do much more than ask to see identification and airline ticket. *See* United States v. Gonzales, 842 F.2d 748, 752 (5th Cir. 1988)(holding that suspect was seized when the officer told her that he was "working narcotics" and asked to search her bag; overruled on other grounds); United States v. Sadosky, 732 F.2d 1388, 1392-93 (8th Cir. 1984) *cert. denied* 469 U.S. 884 (1984)(holding that defendant was seized when officer said that he was investigating possible narcotics violations and that he wanted to question the defendant due to the defendant's unusual behavior); United States v. Berryman, 717 F.2d 651, 656 (1st Cir. 1983) *cert. denied* 465 U.S. 1100 (1984)("[A] reasonable person would not feel free to walk away when, after answering truthfully where he had been and for how long, and proffering his airline ticket whose information is confirmed by other identification, he is questioned further and confronted with the suspicion of drug trafficking.").

[178] United States v. Bostick, 111 S.Ct. 2382, 2386 (1991).

[179] United States v. Dennis, 933 F.2d 671 (8th Cir. 1991); United States v. Evans, 937 F.2d 1534 (10th Cir. 1991); United States v. Gordon, 895 F.2d 932 (4th Cir. 1990) *cert. denied* 498 U.S. 846 (1990); United States v. Gray, 883 F.2d 320 (4th Cir 1989); United States v. Mancini, 802 F.2d 1326 (8th Cir. 1986).

[180] 466 U.S. 210 (1984).

[181] *Id.* at 212.

[182] *Id.*

[183] *Id.* at 212-13.

[184] *Id.* at 216-18.

[185] *Id.* at 219.

the seizure question to be a close one, instead referring to the individual questioning as "classic consensual encounters."[186]

The Court rejected the claim that the work force was seized because the INS stationed agents near the exits.[187] In its opinion, the employees' freedom of movement was not restricted by the agents' conduct, but by the workers' voluntary obligations to their employers.[188] Furthermore, the Court felt that placing agents at the door did not prove INS's intent to prevent people from leaving.[189] In the Court's view, the "obvious purpose" of the agents standing at the exits was to insure that all the employees were questioned; the workers had no reason to believe that, if they had refused to answer, they would be detained.[190] The Court similarly did not think that the individual questioning amounted to seizures because the manner of the inquiry was such that the employees did not have a reasonable fear that they could not continue working or moving around the factory.[191] Interestingly, the Court reached this conclusion after acknowledging that "persons who attempted to flee or evade the agents may eventually have been detained for questioning . . . ."[192] Thus, according to the Court, the threat of physical detention at a later time if the employee failed to cooperate with the INS agents was not enough to cause a reasonable person in that situation to feel that she was not free to leave. *Delgado* is not an isolated case. The Court used *Delgado* as precedent recently in *United States v. Bostick*,[193] a case in which the United States Supreme Court voiced its approval for drug interdiction methods similar to one employed in the HPD's "walk and talk" program.[194]

In *Bostick*, the Court reversed a per se rule established by the Florida Supreme Court, banning law enforcement officers from boarding buses

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[186] *Id.* at 178.

[187] *Id.* at 218. The Court of Appeals for the Ninth Circuit had held that, during the surveys, the entire work forces of the factories were seized. *Id.* at 214. Although the Court of Appeals based its conclusion on the element of surprise and the method of questioning, the focus of its holding was on the fact that INS agents stood by the exits. *Id.* at 217.

[188] *Id.* at 218.

[189] *Id.*

[190] *Id.*

[191] *Id.* at 220-21.

[192] *Id.* at 220.

[193] 111 S.Ct. 2382 (1991).

[194] For a description of HPD's "walk and talk" program, see *supra* notes 4-12 and accompanying text.

during scheduled stops, without any reasonable suspicion for doing so, and randomly asking passengers for consent to search their luggage.[195] The Florida Supreme Court felt that the bus encounters were unlike similar encounters in airport or bus terminals because of the intimidating atmosphere of having a police officer stand over a passenger in a limited space.[196] The United States Supreme Court disagreed.[197]

Significantly, the Court noted that this type of encounter, without question, would not rise to the level of a seizure if done in the lobby of the bus terminal.[198] The Court then analogized the bus encounter with the questioning in *Delgado*.[199] Just as the employees' freedom of movement was restricted, not by the police conduct, but by the workers' obligations with their employers in *Delgado*, the passengers' freedom to move was restricted by their decision to take the bus rather than by the conduct of the agents.[200] The Court held that in such a situation, where an individual's freedom of movement is restricted by a "factor independent of police conduct," the proper question is not whether a reasonable person would have felt free to leave, but "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[201] *Bostick* illustrates the current

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[195] *Bostick*, 111 S.Ct. at 2385. The Florida instituted the per se ban on "working the buses" in rather unusual fashion. *See id.* at 2385. Two officers with badges boarded a bus during a stopover in Fort Lauderdale, Florida. *Id.* at 2384. One of the officers was carrying a zipper pouch with a gun in it. *Id.* Without any articulable suspicion, the officers picked out Bostick and asked to see his identification and ticket. *Id.* at 2384-85. The identification and ticket contained nothing suspicious so the officers returned those items. *Id.* at 2385. The officers then explained that they were narcotics agents and requested consent to search Bostick's luggage. *Id.* Bostick was arrested and charged with drug trafficking when cocaine was found in his luggage. *Id.* The trial court denied Bostick's motion to suppress the evidence. *Id.* Bostick then pleaded guilty to the charge, reserving his right to appeal. *Id.* The Florida District Court of Appeal affirmed the trial court, but sent a certified question to Florida Supreme Court. *Id.* The Florida Supreme Court felt that a reasonable person in Bostick's position would not have felt free to leave, but, instead of merely ordering the evidence in the Bostick's case to be suppressed, the court rephrased the certified question to categorically bar evidence obtained from the practice of "working the buses." *Id.*

[196] *Id.* at 2386-87.

[197] *Id.* at 2387-88.

[198] *Id.* at 2386.

[199] *Id.* at 2387.

[200] *Id.*

[201] *Id.* The Court declined to rule that Bostick was not seized under this standard because the trial court did not make findings of fact and the Florida Supreme Court held that a seizure occurred based solely on the fact that the encounter took place on a bus. *Id.* at 2388. The case was remanded. *Id.*

Court's willingness to allow the introduction of evidence even in cases where the traditional application of the "free to leave" test would appear to have mandated the exclusion of the evidence. This willingness is also exemplified in *California v. Hodari D.*;[202] a case decided just two months prior to *Bostick*.

In *Hodari D.*, the Court added a threshold requirement that a subject of the seizure yield before the "free to leave" test is applied.[203] There, two police officers driving in an unmarked police car came upon four or five youths huddled around a car parked at a curb.[204] When the youths saw the officers, they ran.[205] One of the officers chased Hodari D. who threw a small piece of crack cocaine just before being tackled.[206] The Court held that a seizure cannot occur unless physical force is used or the subject submits to an assertion of authority.[207]

The Court did not reject the objective *Mendenhall* "free to leave test"—indeed the Court stated that application of the test is necessary to a finding of a seizure.[208] However, the Court stated that a seizure requires the "application of physical force to restrain movement," or "submission to the assertion of authority."[209] Therefore, although finding that a reasonable person would not feel free to leave in a situation is *necessary* to finding seizure, it is not *sufficient* to constitute a seizure if the defendant did not yield.[210]

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[202] 111 S.Ct. 1547 (1991).

[203] *Id.* at 1551. The Court stated: "The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not." *Id.* at 1550.

Later in the opinion, the Court furnished its interpretation of the "free to leave" test: "It says that a person has been seized 'only if,' not that he has been seized "whenever"; *it states a necessary, but not a sufficient condition for seizure . . . .*" *Id.* at 1551 (emphasis added). In other words, the test states that a court cannot conclude that a seizure occurred unless the court finds that a reasonable person would not have felt free to leave. The test, however, does not state that, once a court finds that a reasonable person would not feel free to leave, a seizure has occurred. The court may have to satisfy other tests. Therefore, concluding that a reasonable person would not feel free to leave is *necessary* to a finding of seizure, but it is not *sufficient* to conclude that a seizure occurred.

[204] *Id.* at 1549.

[205] *Id.*

[206] *Id.*

[207] *Id.* at 1550-51.

[208] *Id.* at 1551. *See supra* note 202.

[209] *Id.* at 1550-51.

[210] *Id.* at 1551.

Delgado, *Bostick*, and *Hodari D.*, taken together, demonstrate the Court's aversion for excluding evidence based on the claim that the evidence was obtained as a result of an unreasonable seizure. On the other hand, the Hawai'i Supreme Court, in *Quino*, does not hesitate to exclude evidence obtained by means of police tactics that the United States Supreme Court approved of in *Bostick*. Prior to *Quino*, however, the Hawai'i Supreme Court followed the United States Supreme Court in analyzing the reasonableness of seizures.

2. State seizures of the person

The only case in Hawai'i that discusses the criteria for determining when a nonseizure becomes a seizure is *State v. Tsukiyama*.[211] There, the court applied the "free to leave" test in holding that the defendant was not seized under the Fourth Amendment or article I, section 7.[212] Officer Paul Kohler was on routine patrol when he came upon three parked cars.[213] Numerous people were gathered around one of the cars, which had its hood up.[214] Officer Kohler also identified one of the men as an ex-convict.[215] After calling for assistance, Kohler got out of his car to investigate.[216] As Kohler approached the car around which the individuals were gathered, Tsukiyama met Kohler, explained that the car was stalled, and asked for a flashlight.[217] After getting the flashlight, Kohler and Tsukiyama both returned to the car.[218]

Officer Kaalele was one of the first officers to arrive in response to the call for assistance.[219] He parked next to one of the other two cars, a blue Comet.[220] After seeing that Kohler was safe, Kaalele was going back to his car when he noticed a man, Anthony Oh Young, lying on the front seat of the blue Comet.[221] Kaalele went to the passenger side of the Comet, opened the door and asked Oh Young if he was all

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[211] 56 Haw. 8, 525 P.2d 1099 (1974).
[212] *Id.* at 17-18, 525 P.2d at 1105.
[213] *Id.* at 9, 525 P.2d at 1100.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.* at 9, 525 P.2d at 1101.
[220] *Id.*
[221] *Id.* at 10, 525 P.2d at 1101.

right.[222] Oh Young got out of his car, and Kaalele asked him who owned the car.[223] Oh Young pointed to the group of people gathered around the stalled car and stated that the car belonged to one of them.[224]

As Kaalele was talking to Oh Young, Tsukiyama joined them.[225] Kaalele asked Tsukiyama if he knew who owned the blue Comet.[226] Tsukiyama answered that the car was his.[227] Kaalele had noticed a bicycle in the back seat so he asked Tsukiyama who the bike belonged to.[228] Tsukiyama said that the bike was his son's.[229] Kaalele then inquired if Tsukiyama had any identification.[230] Tsukiyama replied that his identification was in the glove compartment.[231] Kaalele then asked, "would you go get it?"[232] When Tsukiyama opened the compartment, Kaalele saw the butt of a revolver and immediately subdued Tsukiyama.[233] The glove compartment contained a gun and some narcotics.[234]

The court cited *Terry*[235] for the proposition that a seizure can only occur when an officer restrains the liberty of a citizen by means of force or show of authority.[236] Although the court did not refer to *Mendenhall*[237], it did state that, in order to determine whether a person's liberty was restrained, the court must "evaluate the totality of the circumstances and decide whether or not a reasonably prudent person would believe that he was free to go."[238] The court felt that, on the facts of the case, the officer's questioning of Tsukiyama did not constitute a seizure under the Fourth Amendment.[239]

Prior to *Quino*, the Hawai'i Supreme Court also followed United States Supreme Court precedent with regard to *Terry*-type stops.[240] The

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[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.* at 10-11, 525 P.2d at 1101.
[234] *Id.*
[235] *See supra* notes 117-28 and accompanying text.
[236] *Id.* at 12, 525 P.2d at 1102.
[237] *See supra* notes 129-54 and accompanying text.
[238] *Id.*
[239] *Id.* at 13, 525 P.2d at 1103
[240] *See, e.g.*, State v. Barnes, 58 Haw. 333, 568 P.2d 1207 (1977)(citing Terry v.

Hawai'i Supreme Court, however, declined to follow United States Supreme Court precedent in *Quino*.[241] The following discussion focuses on how the United States Supreme Court and the Hawai'i Supreme Court have defined consent and how both courts have applied consent within the context of the Fourth Amendment and article I, section 7.

C. Consent

The United States Supreme Court and the Hawai'i Supreme Court have stated that a warrantless search is per se unreasonable unless it falls within an exception to the warrant requirement.[242] One exception is a search conducted pursuant to consent.[243] Although, prior to *Quino*, neither court had suggested that consent was an exception to an otherwise unreasonable *seizure*,[244] the Hawai'i Supreme Court in *Quino* appears to have established a consent exception to seizures in Hawai'i.[245] Because no precedent exists from which to analyze consent to a seizure, what follows is an examination how the United States Supreme Court and the Hawai'i Supreme Court have defined consent in the context of searches.

In order to be valid, consent to a search must be voluntary.[246] Consent is voluntary if it is not "the product of duress or coercion, express or implied,"[247] or, in other words, if it is "uncoerced."[248] The voluntariness of consent is a question of fact determined by the trial court from the "totality of the circumstances."[249] At trial, the prose-

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Ohio, 392 U.S. 1 (1967), throughout); State v. Joao, 55 Haw. 601, 525 P.2d 580 (1974)(also following *Terry*).

[241] *See infra* part V and accompanying notes.

[242] Katz v. United States, 389 U.S. 347, 357 (1967); State v. Patterson, 58 Haw. 462, 467, 571 P.2d 745, 748 (1977).

[243] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Davis v. United States, 328 U.S. 582, 593-94 (1946); *Patterson*, 58 Haw. at 467, 571 P.2d at 748.

[244] *See infra* part V.C.1 and accompanying notes.

[245] *See supra* note 114.

[246] *Schneckloth*, 412 U.S. at 227; Bumper v. North Carolina, 391 U.S. 543, 550 (1968); State v. Price, 55 Haw. 442, 443, 521 P.2d 376, 377 (1974); *Patterson*, 58 Haw. at 467, 571 P.2d at 748.

[247] *Schneckloth*, 412 U.S. at 227.

[248] *Price*, 58 Haw. at 443, 521 P.2d at 377.

[249] *Schneckloth*, 412 U.S. at 227; *Patterson*, 58 Haw. at 468, 571 P.2d at 749. The significance of a question of fact, as opposed to a question of law, is that a reviewing court will accord considerable deference to findings of fact, upholding the findings of fact unless clearly erroneous. *See id.* at 468-69, 571 P.2d at 749. On the other hand,

cution has the burden of proving, by a preponderance of evidence, that the consent was freely and voluntarily given.[250] Although knowledge of the right to refuse consent is one factor to be considered in determining whether consent was voluntarily given, such knowledge is not a requirement in establishing consent.[251] While the Hawai'i Supreme Court echoes the same tests applied by the United States Supreme Court, the line of cases dealing with consent to searches in Hawai'i indicates that the Hawai'i Supreme Court may, in fact, give greater protection to Hawai'i's citizens.

1. Federal view of consent

In *Schneckloth v. Bustamonte*,[252] the United States Supreme Court explained the type of evidence that the prosecution must present in order to meet its burden of proving that consent to a search was "voluntarily" given.[253] In determining the meaning of voluntary consent, the Court balanced the legitimate need to conduct consent searches against the requirement of the Fourth and Fourteenth Amendments that "consent not be coerced, by explicit or implicit means, by implied threat or covert force."[254] The Court held that prosecution must prove

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an appellate court reviews questions of law *de novo* not giving any weight to the trial court's conclusion of law when redeciding the issue. *See* State v. Miller, 4 Haw. App. 603, 606, 671 P.2d 1037, 1040 (1983). For a discussion of standards of review, *see generally* Michael J. Yoshi, *Appellate Standards of Review in Hawai'i*, 7 U. HAW. L. REV. 273 (1985).

The Hawai'i Supreme Court has stated that the trial court is best situated to decide that question of the voluntariness of consent. *Patterson*, 58 Haw. at 468, 571 p.2d at 749. The court explained in part: "[t]he power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court." *Id.* (citing People v. James, 561 P.2d 1135, 1139 (Cal. 1977)).

[250] *Bumper*, 391 U.S. at 548; *Patterson*, 58 Haw. at 468, 571 P.2d at 749.

[251] *Schneckloth*, 412 U.S. at 227; *Price*, 55 Haw. at 443, 521 P.2d at 377; State v. Russo, 67 Haw. 126, 138, 681 P.2d 553, 562 (1984). Stated another way, the police are not required to inform a person of her right to refuse consent in order for a consent to be voluntary, but is a factor to be considered. *Schneckloth*, 412 U.S. at 231-32; *Patterson*, 58 Haw. at 470 n.8, 571 P.2d at 750 n.8; Nakamoto v. Fasi, 64 Haw. 17, 21, 635 P.2d 946, 951 (1981).

[252] 412 U.S. 218 (1973).

[253] *Id.* at 248-49.

[254] *Id.* at 227-28. The Court noted that, in situations when the police have some evidence of a crime but lack probable cause to effect a search or make an arrest,

that the consent was not a product of duress or coercion.[255] In the Court's view, the voluntariness of consent does not turn on the presence or absence of one criterion, but is a question of fact determined from the totality of the circumstances.[256] Therefore, the Court refused to rule that knowledge of the right to refuse consent is a prerequisite to establishing a voluntary consent.[257] The knowledge of the right to refuse is just one factor to be taken into account when considering the totality of the circumstances.[258]

The Court rejected a rule that would require the prosecutor to prove the defendant knew of her right to refuse consent because it felt such a rule would "create serious doubt whether consent searches could continue to be conducted."[259] The Court predicted that, even though a case contained no evidence of coercion, prosecutors would not be able to prove that the defendants knew of their right to refuse consent.[260] Furthermore, the Court declined to accept the alternative of requiring that police inform subjects of their right to refuse consent.[261] The situations in which consent searches normally occur, the Court reasoned, are different from the structured atmosphere of a courtroom, where a defendant is informed of his trial rights, and custodial interrogations where *Miranda* rights are required.[262]

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consensual searches enable the police to gather evidence against the guilty and prevent the police from bringing innocent suspects to trial. *Id.* In cases where the police have probable cause to search but do not have a warrant, consent to a search may avoid an arrest or a more extensive search with a warrant. *Id.* at 228.

[255] *Id.* at 248.

[256] *Id.* at 248-49.

[257] *Id.* at 232-33.

[258] *Id.* at 248-49.

[259] *Id.* at 229.

[260] *Id.* at 230. The Court stated:

> Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction of evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent.

Id.

[261] *Id.* at 231.

[262] *Id.* at 231-32. The Court noted that:

> Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal an unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to

The Court also went to great lengths to distinguish "consent" from a "waiver."[263] The concept of "waiver" was enunciated in *Johnson v. Zerbst*,[264] where the Court ruled that in order to establish a "waiver" the prosecutor must prove "an intentional relinquishment or abandonment of a known right or privilege."[265] *Johnson*, however, involved the waiver of the right to counsel, which is a right intended to protect a fair trial.[266] The Court maintained that it has only required a knowing and intelligent waiver for Constitutional rights designed to guarantee a fair trial.[267] Holding that Fourth Amendment protections are of a "wholly different order," the Court refused to extend the *Johnson* standard to the relinquishment of Fourth Amendment rights.[268] The Court reasoned that the Constitutional rights granted to a criminal defendant give the defendant the ability to use "every facet of the constitutional model of a fair criminal trial."[269] If one of these rights is not exercised, then a possibility exists that "the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided."[270] Thus, the Court thought that every reasonable presumption should be indulged against a voluntary waiver of those rights to insure that the criminal defendant has every opportunity to utilize the constitutional model.[271]

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investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of the crime.

Id.

[263] *Id.* at 235-49.

[264] 304 U.S. 458 (1938).

[265] *Schneckloth*, 412 U.S. at 235 (citing *Johnson*, 304 U.S. at 464).

[266] *Schneckloth*, 412 U.S. at 236-37.

[267] *Id.* at 237. The Court stated that most of the rights that require a knowing and intelligent waiver are trial rights. *Id.* The knowing and intelligent waiver standard has mostly been applied to the right of counsel, or upon guilty plea. The standard also pertains to the right to confrontation, right to a jury trial, right to a speedy trial, and the right to be free from double jeopardy. *Id.* at 237-38. The knowing and intelligent waiver standard has also been applied to the "pre-trial" stage in the criminal process where waiver of the right involved could affect the fairness of trial. *Id.* at 238-39. Therefore, in a custodial interrogation a suspect must be read *Miranda* warnings before the suspect can knowingly or intelligently waive the right against compulsory incrimination. *Id.* at 239-40.

[268] *Id.* at 242.

[269] *Id.* at 241.

[270] *Id.*

[271] *Id.* at 243.

On the other hand, the Court stated that the Fourth Amendment does not promote a fair trial, but rather protects the value in American society "to be let alone."[272] The Court reasoned that a search is not somehow "unfair" if a person consents to the search whereas the waiver of a right designed to promote a fair trial leaves open the possibility of unfairness.[273] Although the Court did acknowledge that it had in the past referred to a consent search as a "waiver," it made clear that "waiver" was not used to denote a knowing and intelligent waiver.[274]

Therefore, *Schneckloth* established the rule that a prosecutor need not produce evidence that a defendant was aware of the right to refuse consent to a search in order to prove that the defendant's consent was voluntarily given. The Hawai'i Supreme Court has widely cited *Schneckloth* for this proposition. The case law in Hawai'i, however, indicates that, if knowledge of the right to refuse consent to a search is not in fact a prerequisite for finding that consent was voluntarily given, a knowing consent is, at least, a very important factor.

2. State view of consent

The Hawai'i Supreme Court has decided four cases that directly address the question of whether a prosecutor must prove that the person consenting to the search had knowledge of the right to refuse consent in order to establish that the consent was voluntarily given. In all four cases, the Hawai'i Supreme Court has cited *Schneckloth* for the proposition that knowing consent is not required. A comparison of the cases, however, indicates that establishing knowledge of the right to refuse consent is an important factor that the court weighs in determining whether consent was voluntarily given.

In *State v. Price*,[275] the police asked the defendant for consent to search his car after they arrested him and read him his *Miranda* warnings.[276] The Hawai'i Supreme Court affirmed the trial court's finding of voluntary consent.[277] The court stated that knowledge of the right to refuse consent was not a prerequisite to a finding of voluntar-

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[272] *Id.*
[273] *Id.* at 242.
[274] *Id.*
[275] 55 Haw. 442, 521 P.2d 376 (1974).
[276] *Id.* at 442, 521 P.2d at 377.
[277] *Id.* at 444, 521 P.2d at 377.

iness.[278] The court, however, went on to agree with the trial court's statement that, when an officer asks a suspect if she objects to a search, at least some suggestion exists indicating that an objection would be significant.[279] Furthermore, the court stated,

> [w]hen this is combined with a warning of his right to remain silent, and his right to counsel, which would seem in the circumstances to *put him on notice* that he can refuse to cooperate, we think it fair to infer that his purported consent is in fact voluntary.[280]

Therefore, the court inferred that the consent was voluntary after the court indicated the defendant should have known that he had the right to refuse consent.

Another case in which the court found a voluntary consent is *State v. Patterson*,[281] which involved a search pursuant to a signed consent to search form.[282] The court again explicitly stated, as it did in *Price*, that the police did not have to advise the defendant of his right to refuse consent.[283] The court, however, prominently noted in reaching its decision that "there was substantial evidence that appellant signed the consent to search form after being carefully advised of his right to withhold consent."[284]

Two cases that stand in contrast to *Patterson* and *Price* are *State v. Russo*,[285] and *Nakamoto v. Fasi*.[286] In both *Russo* and *Nakamoto*, the court found that consent was not voluntarily given, and in both cases the subject of the search was not informed of the right to refuse consent, and the court refused to infer that the defendant had knowledge of the right. In *Russo*, the police asked Russo for written consent to search his car after they placed him under custodial arrest, but, unlike *Price*, before they read Russo his *Miranda* rights.[287] The police took Russo's

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[278] *Id.* at 443, 521 P.2d at 377.

[279] *Id.* at 444, 521 P.2d at 377.

[280] *Id.* (emphasis added). Whether the factors mentioned by the court actually do put an accused on notice that she has the right to refuse consent to a search is arguable. The fact that the court felt that the defendant was served notice, however, indicates that the court seems to have inferred that the accused had knowledge of the right to refuse consent.

[281] 58 Haw. 462, 571 P.2d 745.

[282] *Id.* at 465-66, 571 P.2d at 747.

[283] *Id.* at 470 n.8, 571 P.2d at 749 n.8.

[284] *Id.* at 469-70, 571 P.2d at 750.

[285] 67 Haw. 126, 681 P.2d 553 (1984).

[286] 64 Haw. 17, 635 P.2d 946 (1981).

[287] *Id.* at 130, 681 P.2d at 558.

statement, "I gave you verbal consent and I won't sign any papers" as consent.[288] The court disagreed because of the coercive atmosphere in which Russo made the statement and because, while "knowledge of the right to refuse is not an indispensable element of a valid consent that a person was not so advised is nevertheless a factor to be considered . . . ."[289]

In *Nakamoto v. Fasi*,[290] the court held that the plaintiff did not consent to a search of her handbag.[291] There, the City and County of Honolulu had a policy of searching patrons' bags for cans and bottles before the patrons were allowed to enter the City-owned Neal Blaisdell Center.[292] In accordance with this policy, Susan Nakamoto's handbag was searched upon entering the Center's arena.[293] Nakamoto challenged the policy as an unreasonable search.[294] The City claimed that Nakamoto consented to the search.[295] Ruling in favor of Nakamoto, court pointed out that Nakamoto was not notified of the policy until she reached the entrance of the arena, and she was not informed that she had the right to refuse the search.[296]

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[288] *See id.* at 130, 681 P.2d at 558.

[289] *Id.* at 138, 681 P.2d at 562.

[290] 64 Haw. 17, 635 P.2d 946 (1981).

[291] *Id.* at 22, 635 P.2d at 951.

[292] *Id.* at 19, 635 P.2d at 949-50.

[293] *Id.* at 19, 635 P.2d at 950.

[294] *Id.* at 19-20, 635 P.2d at 950.

[295] *Id.* at 21, 635 p.2d at 951.

[296] *Id.* at 22, 635 P.2d at 951. Furthermore, the court held that Nakamoto did have the right to refuse consent to the search because the City's interest in keeping cans and bottles out of the arena was not strong enough to require patrons to submit to a search as a condition of entry. *Id.* at 26, 635 P.2d at 954. That being the case, the court spelled out what would be proper conduct of a security guard. *See id.* at 24-25, 635 P.2d at 953. The guard could briefly stop any patron carrying a handbag, tell the person that cans and bottles were not allowed, and ask her if she was carrying a can or bottle. *Id.* at 25, 635 P.2d at 953. The court further stated:

> upon receiving a negative answer and if still not satisfied with the response, the guard, *after first making it clear to the person stopped that he need not accede to the request*, might then have asked the person if he would agree to open the suspected container for inspection.

Id. (emphasis added). Upon a refusal, the guard could only detain the patron if he had a clear and articulable basis for concluding that the patron had a can or bottle. *Id.* at 25-26, 635 P.2d at 953.

The state, however, can require the visitors to the prison submit to a search prior to entry. State v. Custodio, 62 Haw. 1, 607 P.2d 1048 (1980)(the State allowed to require a search of a visitor's person as a condition of entry to the prison); State v.

The Hawai'i Supreme Court in *Nakamoto* and *Russo* did point to other factors beside the fact that the defendants were not informed of their right to refuse consent to the searches. Therefore, to say that the existence of the knowledge of the right to refuse consent is a prerequisite to a finding of voluntary consent in Hawai'i may be reading more into the cases than what is there. Nevertheless, *Price* and *Patterson* illustrate that establishing that a defendant knew or should have known of her right to refuse consent is a very important factor in determining the volutariness of consent. Furthermore, the Hawai'i Supreme Court has recently stated for the first time in the context of a consent search "any waiver of one's constitutional rights must be voluntarily, and *intelligently* undertaken."[297]

The problem with relying on that statement as establishing knowledge of the right to refuse consent to search as a prerequisite to a finding that the consent was voluntarily given is two-fold: (1) the case in which it was stated, *State v. Pau'u*, did not turn on the question of knowing consent—the defendant conceded that he gave voluntary and intelligent consent,[298] and (2) the *Pau'u* court cited *State v. Vares*[299] for that proposition, but *Vares* dealt with a knowing and intelligent waiver of the right to counsel.[300] The Hawai'i Supreme Court and the United States Supreme Court have held on any number of occasions that, in the context of waiving one's constitutional rights to a fair trial, a voluntary, knowing, and intelligent waiver is required.[301]

While the Hawai'i Supreme Court has adhered to *Schneckloth* in theory, the court's actual application of the *Schneckloth* principles indi-

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Martinez, 59 Haw. 366, 580 P.2d 1282 (1978)(person seeking entry into a prison cannot claim immunity from a search of the person).

[297] *State v. Pau'u*, 72 Haw. 505, 509, 824 P.2d 833, 835 (1992).

[298] *See id.* at 510, 824 P.2d at 836. The defendant asserted, and the court found persuasive, that the consent search of the car was a fruit of a prior illegal search of the defendant's bag and, thus, the evidence obtained from the search of the car had to be suppressed. *Id.* at 510-12, 824 P.2d at 836-37.

[299] 71 Haw. 617, 801 P.2d 555 (1990).

[300] *Id.* at 621, 801 P.2d at 557-58. *Pau'u* itself involved a waiver of *Miranda* rights, which an accused must waive voluntarily, knowingly, and intelligently. *See infra* note 267.

[301] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 235-45 (1983). *See supra* notes 263-74 and accompanying text. *See, e.g.*, Wong v. Among, 52 Haw. 420, 477 P.2d 630 (1970)(waiver of right to counsel); State v. Hoglund, 71 Haw. 147, 785 P.2d 1311 (1990)(waiver of right to counsel); State v. Amorin, 61 Haw. 356, 604 P.2d 45 (1979)(waiver of *Miranda* rights); Eli v. State, 63 Haw. 474, 630 P.2d 113 (1981)(guilty plea).

cates a possible divergence from the United States Supreme Court. The Hawai'i case law demonstrates that the knowledge of the right to refuse consent is very important to a showing of voluntary consent.[302]

D. The Effect of a Prior Illegality on a Search Pursuant to Consent

In *Florida v. Bostick*,[303] Justice Marshall in his dissent stated that, if the police had seized Bostick prior to asking for consent to search his luggage, "the resulting search was likewise unlawful no matter how well advised, [Bostick] was of his right to refuse consent."[304] While the majority in *Bostick* did not address this statement,[305] United States Supreme Court precedent seems to support Justice Marshall.

In *Brown v. Illinois*,[306] the United States Supreme Court excluded a confession obtained as a result of an illegal arrest notwithstanding the fact that Brown may have given the confession voluntarily.[307] Two police officers illegally arrested Brown for the murder of Roger Corpus.[308] The officers read Brown his *Miranda* warnings after which Brown gave a signed statement implicating him in the murder of Corpus.[309] A few hours later, Brown made substantially the same confession to Assistant State's Attorney Crilly, after Crilly had again informed Brown of his *Miranda* rights.[310] The Court concluded that both confessions

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[302] There are other cases that deal with consent, but are of a different character. *See* State v. Barrett, 67 Haw. 650, 656-57, 701 P.2d 1277, 1282 (1985)(holding that officer taking cigarettes out of defendant's bag upon defendant's request not a search, but, even if a search, defendant consented to it by asking for the cigarettes); State v. Groves, 65 Haw. 104, 109, 649 P.2d 366, 370 (1982)(holding no consent to search when officer ordered defendant to stand up and submit to a frisk); State v. Merjil, 65 Haw. 601, 605-07 655 P.2d 864, 868-69 (1982)(holding consent to search given under duress); State v. Kawazoye, 63 Haw. 147, 149, 621 P.2d 384, 388 (1981)(stating, without discussion, that the defendant consented to a search of a car).

[303] 111 S.Ct. 2382 (1991). For a discussion of *Bostick*, see *supra* notes 193-201 and accompanying text.

[304] *Id.* at 2392 (Marshall, J., dissenting).

[305] *Id.* at 2386. The court accepted, for purposes of the *Bostick* decision, Florida's concession that if a seizure occurred then the evidence had to be suppressed. *Id.*

[306] 422 U.S. 590 (1975).

[307] *See id.* at 601-04.

[308] *Id.* at 592. Illinois did not dispute that the fact that the officers broke into Brown's apartment, searched it, and arrested Brown without probable cause or a warrant. *Id.*

[309] *See id.* at 594. On appeal, Brown did not claim that he did not understand his Miranda rights. *Id.* at 594 n.2.

[310] *Id.* at 595.

were inadmissible under a *Wong Sun*, "fruit of a poisonous tree" analysis.[311] The Court stressed that, if the reading of *Miranda* warnings could always attenuate the taint of a prior illegal arrest, then the effect of the exclusionary rule, i.e. to deter that initial illegality, would be defeated.[312] Indeed, the Court would, in effect, be encouraging illegal arrests if the reading of *Miranda* warnings could serve as a "cure-all" to cleanse the Fourth Amendment violation.[313] The Court, however, refused to adopt a per se rule to exclude any confession that results from an illegal arrest.[314]

An important distinction worth noting is that the *Brown* Court did not exclude the confession because the coercive atmosphere of the illegal arrest made a voluntary statement impossible, but rather because the confession was the fruit of a poisonous tree that the Court had to suppress in order to deter the initial illegality.[315] Whether Brown gave the confession voluntarily was moot; the only question was whether the confession was gained by means sufficiently distinguishable from the prior illegality so as to be purged of the primary taint.[316] Therefore, when the plurality in *Florida v. Royer*[317] held that Royer was unjustifiably seized, the Court excluded the evidence obtained as a result of the subsequent consent search without even discussing whether Royer voluntarily consented to the search.[318] On the other hand, the plurality had to admit that if Royer voluntarily consented to the search of his luggage during a proper investigatory stop, then the Court would have had to allow the introduction of any evidence obtained from the search at trial.[319]

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[311] *See id.* at 602-03. *See also supra* part III.A and accompanying notes.

[312] *Id.* at 602.

[313] *Id.* at 602-03.

[314] *Id.* at 603-04. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 491 (1963) (Court allowed Wong Sun's confession into evidence even though a result of an illegal arrest when Wong Sun, out on his own recognizance, confessed a few days after arrest). For a discussion of *Wong Sun*, see *supra* notes 77-94 and accompanying text.

[315] *See id.* at 601-03.

[316] *See id.* at 602.

[317] 460 U.S. 491 (1983). *See supra* notes 164-67 and accompanying text.

[318] *See id.* at 507-08. Justice Brennan concurred with the plurality that the Court had to suppress the evidence because an illegal seizure occurred, although he thought the seizure occurred sooner than did the majority. *See id.* at 511, 512. Justice Brennan also did not discuss the issue of the voluntariness of the consent.

[319] *See id.* at 502.

The Hawai'i Supreme Court is in accord with this analysis. In *State v. Pau'u*,[320] the Hawai'i Supreme Court ordered the trial court to exclude a confession and evidence, obtained by means of a consent search of a car, both of which were tainted by a prior illegal search of Pau'u's bag.[321] Several officers stopped Pau'u, a theft suspect, driving his car.[322] One of the officers illegally searched Pau'u's bag which was in the car.[323] After the officers informed Pau'u of his *Miranda* rights, Pau'u confessed to the theft crimes and consented to a search of his car.[324] The court stated that a waiver of one's constitutional rights is invalid if induced by a prior illegality even if intelligently given and without coercion.[325] Pau'u conceded that, when he consented to the search of his car and made the confession, he understood his rights and the police did not coerce him into waiving them.[326] Notwithstanding the volutariness of Pau'u's confession and consent, the court excluded the evidence.[327]

In order to effectuate the purposes of the exclusionary rule, a court needs to suppress any evidence, as did the *Royer* court, that police acquire during a "walk and talk" by means of a consent search if the officer illegally seizes the person prior to that person giving consent. As in *Royer*, the court must exclude the evidence as a "fruit of a poisonous tree" without reference to the coerciveness of the situation and irrespective of how voluntarily, knowingly, or intelligently the consent may have been given. Otherwise, officers could physically grab passengers as the passengers walk through the terminal, defuse the coerciveness of the situation by informing the passengers that they are free to leave, inform the passengers of their right to refuse consent to a search, and then ask for permission to conduct the search. The purpose of the exclusionary rule, however, is to deter the initial illegality, which in this hypothetical is the grabbing of the passengers.

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[320] 72 Haw. 505, 824 P.2d 833 (1992).

[321] *Id.* at 512, 824 P.2d at 837.

[322] *Id.* at 508, 824 P.2d at 835.

[323] *Id.* at 508, 824 P.2d at 835. The trial court determined that the search was illegal. *Id.*

[324] *Id.*

[325] *Id.* at 509, 824 P.2d at 835-36.

[326] *Id.* at 510, 824 P.2d at 836.

[327] *Id.* at 512, 824 P.2d at 837. Pau'u's claim, which the court apparently found persuasive, was that he consented to the car search and confessed because he felt that he had no choice based on the evidence discovered in the initial illegal search of his bag. *Id.* at 510, 824 P.2d at 836.

The only way to eliminate the incentive to commit the initial Forth Amendment or article I, section 7 violation is for courts to suppress the evidence obtained after that illegality.

E. Legal History Summary

A method of analyzing the issue of seizures short of arrest has emerged from the United States Supreme Court and Hawai'i case law.[328] First, the officer must have used physical force or the defendant must have submitted to an assertion of authority.[329] Second, the officer, by means of physical force or show of authority, must have restrained the liberty of the defendant such that a reasonable person in the situation would not have felt free to leave.[330] If either of these two elements is absent, then no seizure has occurred and the prosecution may use any evidence otherwise legally obtained during the encounter against the defendant.[331] Third, if a reasonable person would not have felt free to leave, then the only other inquiry is whether the officer had reasonable suspicion to justify the seizure.[332] If the officer did not have reasonable suspicion, then a seizure occurred and the court will suppress all evidence obtained as a fruit of the seizure.[333] If the officer

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[328] *Quino*, however, has changed the method of analysis somewhat. *See infra* part V.C and accompanying notes.

[329] *See* California v. Hodari D., 111 S.Ct. 1547, 1550-51 (1991). *See also supra* notes 203-10 and accompanying text. The Hawai'i Supreme Court in *Quino*, however, rejected the *Hodari D* definition of a seizure. *Quino*, 74 Haw. 161, 170, 840 P.2d 358, 362 (1992).

[330] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980)(Stewart, J., opinion), Florida v. Royer, 460 U.S. 491, 501-02 (plurality opinion); *Id.* at 514 (Blackmun, J., dissenting); INS v. Delgado, 466 U.S. 210, 216 (1984); State v. Tsukiyama, 56 Haw 8, 12, 525 P.2d 1099, 1102 (1974). *See also supra* part III.B and accompanying notes

[331] *See, e.g., Hodari D.*, 111 S.Ct. at 1552; *Delgado*, 466 U.S. at 221; *Tsukiyama*, 56 Haw. at 17-18, 525 P.2d at 1105. *See also* Florida v. Bostick, 111 S.Ct. 2382, 2386 (1991). This is what the United States Supreme Court labels a "consensual encounter." *See supra* notes 105-07 and accompanying text.

If, therefore, the person freely and voluntarily consented to a search, *see supra* part III.C and accompanying notes, then the prosecution can use any evidence obtained from the search.

[332] *See Mendenhall*, 446 U.S. at 560-66 (Powell, J., concurring); Florida v. Rodriquez, 469 U.S. 1, 6-7 (1984). For a definition of reasonable suspicion, see United States v. Sokolow, 490 U.S. 1, 7-8 (1989). *See also supra* notes 111-12 and accompanying text.

[333] *See* United States v. Sokolow, 490 U.S. 1, 7-8 (1989); State v. Joao, 56 Haw 216, 221, 533 P.2d 270, 273 (1975).

In this situation, the court will exclude evidence obtained as a result of a search pursuant to consent as well. *See supra* part III.D and accompanying notes.

had a reasonable suspicion, then the court will admit all evidence legally obtained during investigative stop as long as the officer did not exceed the scope of the stop.[334]

IV. ANALYSIS

The Hawai'i Supreme Court in Quino focused on (1) whether the police officers' questioning of Quino constituted a seizure[335] and, if so, (2) whether Quino voluntarily consented to the "seizure" such that there was no violation of either the United States or Hawai'i Constitutions.[336] In reversing the decision of the Intermediate Court of Appeals (ICA), the court held that the action of the police officers constituted a seizure under the provisions of the Hawai'i Constitution,[337] and that the State failed to overcome its burden of proving that Quino voluntarily consented to the seizure.[338] Justice Levinson filed a separate concurrence, in which he analyzed the majority's decision in light of the greater protection afforded by the Hawai'i Constitution, and compared the federal and state constitutional standards.[339]

A. Was There A Seizure?

The court began by briefly tracing the evolution of Fourth Amendment jurisprudence related to seizures of persons, noting the standards set out in *Terry v. Ohio*,[340] *United States v. Mendenhall*,[341] and *California v. Hodari D.*[342] Interpreting *Hodari D.* as departing from *Mendenhall*'s "reasonable person" standard,[343] the court explicitly rejected *Hodari*

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[334] *See* Terry v. Ohio, 392 U.S. 1, 30-31 (1967). Therefore, if the person freely and voluntarily consented to a search while being legally detained, then any evidence obtained from the consent search will be admissible. *See Sokolow*, 490 U.S. at 11.

[335] *Quino*, 74 Haw. at 163, 840 P.2d at 359.

[336] *Id.*

[337] *Id.* at 173, 840 P.2d at 364.

[338] *Id.* at 175, 840 P.2d at 365.

[339] *Id.* at 176-80, 840 P.2d at 365-66.

[340] 392 U.S. 1 (1967). *See supra* notes 123-28 and accompanying text.

[341] 446 U.S. 544 (1980). *See supra* notes 129-50 and accompanying text.

[342] 111 S.Ct 1547 (1991). *See supra* notes 202-10 and accompanying text.

[343] The court stated regarding *Hodari D.*:

> [T]he Court *departed* from previous case law *by refusing to adhere* to the reasonable person standard established in *Mendenhall*. The Court purported to rely on the common law definition of arrest when it held that a seizure within the meaning

D.,[344] noting that, in analyzing seizures under the Hawai'i Constitution, the *Mendenhall* standard remained the appropriate measure.[345] In support of this proposition, the court cited *State v. Tsukiyama*,[346] which contained language similar to that used by the United States Supreme Court in *Mendenhall*.[347]

The court distinguished what it interpreted as a legitimate "field interrogation" in *Tsukiyama*,[348] with the questioning of Quino, which it saw as being specifically designed to elicit evidence of criminal activity.[349] The court characterized the police-citizen encounter in *Tsukiyama* as officers coming upon a scene by "happenstance" and asking questions that were "general, non-intrusive and limited to a request for identification."[350] In contrast, Officers Tano and Sumaoang "deliberately initiated" conversation with Quino, Cachola, and Galinato specifically to investigate criminal activity.[351] Officers Tano and Sumaoang also used questions that gradually became more intrusive and accusatory in nature hoping to "bootstrap" their investigation by finding evidence of criminal activity.[352] Furthermore, the court char-

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of the fourth amendment requires either physical force or submission to an assertion of authority.

Quino, 74 Haw at 169-70, 840 P.2d at 362 (emphasis added). The *Hodari D.* Court, however, did not refuse to adhere to the *Mendenhall* standard. In fact, the Court specifically stated that the *Mendenhall* reasonable person standard was necessary to a finding of that a seizure occurred. *Hodari D.* added a threshold requirement that the police had to have used physical force or the subject must have submitted to an assertion of authority. *See supra* notes 203-10 and accompanying text.

[344] *Quino*, 74 Haw. at 170, 840 P.2d at 362 (citing State v. Texeira, 50 Haw. 138, 433 P.2d 593 (1967)). The court based this rejection on its power to interpret the State Constitution to provide greater protection for its citizens. *Texeira*, 50 Haw. at 142 n.2, 433 P.2d at 597 n.2.

[345] *Quino*, 74 Haw. at 170, 840 P.2d at 362.

[346] 56 Haw. 8, 525 P.2d 1099 (1974). *See supra* notes 211-39 and accompanying text.

[347] *Quino*, 74 Haw. at 170, 840 P.2d at 362. The court stated: "In order to determine if the defendant's liberty was restrained and he was, therefore, seized, we must evaluate the totality of the circumstances and decide whether or not a reasonably prudent person would believe he was free to go." *Id.* (citing *Tsukiyama*, 56 Haw. at 12, 525 P.2d at 1102).

Tsukiyama was decided under the authority of the Fourth Amendment as opposed to article 1, section 7. *See supra* note 239 and accompanying text.

[348] *Id.* at 170-71, 840 P.2d at 363. For a discussion of *Tsukiyama*, see *supra* notes 210-38 and accompanying text.

[349] *Id* at 171-72, 840 P.2d at 363.

[350] *Id.* at 172, 840 P.2d at 363.

[351] *Id.* at 171-72, 840 P.2d at 363.

[352] *Id.* at 172, 840 P.2d at 363.

acterized the questions as "pretextual," which the court explained as "specifically designed to elicit responses that would either vindicate or implicate the men."[353] In light of these distinctions, the court held that once the encounter "turned from general to inquisitive questioning," it failed to satisfy the *Mendenhall* standard since a reasonable person in Quino's position would not have felt free to leave.[354] Therefore, Quino was seized under article I, section 7 of the Hawai'i Constitution.[355]

In reaching this conclusion, the court expressed concern over the fact that Quino involved a "staged police-citizen encounter," completely police-controlled, in which general questioning developed into an on-going interrogation, involving increasingly intrusive questions which lacked any objective basis.[356] Under the circumstances of such questioning, an individual would feel obliged to respond to all questions posed by a police officer to avoid further suspicion.[357] Also, according to the dictate of *Terry*, Officer Tano could have legally stopped Quino if she had some objective basis to suspect criminal activity.[358] Therefore, the officer's investigation benefits from the "pretextual" questioning of passengers.[359]

B. Was The Seizure Consensual?

The court began its discussion of this issue by stating that the United States Supreme Court has held that "police questioning in an airport

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[353] *Id.*

[354] *Id.* at 173, 840 P.2d at 363-64. The exact language of the court is: "we are persuaded that once the stop turned from general to inquisitive questioning, a reasonable person in Quino's position would not have believed that he was free to ignore the officer's inquiries and walk away." *Id.* at 173, 840 P.2d at 364.

[355] *Id.*

[356] *Id.* at 172-73, 840 P.2d at 363. The Court noted in particular that Officer Tano asked to search Quino's carry-on bag even after he informed her he had no narcotics, persisted in her questioning despite the fact that she found none, and requested a pat-down search even though she lacked any objective basis to suspect that Quino was concealing contraband. *Id.*

[357] *Id.* at 172, 840 P.2d at 363. The court noted that, if Quino had showed Officer Tano his airline ticket and identification but did not allow her to search his bag or person, Officer Tano's suspicion would "surely have been aroused." *Id.* at 172-73, 840 P.2d at 363.

[358] *Terry* permitted a police officer, who, based on "specific and articulable facts," had reason to believe that an individual was carrying a concealed weapon, to temporarily detain that individual for a pat-down search. *Terry*, 392 U.S. at 30. *See also supra*, notes 105-09 and accompanying text.

[359] *Quino*, 74 Haw. at 173, 840 P.2d at 364. The court stated that Officer Tano could observe Quino's body language and evaluate his responses. *Id.*, 840 P.2d at 364-65.

terminal may not be an unconstitutional seizure when there is consent."[360] In support of this proposition, the court quoted language from the plurality opinion in *Florida v. Royer*[361] explaining that the Fourth Amendment is not violated if an officer approaches a person on the street, asks the person if she is willing to answer questions, asks her the questions if she is willing to listen, or uses her voluntary answers against her in a criminal prosecution.[362] The *Quino* court then cited *Florida v. Bostick*[363] as holding that police officers can randomly approach individuals, ask questions, and request to search luggage without violating the Fourth Amendment "so long as a reasonable person would understand that he or she could refuse to cooperate."[364]

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[360] *Id.* at 173, 840 P.2d at 364.

[361] 460 U.S. 491, 497 (1983).

[362] *Quino*, 74 Haw. at 173, 840 P.2d at 364. The exact language that the Hawai'i Supreme Court quoted is:

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Id. (quoting *Royer*, 460 U.S. at 497).

The problem with using this quotation to indicate the state of federal law in discussing the issue of whether Quino consented to the seizure, *assuming the seizure occurred*, is that the *Royer* plurality was not describing a situation in which a seizure occurred, but the person voluntarily consented to the seizure. The plurality was referring to a situation which did not rise to the level of seizure at all. The sentence in the *Royer* opinion that immediately follows that quotation is: "Nor would the fact that the officer identifies himself as a police officer, without more, *convert the encounter into a seizure* requiring some level of objective justification." *Royer*, 460 U.S. at 497 (emphasis added) (citations omitted).

[363] 111 S.Ct. 2382 (1991).

[364] *Quino*, 74 Haw. at 174, 840 P.2d at 364 (quoting *Bostick*, 111 S.Ct. at 2384). Citing *Bostick* under this issue, like citing *Royer*, *see supra* note 362, also seems misplaced. Under this issue the *Quino* court analyzes whether Quino freely and voluntarily consented to the seizure. *Bostick* on the other hand addresses the question whether a *reasonable person* would feel free to leave under the circumstances. The *Bostick* court stated: "[t]he sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily *constitutes a "seizure" within the meaning of the Fourth Amendment.*" *Bostick*, 111 S.Ct. at 2386 (emphasis added). Therefore, the issue in *Bostick* was whether Bostick was seized not whether Bostick freely and voluntarily consented to the seizure, assuming a seizure occurred. *See infra* note 426-28 and accompanying text. Also, technically, the *Bostick* holding merely struck down Florida's per se ban on bus encounters and rephrased the "free to leave" test to apply in those situations. *See supra* note 195-201 and accompanying text.

The court then explained the positions asserted by the State and Quino.[365] The State argued that the encounter between Officer Tano and Quino was consensual and therefore did not violate either the federal or state constitutions.[366] Quino, however, asserted that he felt compelled to submit to Tano's questions and did not freely and voluntarily consent to a seizure of his person.[367] Quino further alleged that he could not have voluntarily consented to questioning because he was never informed that he was not obliged to cooperate with the officers.[368]

In response, the court noted that a person must waive her constitutional rights freely, voluntarily, and intelligently in order for the waiver to be valid, and that the government has the burden to prove that such a waiver was voluntary and uncoerced.[369] Addressing Quino's second argument, the court found, based on *Nakamoto v. Fasi*,[370] that while an officer has no affirmative duty to inform a person approached for questioning that he is free to leave at any time, failure to inform is a factor to be considered in evaluating the free and voluntary nature of consent.[371] In light of these standards, the court held that Quino did not consent to his seizure.[372]

The consent was not "voluntary or intelligent" because the consent was based on "material nondisclosures."[373] These material nondisclosures were: (1) the officers' failure to disclose to Quino that he was free to leave at any time, and (2) the officers failure to explain that they were investigating drug trafficking when they identified themselves as police officers.[374] In addition, Quino's mere acquiescence to the officers' authority did not constitute voluntary consent.[375] Since the

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[365] *Quino*, 74 Haw. at 174, 840 P.2d at 364.

[366] *Id.* at 174, 840 P.2d at 364. *See also* Answering Brief of The State of Hawai'i at 20, *Quino* (No. 15239).

[367] *Id. See also* Opening Brief of Defendant-Appellant at 24, *Quino* (No. 15239).

[368] *Id.*

[369] *Quino*, 74 Haw. at 174, 840 P.2d at 364 (citing State v. Pau'u, 72 Haw. 505, 509, 824 P.2d 833, 835 (1992)). For the difficulties inherent in relying on *Pau'u* for this statement, see *supra* notes 297-301.

[370] 64 Haw. 17, 635 P.2d 946 (1981). *See supra* notes 290-96 and accompanying text.

[371] *Id.* at 21, 625 P.2d at 951. For a discussion of *Nakamoto*, *see supra* notes 290-96 and accompanying text.

[372] *Quino*, 74 Haw. at 175, 840 P.2d at 364.

[373] *Id.* at 175, 840 P.2d at 364.

[374] *Id.*

[375] *Id.* In support of this proposition, the Court cited *Bumper v. North Carolina*, 391

State failed to meet its burden of proof on the issue of consent, Quino's seizure was unlawful.[376]

The Court concluded that, if it allowed such conduct by officers, it would permit officers to randomly "encounter" individuals, with no objective basis, and to place them in a coercive environment aimed at producing reasonable suspicion of a criminal activity.[377] As a result, the police could place the burden on the public to prove their innocence: a direct violation of constitutional freedoms.[378]

C. Justice Levinson's Concurrence

In a separate concurrence, Justice Levinson praised the majority's decision, while criticizing recent federal precedent dealing with seizures of the person.[379] Picking up where the majority left off in its invocation of the Hawai'i Constitution, Justice Levinson pointed directly to the Hawai'i Constitution's privacy clause[380] as justification for the decision in *Quino*.[381] Although the police can infringe upon personal rights under certain specific circumstances, as first set out by *Terry*,[382] the questioning of Quino was an unjustified intrusion of his right of privacy under the Hawai'i Constitution since the officers failed to meet the *Terry* standard.[383] Justice Levinson closed with an attack on staged police encounters, of the kind at issue in *Quino*, and alleged that, while the Fourth Amendment of the United States Constitution might permit

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U.S. 543 (1968), in which a rape suspect's consent to a search of his home, given pursuant to a police officer's claim that he had a warrant, was held to be mere acquiescence, and therefore violative of the Fourth Amendment requirement of voluntary consent.

[376] *Id.*, 840 P.2d at 365.

[377] *Id.*

[378] *Id.* at 175-76, 840 P.2d at 365.

[379] *Id.* at 176, 840 P.2d at 365 (Levinson, J., concurring) Justice Levinson stated, "in light of the surreal and Orwellian world of Florida v. Royer, . . . California v. Hodari D., . . . and Florida v. Bostick, . . . in which the Fourth Amendment of the United States Constitution appears to have atrophied to the condition of a vestigial organ, I believe that more needs to be said." *Id.* at 176-77, 840 P.2d at 365.

[380] *Id.* at 177, 840 P.2d at 365. "The right of the people to be *secure in their persons*. . . against *unreasonable* searches, *seizures and invasions of privacy* shall not be violated . . . ." *Id.* at 177 n.1, 840 P.2d at 365 n.1. (citing HAW. CONST. art. I, §7) (emphasis supplied by Justice Levinson).

[381] *Id.* at 177-80, 840 P.2d at 365-66.

[382] 392 U.S. 1 (1968). *See supra* notes 117-28 and accompanying text.

[383] *See id.* at 178-80, 840 P.2d at 366. *See supra* note 128.

such encounters,[384] article I, section 7 of the Hawai'i Constitution does not.[385]

V. COMMENTARY

A. When Did The Seizure Occur?

The court devoted a large part of its analysis to a comparison between the police conduct in *Tsukiyama*[386] involving a valid "field interrogation" conducted by officers who came upon the scene by "happenstance," and the police-initiated "staged police-citizen encounter" in *Quino*.[387] By focusing on what it saw as the non-intrusive, chance nature of the former and the intrusive, intentional, and coercive design of the latter, the court appeared to hold that the "walk and talk" questioning process was a per se unconstitutional seizure of the person.[388] The question is at what point in the process did Officers Tano and Sumaoang cross the line between a seizure and a nonseizure?

Finding the line where a nonseizure turns into a seizure is critical for two reasons: (1) the court will exclude evidence obtained after the illegal seizure occurred,[389] and (2) only facts available to an officer prior to a seizure can support claim of reasonable suspicion.[390] The

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[384] Justice Levinson cited *Florida v Bostick* for this proposition. For a fuller discussion of *Bostick*, see *supra* notes 195-201 and accompanying text.

[385] *Quino*, 74 Haw. at 180, 840 P.2d at 366.

[386] *See supra* notes 210-38 and accompanying text.

[387] *Quino*, 74 Haw. at 170-72, 840 P.2d at 362-63.

[388] *See id* at 171-72, 840 P.2d at 364. Another indication that the court probably intends a per se ban on the "walk and talk" process is its reference not only to the encounter involving Officer Tano and Quino, which is the subject of the appeal, but also to the conversation between Officer Sumaoang and Galinato, which is not even on the record. The court distinguishes between field interrogation in *Tsukiyama* and Officer Tano *and* Officer Sumaoang's encounter with "Quino *and his companions*." *Id.* at 171, 840 P.2d at 363 (emphasis added). However, this appeal only concerns Officer Tano's conversation with Quino. The court never gives any indication that Officer Sumaoang's questioning in this particular incident was part of the record. Perhaps this is not greatly significant, nevertheless it is an indication the courts hostility not only to Officer Tano's questioning but to the program as a whole.

[389] *See supra* part III.D and accompanying notes.

[390] An officer has a reasonable suspicion only if the officer, at trial, can point to specific and articulable facts that warrant the intrusion. *See supra* note 112 and accompanying text. In conjunction with the exclusionary rule, the reasonable suspicion requirement deters officers from seizing individuals on based on nothing more than inarticulate hunches. *See supra* note 148 and accompanying text. The reasonable suspicion requirement, however, would not prevent this type of unjustifiable governmental intrusion if an officer were allowed to bootstrap a reasonable suspicion justification with evidence obtained as a result of the seizure.

court's statement of its holding clearly draws the seizure/nonseizure line at the point where the questioning went from "general to inquisitive."[391] Because the court highlighted the fact that the questioning in *Tsukiyama* was general and limited to a request for identification, the court does not appear to hold that the questioning turned from "general to inquisitive," at anytime up to or including the point when Officer Tano asked to see identification.[392] Therefore, the seizure probably occurred immediately after that time, when Officer Tano asked if either Quino or Cachola were carrying narcotics or, at the latest, when Officer Tano asked to search their bags.[393]

If this is true, then the Hawai'i Supreme Court has made a sharp break from the United States Supreme Court and the federal courts.[394]

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[391] *Id.* at 173, 840 P.2d at 364. The Court stated:

> Under these facts, we are persuaded that once the stop turned from general to inquisitive questioning, a reasonable person in Quino's position would not have believed that he was free to ignore the officer's inquiries and walk away. Although no physical force was used, given the totality of the circumstances, we hold that a seizure took place within the meaning of article I, section 7 of the Hawai'i Constitution.

Id.

Although court states that once the "stop" turned to inquisitive questioning a reasonable person would not have felt free to leave, one must assume that the court is not using that word as a term of art denoting a seizure. Otherwise, by definition, a reasonable person would not have felt free to leave at the encounter's inception and the holding would sound nonsensical.

[392] The Court stated: "[t]he record establishes that Officer Tano initially approached Quino and the others by starting an apparently innocuous 'voluntary conversation.' This 'voluntary conversation' soon evolved into an interrogation, as Officer Tano's questions grew more intrusive and accusatory in nature." *Id.*

[393] While the opinion contains language that may indicate that Officer Tano's initial approach constituted a seizure, taken as a whole, the opinion seems to draw the line when Officer Tano asked if Quino or Cachola were carrying drugs. The misleading language is the court's use of the word "stop" three different times to characterize Officer Tano's initial approach. The court labeled Officer Tano's initial approach a "stop:" 1) in the facts, "both officers approached and *stopped* them," *id* at 165, 840 P.2d at 360 (emphasis added), 2) in its discussion of the staged police-citizen encounter, "the police investigation is benefitted immensely by the pretextual *stop* and questioning process, *id.* at 173, 840 P.2d at 363 (emphasis added), and 3) in its holding, *see supra* note 391. The court used the word even after recognizing that "stop" is synonymous with "seizure," in stating the holding of *Tsukiyama*. *Quino*, 74 Haw. at 171, 840 P.2d at 363. However, the statement of the holding would not make sense if the court meant to say that the encounter was a seizure at the outset.

[394] A few states' highest courts have directly addressed the constitutionality of employing police procedures similar to those used in Hawai'i's "walk and talk"

Without question, the United States Supreme Court would approve of

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program, and the overwhelming majority of these courts have approved of these police practices. *Compare* Oliver v. United States, 618 A.2d 705, 708-09 (D.C. 1993)(holding no seizure until officers patted down defendant, after the officers identified themselves, asked if defendant was carrying any contraband, and asked to pat down defendant) *and* Molino v. State, 546 N.E.2d 1216, 1218-20 (Ind. 1989)(holding no seizure when officer identified himself, explained that he was conducting a narcotics investigation, asked to see an identification and airline ticket, requested a search of defendant's bag, and asked permission to pat down defendant) *and* Commonwealth v. Sanchez, 531 N.E.2d 1256, 1259 (Mass. 1988)(holding no seizure when officer identified himself, asked defendant to talk, informed defendant that officer was conducting a narcotics investigation, and asked permission to search the defendant for narcotics) *and* Jacobson v. State, 476 So.2d 1282, 1285-86 (Fla. 1985)(holding no seizure when officer identified himself, asked to see identification and ticket, asked for permission to search defendant's bag, and told defendant that the defendant could refuse consent to search) *and* State v. Reid, 276 S.E.2d 617, 621-22 (Ga. 1981)(holding no seizure when officer identified himself, asked to see an identification and airline ticket, inquired why defendant and a companion had gone to Florida, and asked defendant whether he would return to the terminal and consent to a search) *with* State v. Ossey, 446 S.2d 280, 285 (La. 1984) *cert. denied* 469 U.S. 916 (1984)(holding a seizure occurred when officer informed defendant that he was conducting a narcotics investigation and believed the defendant was carrying drugs, after the officer identified himself, asked for permission to speak with defendant, asked to see an identification and airline ticket, asked a few questions).

Lower state appellate courts are split on the issue of the constitutionality of police procedures similar to those employed by the HPD. *Compare* State v. Frost, 603 N.E.2d 270, 273 (Ohio Ct. App 1991) *cert. denied* 113 S.Ct. 133 (1992)(holding no seizure when officers asked to speak with defendant because he fit drug courier profile, asked to search luggage, and asked permission to pat down the defendant) *and* People v. Sasson, 443 N.W.2d 394, 396 (Mich. Ct. App. 1989)(holding no seizure when officers identified themselves, explained their purpose, asked to see and identification and airline ticket, and asked if defendant was carrying narcotics) *and* People v. Hicks, 539 N.E.2d 756, 760 (Ill. App. Ct. 1989)(holding no seizure when officer identified himself, asked to speak with defendant, requested to see identification and airline ticket, advised defendant that the officer was conducting a narcotics investigation, and asked for permission to search defendant's bag) *with* State v. Soto-Garcia, 841 P.2d 1271, 1273-74 (Wash. Ct. App. 1992)(holding a seizure occurred when officer asked defendant if he had cocaine on his person and asked to search defendant, after asking for identification) *and* State v. Carter, 812 P.2d 460, 465 (Utah App. 1991)(holding a seizure occurred when one officer asked to conduct a pat down search while another officer was conducting a consent search of defendant's belongings).

Texas seems to have inconsistent decisions on this issue. *Compare* Jennings v. State, 846 S.W.2d 361, 364 (Tex. Ct. App. 1992)("Once an officer requests appellant's permission to search of his luggage, as here, the initial approach becomes an investigatory encounter implicating appellant's Fourth Amendment rights") *and* Walton v. State, 827 S.W.2d 500, 502 (Tex. Ct. App. 1992)(holding that appellant was detained when officer asked to search his bag) *with* Layne v. State, 752 S.W.2d 690, 693 (Tex.

the conduct of Officers Tano and Sumaoang.[395] What then is the reason for this divergence of views?

B. The Standard For Seizure

The Hawai'i Supreme Court's rejection of the *Hodari D.* standard in favor of the *Mendenhall* test does not appear to be the reason for its difference of opinion with the United States Supreme Court in *Quino*.[396] Granted, the United States Supreme Court would have applied the *Hodari D.* standard and probably would have held that no seizure occurred because Quino did not yield. If, however, the United States Supreme Court chose, as the Hawai'i Supreme Court did,[397] not to address the issue of the chase then the United States Supreme Court

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Ct. App. 1988)(holding no seizure when officers identified themselves, informed defendant that they were investigating narcotics trafficking, and asked to search defendant's suitcase).

[395] One need look no farther than the court's opinion in United States v. Bostick, 111 S.Ct. 2382, which carried a 6-3 majority. Although the court's actual holding was limited to striking down Florida's per se ban on "working the buses," *see supra* note 195 and accompanying text, in reaching its holding the court interpreted prior case law as approving of the drug interdiction programs in airports that are now in operation throughout the country. *See supra* notes 1-3 and accompanying text. The Court stated: "[t]he dissent reserves its strongest criticism for the proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions. But this proposition is by no means novel; it has been endorsed by the Court any number of times." *Bostick*, 111 S.Ct. at 2388.

[396] For a discussion of *California v. Hodari D.*, see *supra* notes 203-10 and accompanying text. If a reasonable person would not have felt free to leave when Officer Tano asked if Quino and Cachola were carrying narcotics or when she asked to search their bags, then, even under *Hodari D.*, the court, arguably, could have held a seizure occurred. The court could have found that Quino and Cachola submitted to an assertion of authority because when Officer Tano was asking them these questions they were just standing there, distinguishing this case from *Hodari D.* where the defendant ran as soon as he saw the officer. Thus, the court could have then suppressed any evidence obtained from the chase as being tainted by the prior illegality without refusing to follow *Hodari D.*.

On the other hand, the court may have had to reject *Hodari D.* The fact that Quino ultimately fled may contradict the argument that he did at one time submit to an assertion of authority.

[397] The Hawai'i Supreme Court declared that it was not addressing the question of whether Quino was seized during when he ran with the officers in pursuit. *Quino*, 74 Haw. at 163 n.1, 840 P.2d at 359 n.1.

would still have found no seizure.[398] Looking at the Intermediate Court of Appeals' (ICA) interpretation of the *Mendenhall* "free to leave" test may shed some light on why the two courts are split in the application of the test.

In affirming the trial court's conviction of Quino, the ICA appeared to modify the standard, holding that "a seizure occurs only if . . . a reasonable person would have reasonably believed that, *if he or she started to leave, the police would attempt to physically restrain him or her from leaving.*"[399] While this test is probably erroneous under *Florida v. Royer*[400]

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[398] *See supra* note 394 and accompanying text. *See also supra* notes 175-78 and accompanying text.

[399] State v. Quino, No. 15239, slip op. at 6 (Haw. App. May 7, 1992) (emphasis added).

[400] 460 U.S. 491 (1983). The test is incorrect under *Royer* because a majority of the court felt that when the officers asked Royer to accompany them to that room, *while holding Royer's ticket*, a seizure occurred. *See* the discussion of the plurality opinion and Justice Brennan's concurrence, *supra* pp. 32-33. A majority of the federal courts of appeals have also indicated in holdings or dicta that an officer retaining a passenger's airline ticket and/or identification, while asking further questions, constitutes a seizure. *See* United States v. Glover, 957 F.2d 1004, 1009 (2nd Cir. 1992)(holding defendant was seized when officer requested defendant to accompany officer to security office without returning defendant's identification and without telling defendant that defendant was free to leave); United States v. Jordan, 958 F.2d 1085, 1088 (D.C. Cir. 1991)(holding "what began as a consensual encounter . . . graduated into a seizure when the officer asked Jordan's [defendant] consent to a search of his bag, after he had taken and still retained Jordan's driver's license."); United States v. Low, 887 F.2d 232, 235 (9th Cir. 1989)(holding a seizure occurred when agent asked further questions without returning the ticket); United States v. Campbell, 843 F.2d 1089, 1093 (8th Cir. 1988)(stating that retention of an airline ticket or a driver's license has been treated as a significant factor in determining that a seizure has occurred . . . [s]uspects . . . are effectively deprived of the practical ability to terminate the questioning and leave."); United States v. Black, 675 F.2d 129, 136 (7th Cir. 1982) *cert. denied* 460 U.S. 1068 (1983)(stating that the retention of an airline ticket "beyond that interval required for the appropriate brief scrutiny, may constitute a 'watershed point' in the seizure question."); United States v. Berry, 670 F.2d 583, 597 (5th Cir. 1982)(indicating that "implicit constraints on an individual's freedoms would be caused by retaining an individual's ticket for more than a minimal amount of time . . . suggest that a seizure has occurred."); United States v. Elsoffer, 671 F.2d 1294, 1297 (11th Cir. 1982)(holding that retention of airline ticket and identification while questioning the defendant constituted a seizure).

Another example of police conduct that may cause a reasonable person to feel that she is not free to leave without the threat of physical detention is found in Commonwealth v. Borges, 482 N.E.2d 314 (Mass. 1985). The Massachusetts Supreme Court held that a seizure occurred when the police ordered the defendant to remove his

and *INS v. Delgado*,[401] it reflects an interpretation of the "free to leave" test similar to that of the United States Supreme Court, i.e. one that has a high tolerance for police conduct short of actual physical restraint or an obvious statement that compliance is required.[402] Although the Hawai'i Supreme Court did not specifically address the standard used by the ICA, the Hawai'i Supreme Court appears to have rejected the ICA's interpretation. In describing the "staged police-citizen encounter," the court stated:

> the circumstances beget an obligation by the citizen to reply to any and all questions, no matter how intrusive, *lest the authorities deem one's conduct suspicious*. Had Quino cooperated by producing an airline ticket and identification, but refused an inspection of his bags or a pat down search, the officer's *suspicion* would surely have been aroused.[403]

Significantly, the court did not say that the officer would have had a *reasonable suspicion*, i.e. that Officer Tano would have been able to briefly detain Quino, if, after allowing the officer to see his identification and ticket, Quino had refused a search of his bag or a pat down.[404] Therefore, the Hawai'i Supreme Court seems to interpret the "free to leave" test as stating that a reasonable person would not feel free to leave a situation if an attempt to leave would arouse an officer's

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shoes. *Id.* at 317.

Interestingly, a legal retention of a passenger's bag does not necessarily constitute a seizure. *Compare* United States v. Weaver, 966 F.2d 391, 394 (8th Cir. 1992) *cert. denied* 113 S.Ct. 829 (1992)(holding officer seized defendant when officer told defendant of his intention to seize defendant's bag) *with* United States v. Sullivan, 903 F.2d 1093, 1096-97 (7th Cir. 1990)(holding no seizure occurred when officer informed defendant that defendant was free to leave, but officer was going to retain defendant's bag).

[401] 466 U.S. 210 (1984). The United States Supreme Court applied the free to leave test in *Delgado* and found that a reasonable person would have felt free to leave even after acknowledging that people who attempted to flee may have been detained for questioning. *See supra* note 191-92 and accompanying text.

[402] The United States Supreme Court seems to share this high tolerance. *See supra* notes 180-201 and accompanying text.

[403] *Quino*, 74 Haw. at 172-73, 840 P.2d at 363 (emphasis added).

[404] The court does state in the next few sentences that the questioning allowed Officer Tano to observe Quino's body language and evaluate his responses and if based on those observations Officer Tano had a reasonable suspicion then Quino could be detained. The court, however, does not say that refusing a search of a bag after showing the officer identification and a ticket, in and of itself, would give Officer Tano a reasonable suspicion to effectuate a stop. *See id.* at 173, 840 P.2d at 363-64.

suspicion of criminal activity. The United States Supreme Court clearly has interpreted the test differently.[405]

Terry established that the protections of the Fourth Amendment is triggered when an individual's liberty is restrained.[406] Justice Stewart then introduced the "free to leave" test in *Mendenhall* in order to define restraint.[407] The Court, however, has not found that a person was restrained under the "free to leave" test except in extreme circumstances.[408] In *INS v. Delgado*,[409] the Court may have interpreted the meaning of "free to leave" even more narrowly than the ICA.[410] The Court acknowledged that those who walked away from the questioning may have eventually been detained.[411] Nevertheless, the Court still came to the conclusion that a reasonable person would have felt free to leave.[412] Also, in *Florida v. Bostick*,[413] the Court stated unequivocally that, if the agent had approached Bostick in the bus terminal and requested to search his luggage, without suggesting that compliance was required, no seizure would have occurred.[414] The plurality in *Florida v. Royer*[415], the only case in which the Court has applied the "free to leave" test to exclude evidence, did not state that the questioning process was inherently coercive such that a reasonable person would not have felt free. The Court objected to the fact that the officers asked Royer to accompany them to a room while retaining Royer's ticket and subjecting Royer to a detention tantamount to an arrest without having probable cause.[416]

Unquestionably, the Hawai'i Supreme Court has a lower threshold for concluding that a reasonable person would not feel free to leave an

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[405] The Hawai'i Supreme Court, of course, has the prerogative to interpret the Hawai'i Constitution differently than the United States Constitution. That the Hawai'i Supreme Court has the unreviewable authority to provide greater protection to its citizens than that of United States Constitution is well-grounded in precedent and in logic. *See supra* notes 51-58 and accompanying text.

[406] *See supra* note 125-26 and accompanying text.

[407] *See supra* note 140-47 and accompanying text.

[408] *See supra* note 155-201 and accompanying text.

[409] 466 U.S. 210 (1984).

[410] *See supra* note 400 and accompanying text.

[411] *Delgado*, 466 U.S. at 220.

[412] *See id.* at 220-21.

[413] 111 S.Ct. 2382 (1991).

[414] *See id.* at 2386.

[415] 460 U.S. 491 (1982).

[416] *See id.* 501-03.

encounter than does the United States Supreme Court. Therefore, in that sense, the Hawai'i Supreme Court does provide greater protection to its citizens under article I, section 7, than that granted under the Fourth Amendment, as is its prerogative. However, whereas a conclusion by the United States Supreme Court that a person was seized without reasonable suspicion would end the inquiry and the Court would order the evidence obtained as a result of the seizure to be suppressed, the Hawai'i Supreme Court adds an additional issue asking whether the seizure was consensual.

C. Voluntary Consent

It is well established in Hawai'i and federal precedent that consent is an exception to what might otherwise be an unconstitutional *search*.[417] The Hawai'i Supreme Court's analysis of *Quino* appears to extend the consent exception to apply to *seizures* as well. Also, *Quino* is another case supporting the proposition that, in Hawai'i, the knowledge of the right to refuse consent to a search is a crucial factor in determining whether the consent was voluntarily given.[418]

1. The consent exception to seizures

The United States Supreme Court uses the term "consensual encounter" to denote those encounters that never rise to the level of a seizure, i.e. situations in which reasonable person would feel free to leave.[419] In contrast, the Hawai'i Supreme Court is doing something very different as illustrated by its framing of the issues involved in this case. The court stated in part, "we confine our review to the following points: (1) whether Quino was 'seized' . . . and (2) *assuming a seizure occurred*, whether it was consensual."[420] Rather than asking whether the situation was a "consensual *encounter*," the court analyzes whether the encounter was a "consensual *seizure*."

The court declared that "both state and federal law have recognized that one may consensually waive his constitutional right to be free

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[417] Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); State v. Patterson, 58 Haw. 462, 467, 571 P.2d 745, 748 (1977). *See supra* note 243 and accompanying text.

[418] *See supra* part III.C.2 and accompanying notes.

[419] *See supra* note 105-06 and accompanying text.

[420] *Quino*, 74 Haw. at 163, 840 P.2d at 359 (emphasis added). *See supra* note 114.

from warrantless searches and seizures."[421] For this proposition, the court cited *Florida v. Bostick*,[422] *Schneckloth v. Bustamonte*,[423] *State v. Pau'u*,[424] and *Nakamoto v. Fasi*.[425] None of these cases, however, involved the "waiver" of the right to be secure against unreasonable seizures.

The *Bostick* court did not refer to a "consensual encounter" as a situation in which a person was seized but "waived" her right to be secure against an unreasonable seizure. The Court used "consensual encounter" to label situations in which no seizure occurred.[426] The Court stated: "[s]o long as a *reasonable person* would feel free to disregard the police and go about his business, the encounter is consensual . . . ."[427] While the *Bostick* court did refer to a question of whether Bostick consensually waived his Fourth Amendment rights, that discussion dealt with whether the defendant consented to a *search* of his luggage.[428] Also, *Schneckloth*, *Pau'u*, and *Nakamoto* all dealt with consent searches.[429]

Extending the consent exception to seizures is problematic. Consent is not voluntary if it is the product of duress or coercion.[430] A seizure is a situation in which a reasonable person would not feel free to leave.[431] Because an illegal seizure would vitiate any subsequent consent to the seizure, a person would have to consent to the seizure before the seizure begins.[432] If, as the court suggests, an officer (1) approaches

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[421] *Id.* at 174 n.11, 840 P.2d at 364 n.11.

[422] 111 S.Ct. 2382 (1991).

[423] 412 U.S. 218 (1973).

[424] 72 Haw. 505, 824 P.2d 833 (1992)

[425] 64 Haw. 17, 635 P.2d 946 (1981)

[426] *See also supra* note 106.

[427] *Bostick*, 111 S.Ct. at 2386 (emphasis added). *See also* Florida v. Rodriquez, 469 U.S. 1, 5-6 (1984)("[T]he initial contact between the officers and respondent . . . was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."); INS v. Delgado, 466 U.S. 210, 221 (1984)("[T]he encounters were classic consensual encounters rather than Fourth Amendment seizures.")

[428] *Bostick*, 111 S.Ct. at 2388.

[429] *See Schneckloth*, 412 U.S. at 220 (1973)(consent to search of a car); *Pau'u*, 72 Haw. at 508, 824 P.2d at 835 (consent to search of a car); *Nakamoto*, 64 Haw. at 19, 635 P.2d at 950 (consent to search of a handbag). *See also supra* part III.C and accompanying notes.

[430] *See supra* note 246-48 and accompanying text.

[431] *See supra* note 98 and accompanying text.

[432] Under the fruit of the poisonous tree analysis, an officer cannot illegally seize a person then get her consent to be seized. Once the initial illegal seizure occurs any evidence obtained pursuant to a consent must be suppressed regardless of how

a passenger, (2) announces that she, the officer, is from the Honolulu Police Department Narcotics Department investigating drug trafficking, and (3) informs that passenger that the passenger is free to go at any time,[133] then how long is the consent good for? Does the fact that a passenger consented to an initial conversation under no coercion and fully informed of her right to leave at any time, necessarily mean that when the encounter turns into a seizure, i.e. a situation in which a reasonable person would not feel free to leave, that the passenger has voluntarily consented to the seizure?

Allowing consent, voluntarily given at the inception of an encounter, to provide a legal safety blanket covering the entire conversation is inconsistent with the logic behind the holding that the "walk and talk" procedure is a seizure. The court's main objection to the "walk and talk" is that it is a "staged police-citizen encounter," in which "the police exercise complete control over the interaction."[134] The court characterized the encounter as such for two reasons: (1) the method and type of questions are left to the discretion of the officer and (2) the passenger is obligated to answer all questions or else the officer's suspicion would be aroused.[135] Informing a person that he or she is free to leave at anytime, does not alleviate the coerciveness of the situation. The method and type of questioning is still left to the discretion of the officer, albeit the person is armed with the knowledge of the right to walk away. The person, however, who initially agrees to cooperate knowing that she can walk away at any time, would nonetheless feel, under the court's logic, that she is obligated to answer all questions.

To support this proposition that an individual would feel obligated to answer all questions during the "walk and talk" process, the court

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voluntary, knowing or intelligent the consent may have been. This is because the exclusionary rule's effect of deterring the initial illegality would be diluted if an officer could illegally seize a person then cure the seizure by gaining "consent" *See supra* part III.D and accompanying notes. Also, the idea of a person freely and voluntarily consenting to be seized after the person is already seized is like a person consenting to a search after the search occurs; it defies logic.

[133] Whether the court would deem such actions as establishing a "consensual seizure," is arguable. The court mentioned that Officers Tano and Sumaoang failed to do these things, when the court explained its holding that Quino did not "voluntarily or intelligently" consent to the seizure.

[134] *Quino*, 74 Haw. at 172, 840 P.2d at 363.

[135] *Id.* at 363.

gives the example that Quino's production of his airline ticket and identification but refusal to a search of his bag and person would have aroused Officer Tano's suspicion. Under that logic, even if an officer initially informs the passenger of her right to leave and the person voluntarily consents to the initial conversation, at the point when the officer asks to search the bag, a refusal by the person would still arouse the officer's suspicion.

Furthermore, allowing consent given at the beginning of an encounter to constitute consent to a seizure also appears inaccurate. Simply because a person consents to talk with an officer does not mean that the person also consents to the officer placing her in a situation in which a reasonable person would not feel free to leave. Therefore, it would seem disingenuous to interpret a person's consent to a conversation as consent to be restrained from leaving.

On the other hand, if the initial voluntary consent does not cover the entire encounter, then how can the prosecution ever meet its burden of proving a free and voluntary consent at the point when the seizure occurs? Does the officer have to explain what a seizure is and ask, "May I seize you?"[436] People know what a search of a bag is. When a person gives consent to search the bag, one can assume that the person knew what she was consenting to and could evaluate for herself whether to grant the consent or not. Therefore, in the absence of any express or implied coercion, it is plausible to infer that consent was voluntarily given. In contrast, most people do not know what a seizure is or when it occurs.[437] How can a person freely and voluntarily consent to something she does not even know she is consenting to?

In addition, if a person is voluntarily talking with a police officer and the situation suddenly rises to the level of a seizure, how useful is it to inquire whether the person freely or voluntarily consented to the seizure? Clearly, the court does not feel that the prosecution can meet its burden by introducing evidence that the person merely cooperated.[438] Also, the court stated that the consent must be given freely, voluntarily and *intelligently*.[439] Given these two requirements, a prose-

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[436] While the phrasing of this question makes the it sound facetious, truly, it is not intended to be as such. The question just illustrates the point that voluntarily consenting to a seizure is of a wholly different character than consenting to a search.

[437] Indeed, courts do not even agree on when a seizure occurs.

[438] *Quino*, 74 Haw. at 175, 840 P.2d at 364. The court stated that: "the State cannot rely on Quino's acquiescence to establish that he voluntarily consented to the seizure of his person." *Id*

[439] *Id.*

cutor can probably never prove that a person consented to the seizure.

Notwithstanding the inherent problems in recognizing the possibility of a "consensual seizure," the court does seem to acknowledge such a category, which represents another break from the United States Supreme Court, although perhaps unintentionally. In addition, the *Quino* court may also disagree with the United States Supreme Court's definition of consent.[440] The *Quino* court requires that a person give consent freely, voluntarily and intelligently.[441] However, understanding what the court means by "intelligent" consent is difficult.

2. Intelligent consent

Prior to *Quino*, the Hawai'i Supreme Court associated an intelligent waiver of one's constitutional rights with a knowing waiver, which occurs when a person is informed of the rights she is waiving.[442] Although the *Quino* court theoretically distinguishes "intelligent" consent from a knowing consent by explicitly stating that an officer does not have to inform a person that she is free to leave,[443] the reasoning behind its holding appears to indicate otherwise.

In supporting its holding, the court stated that consent based on "material nondisclosures" is not voluntary *or* intelligent.[444] The nondisclosures of Officers Tano and Sumaoang were their failure to inform Quino and Cachola that they were free to go, in order to hide the investigative objective of getting "consent," and not telling Quino and Cachola that they, Tano and Sumaoang, were investigating drug trafficking when they identified themselves as police officers.[445] It seems unlikely that the court would find that Quino and Cachola intelligently consented to the seizure if the officers approached Quino and Cachola

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[440] *See supra* part III.C.1 and accompanying notes.

[441] *See Quino*, 74 Haw. at 174-75, 840 P.2d at 364. The court cites *State v. Pau'u*, 72 Haw. 505, 824 P.2d 833 (1992), for this proposition. However, problems exist in relying on *Pau'u* for this statement.

[442] The court cited *State v. Pau'u*, 72 Haw. 505, 824 P.2d 833 (1992), for the proposition that constitutional rights must be freely, voluntarily, and intelligently waived. *Quino*, 74 Haw. at 174, 840 P.2d at 364. In *Pau'u*, however, the voluntariness of consent was not in issue and *Pau'u* cited *State v. Vares*, 71 Haw. 617, 801 P.2d 555 (1990), which dealt with a waiver of the right to counsel, which must be voluntary, knowing and intelligent. *See supra* note 297-301 and accompanying text.

[443] *Quino*, 74 Haw. at 174, 840 P.2d at 364.

[444] *Quino*, 74 Haw. at 175, 840 P.2d at 364.

[445] *Id.*

and announced that they were police officers investigating drug trafficking without informing the two men that they were free to go. This failure to inform seemed to be the key to the court's finding that there was no "intelligent" consent. That the failure to inform a person of her right to refuse consent, in the absence of factors from which the court can infer knowledge of the right to refuse, is a crucial element in determining whether consent was voluntarily given adds nothing new to Hawai'i's jurisprudence.[446] Explicitly requiring "intelligent" consent in area of searches and seizures, however, is a first in Hawai'i law.

VI. IMPACT

The *Quino* holding, that the "walk and talk" process constitutes an unconstitutional seizure under article I, section 7 of the Hawai'i Constitution, may have an impact in two ways. First, because the Hawai'i Supreme Court applies the "free to leave" test differently than the United States Supreme Court, the Hawai'i state courts will prevent a state prosecutor from introducing evidence against a defendant in a state criminal proceeding that a federal prosecutor could carry across the street and use in a federal criminal trial against that defendant regarding the same incident. Second, the decision raises the question of how desirable is it for the Honolulu Police Department to modify the "walk and talk" drug interdiction program to conform to the Hawai'i Constitution.

As it stands, the "walk and talk" process appears to become an unconstitutional seizure of the person under the Hawai'i Constitution either when the officer asks the passenger if she is carrying narcotics or when the officer requests permission to conduct a search.[447] The very same process, however, does not, at any point, constitute a seizure under the United States Constitution.[448] Therefore, if as a result of a "walk and talk" a defendant is charged with promoting a dangerous drug under the Hawai'i state statute[449] rather than under a federal statute,[450] the prosecutor cannot use the evidence obtained from the

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[446] *See supra* part III.C.2 and accompanying notes.

[447] *See supra* note 391 and accompanying text.

[448] *See supra* note 173-74 and accompanying text.

[449] *See supra* note 46.

[450] For example, 21 U.S.C. § 841(a)(1), which reads in part:

> it shall be unlawful for any person knowingly and intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. § 841(a)(1).

"walk and talk" to pursue a conviction of the charge in state court. If, however, federal charges are instituted then the evidence can be used against the defendant in the federal court.

The practical result is that the State will probably pursue drug charges that result from a "walk and talk" procedure in federal court whenever possible.

Given the fact that the State can still use the evidence in federal court, the question is whether the Honolulu Police Department will want to modify the "walk and talk" program to conform to the Hawai'i Constitution. If the primary purpose of a "walk and talk" encounter is to merely approach passengers, ask preliminary questions, and evaluate whether a reasonable suspicion of criminal activity exists justifying a brief detention of the person, then the "walk and talk" process can remain the same without compromising this goal. In other words, if sole or primary value of the "walk and talk" process is not just the ability to look into people's bags and pat them down, then the program still has some use. The officers may still approach passengers, ask preliminary, non-intrusive questions, and request to see airline tickets and identification. If during this brief period of time the officer develops a reasonable suspicion, then the officer can ask the person for consent to search a bag or to pat the person down. Even though requesting permission to search or pat down at that point would constitute a seizure under *Quino*, the officer's reasonable suspicion would justify the seizure. The consent, therefore, would not be tainted by a prior illegal seizure, and the question of the admissibility of the evidence would turn on whether the consent was voluntarily given.

On the other hand, if the effectiveness of the "walk and talk" program depends on the officers asking for permission to search and the prosecutor instituting action in state court, then the Honolulu Police Department must modify the program. The court found that the arbitrary and accusatory nature of the questioning employed by HPD officers automatically constituted an unconstitutional seizure since those being questioned would not feel "free to leave." Furthermore, the court implied that, for "walk and talk" encounters to be truly "consensual," and not invoke Fourth Amendment protections, persons being questioned would have to first provide their voluntary and intelligent consent to the procedure.

Theoretically, this means at least two additional safeguards must be added to the "walk and talk" procedure to ensure its overall constitutionality in light of *Quino*. First, in addition to asking a person if she would agree to answer questions, an officer would have to inform the

person that she was free to terminate the questioning and to leave at any time. Second, to guarantee intelligent consent, the officer would have to explain she is investigating drug trafficking at the outset of the encounter when she identifies herself as an officer from the HPD. Without these safeguards, *Quino* suggests that "walk and talk" constitutes an "investigative stop" which is unconstitutional unless supported by "reasonable suspicion."

Significantly, however, the court does not state that the "walk and talk" procedure would be permissible if with these safeguards were implemented. Furthermore, because of the problems associated with a consent exception to an otherwise unlawful seizure and the tremendous burden that the court places on the prosecution to establish voluntary consent, the Hawai'i Supreme Court will probably not find that a "walk and talk" is constitutional even if the HPD modifies the program to inform passengers of their right to leave and of the nature of the questioning. Therefore, the future of the "walk and talk" program probably depends on whether asking preliminary questions and requesting identification and a airline ticket is an effective means of finding drug smugglers or whether the State can pursue charges in federal court rather than in state court.

VII. Conclusion

In *State v. Quino*, the Hawai'i Supreme Court faced a difficult task of weighing legal, practical, and policy considerations to decide a sharply divided issue that involved, at its heart, the extent of personal freedoms. Given the broad scope and sensitive nature of the subject matter, opposing views of the court's decision are likely.

From one perspective, the court, while justifiably exercising its constitutional mandate to provide greater protection to Hawai'i's citizens, may have gone too far. Several legal questions surround the efficacy of the result reached in *Quino*. The court breaks from recent federal precedent that has expressly permitted police conduct more restrictive than that at issue in *Quino*. While purporting to employ the "free to leave" test in determining whether Quino was seized, the court appears to ignore any comparison between the facts in the *Quino* case and the potentially more damaging events at issue in *Mendenhall*, the very case in which the test was developed. Finally, while focusing on the nature of the officer's behavior in its determination that Quino was seized, the court fails to adequately explain precisely why or when the seizure occurred. As a result of this oversight, law enforcement

officials are left without any bright line test to follow in their efforts to avoid the legal potholes that *Quino* establishes.

Policy concerns also appear to undermine the court's decision. Although individuals have certain rights to be free from governmental scrutiny, at some point these individual interests must yield to some level of government intervention for the benefit of society as a whole. Applying basic cost-benefit analysis, the cost of the police action in *Quino* is mere inconvenience to citizens, while the benefit is the reduction of a recognized societal evil—the trafficking and use of dangerous drugs. Despite this obvious benefit, the court's decision in *Quino* will undoubtedly alter the effectiveness of HPD's "walk and talk" drug interdiction program. If a less intrusive program can be implemented to produce similar results, then perhaps the court's decision may represent a satisfactory compromise. However, if, as it initially appears, *Quino* represents a per se ban of the "walk and talk" program, then Hawai'i's citizens may have sacrificed long-term societal gains in the name of individual liberty.

From the opposing perspective, however, one may view the Hawai'i Supreme Court as rightfully protecting individual liberty in an area where the United States Supreme Court should have stepped in a long time ago. The question is whether the "walk and talk" procedure restrains the liberty of passengers walking through Honolulu International Airport. If restraint exists, then the situation is not mere inconvenience, but a violation of a citizen's fundamental right to be secure from unreasonable seizures.

The Hawai'i Supreme Court's understanding of police conduct that constitutes restraint differs from that of the United States Supreme Court because the Hawai'i Supreme Court interprets the "free to leave" test differently. The Hawai'i Supreme Court's interpretation, however, may well be the correct one. If a person must answer the questions of a police officer or else become a suspect in a crime, regardless of whether the officer can physically detain the person, then the person's right to leave is not free but is exercised at a cost. The cost is that a totally innocent person, who may not have appeared suspicious and who the officer may have approached purely at random, will become a drug trafficking suspect primarily, or even solely, because that person exercised her right to refuse consent to a search or to walk away.

Furthermore, becoming a suspect in a drug investigation is not to be taken lightly. Because the so-called "war on drugs" is pervasive and prominent throughout this country, people are repeatedly exposed,

through television news or other programs, to police forcibly breaking into drug suspects' homes with battering rams or pinning arrestees to the ground with guns drawn. This use of force and intimidation is understandably necessary in order for officers to protect themselves and the public, as well as detainees. However, the underlying threat that one may be subject to such action if she does not cooperate may be enough to cause the hypothetical "reasonable person" to believe she is not free to leave, but rather may only leave at the cost of definitely becoming a suspect and possibly being forcibly detained.

It is very tempting to point to Ferdinand Quino and say that the court system should not let him get away with breaking the law. No one disputes that Quino was trafficking drugs and deserves to be punished for his act. This country is faced with a drug problem which is promoted and perpetuated by people like him. This case, however, was not about Quino. This case was about all of the other innocent passengers that pass through Honolulu International Airport. This case was about whether the court system will protect those innocent passengers from having their personal effects searched and being subjected to a pat down search, which undoubtedly includes the police officer touching of private areas of one's body, in the middle to the airport in full view of everyone walking by. The Hawai'i Supreme Court's response was to send a strong message to law enforcement officials that this court will do everything in its power to protect those innocent people from this type of police conduct. From this perspective, the Hawai'i Supreme Court was absolutely correct in taking such a stand.

Toby M. Tonaki*
Lance Au**
Dean Myatt***

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* Class of 1993, Wm. S. Richardson School of Law.
** Class of 1994, Wm. S. Richardson School of Law.
*** Class of 1994, Wm. S. Richardson School of Law.

Henderson v. Professional Coatings Corp.: Narrowing Third-Party Liability in Automobile Accidents

I. Introduction

In *Henderson v. Professional Coatings Corp.*,[1] the Hawai'i Supreme Court held that an employer who had leased a car for the use of its employees on an inter-island painting project and entrusted the vehicle to a known habitual drinker to go to a party accompanied by several other employees was not liable as a matter of law for the resulting injuries to the plaintiff. The employees became intoxicated; another employee borrowed the car and, driving while intoxicated, was involved in a head-on collision with the plaintiff.[2] Endorsing earlier Intermediate Court of Appeals precedent, the court found the employees' conduct was outside their scope of employment, thereby precluding liability under a theory of respondeat superior.[3] The court then declared negligent entrustment a specific cause of action, limited to cases where the entrustee actually and personally inflicts injury.[4] Finally, the court examined whether plaintiff could withstand summary judgment on a general negligence theory.[5] Applying Hawai'i Rules of Evidence 701 and 403 regarding, respectively, lay testimony and danger of prejudice or misleading the jury, the court excluded a portion of plaintiff's evidence,[6] and held that the only reasonable conclusion under the remaining evidence was that it was not reasonably foreseeable that allowing the employee to use the car would involve an unreasonable

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[1] 72 Haw. 387, 819 P.2d 84 (1991).

[2] *See infra* notes 9-30 and accompanying text.

[3] *See infra* notes 228-241 and accompanying text.

[4] *See infra* notes 242-269 and accompanying text.

[5] *See infra* notes 337-372 and accompanying text.

[6] *See infra* notes 270-328 and accompanying text.

risk of harm.[7] Two justices dissented from the negligent entrustment and general negligence holdings.[8]

Part II of this note states the facts of *Henderson*. Part III gives an historical overview of scope of employment in the respondeat superior context, negligent entrustment, the standard for summary judgment in negligence actions, the relationship between alcohol and negligence, and third-party negligence generally in actions arising out of injuries resulting from the operation of a motor vehicle by an intoxicated driver. Part IV analyzes the court's rationale for finding defendant entitled to judgment as a matter of law, considering separately the court's respondeat superior, negligent entrustment, evidence, and general negligence holdings, along with the court's approach to summary judgment and its assessment of any relationship between alcoholism and behavior. Part V discusses the potential impact of the court's decision on attorney practice and on the prospects for recovery from a third party where the direct cause of the injury was in some way facilitated by the third party.

II. Facts

Professional Coatings Corp., an Oahu based company partly owned by John Phelps, contracted a painting job on Kauai expected to last one month.[9] Phelps flew to Kauai with his employees on May 2, 1987 in preparation for the job, which was to begin Monday, May 4, 1987.[10] Professional Coatings rented two cars for use by its employees.[11] In addition to the cars, the company paid the employees' travel expenses and rented two condominium units to house the employees during the job.[12]

Among the employees Phelps brought to Kauai were James McLean and Jerald W. Hughes.[13] Prior to their departure from Oahu, Phelps drank beer with the crew—a common practice.[14] Following their arrival,

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[7] *See infra* note 337 and accompanying text.

[8] 72 Haw. at 404, 819 P.2d at 94 (Padgett, Acting C.J., joined by Hayashi, J.).

[9] 2 Haw. at 390, 819 P.2d at 87.

[10] 72 Haw. at 389-90, 819 P.2d at 87.

[11] *Id.*

[12] 72 Haw. at 390, 819 P.2d at 87.

[13] 72 Haw. at 389-90, 819 P.2d at 87.

[14] 72 Haw. at 390, 819 P.2d at 87. It is not clear that Phelps regularly drank with McLean and Hughes. The court states that "[i]t was common for the crew to drink beer together," *id.*, but later criticizes the lack of evidence that Phelps "ever observed McLean in an intoxicated condition," *id.* at 401, 819 P.2d at 93, suggesting that the court considered McLean and Hughes to be part of "the crew" but not Phelps.

Phelps gave several of the employees permission to take one of the cars to Kauai's north shore.[15] The employees shared the driving on this expedition.[16] Phelps later reprimanded Hughes because the car had a flat tire and became muddy or sandy while he was driving it.[17]

The following day, Sunday, Phelps authorized McLean to take one of the cars and visit a friend in Princeville.[18] He was aware that Hughes and two other employees would accompany McLean and that the group would be drinking.[19] The group proceeded to a barbecue party at the home of McLean's friend, where they drank heavily.[20] Early in the evening, when both were already intoxicated, McLean gave Hughes the use of the car.[21] Hughes took the car to the home of a female companion.[22] Several hours later, as he was returning to the party, he collided[23] head-on with an automobile driven by Mary Kathleen Henderson, causing injuries.[24]

Phelps testified in deposition that he considered McLean an alcoholic whom he believed drank 990 out of 1,000 days.[25] There was also evidence in the record that McLean was project superintendent[26] and may have had responsibility for the vehicle in that capacity,[27] and

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[15] 72 Haw. at 390, 819 P.2d at 87.

[16] *Id.*

[17] *Id.*, 819 P.2d at 87-88.

[18] *Id.*, 819 P.2d at 88.

[19] *Id.*

[20] *Id.*

[21] 72 Haw. at 391, 819 P.2d at 88.

[22] *Id.*

[23] *Id.*

[24] 72 Haw. at 389, 819 P.2d at 87.

[25] 72 Haw. at 390, 400, 819 P.2d at 87, 92.

[26] Henderson specifically asserted that an issue of material fact had been raised "on whether McLean had authority to entrust the vehicle to Hughes." Plaintiff-Appellant's Opening Brief at 22-23, *Henderson* (No. 14541); Record at 60-61, *Henderson* (No. 14541). It was undisputed that McLean was Phelps "acting supervisor" or "superintendent" for the Waimea Canyon project. Reply Brief of Plaintiff-Appellant at 1, *Henderson* (No. 14541) (citing Record on Appeal, Vol. 2 at 458-59, 464, 494); Record at 103, *Henderson* (No. 14541). Henderson made the point clear, asserting that Phelps gave authority over the vehicle to McLean, including authority to entrust it to others, and thus McLean was acting within the scope of his employment when he entrusted the car to Hughes. Reply Brief of Plaintiff-Appellant at 2, *Henderson* (No. 14541); Record at 104, *Henderson* (No. 14541).

[27] Reply Brief of Plaintiff-Appellant at 1, *Henderson* (No. 14541) (citing Record on Appeal, Vol. 2 at 458-59, 464, 494); Record at 103, *Henderson* (No. 14541).

evidence that all employees may have been authorized to drive.[28] The Fifth Circuit Court granted summary judgment in favor of Phelps and Professional Coatings[29] without discussion.[30]

III. History

A. *Respondeat Superior*

Respondeat superior, or "let the master answer,"[31] is a form of vicarious liability where an employer may be liable for torts of employees, notwithstanding a complete absence of fault on the part of the employer.[32] Under this doctrine, liability exists only where the negligent employee was acting within the scope of his or her employment.[33] *Nordmark v. Hagadone*[34] presented the Intermediate Court of Appeals ("ICA") with the question of whether a radio station manager's operation of a company car[35] and involvement in an accident in a

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[28] Plaintiff-Appellant's Opening Brief at 17, *Henderson* (No. 14541) (citing Record on Appeal, Vol. 2 at 362, 370, 405-06); Record at 55, *Henderson* (No. 14541). Reply Brief of Plaintiff-Appellant at 9-10, *Henderson* (No. 14541) (citing Record on Appeal, Vol. 2 at 359, 362, 364-66, 370, 405-06, 416-17); Record at 111-12, *Henderson* (No. 14541). Henderson also pointed out that Phelps admitted that Hughes drove the preceding night, and that there was no evidence of any punitive or remedial actions addressed to that fact. Plaintiff-Appellant's Opening Brief at 23 (citing Record on Appeal, Vol. 2 at 435); Record at 61, *Henderson* (No. 14541).

Phelps acknowledged that in deposition testimony McLean could not recall any specific instruction that Hughes was not to drive. Since McLean did recall a rule that all drivers must have a valid license, Phelps grounded his argument that Hughes was explicitly prohibited from operating the vehicle on evidence that his license was suspended. Defendant-Appellee's Answering Brief at 3, *Henderson* (No. 14541); Record at 72, *Henderson* (No. 14541).

[29] 2 Haw. at 389, 819 P.2d at 87.

[30] Plaintiff-Appellant's Opening Brief at 6, *Henderson* (No. 14541) (citing 5th Circuit Ct. Civ. No. 88-0173, Record Vol. 3 at 643); Record at 44, *Henderson* (No. 14541).

[31] Black's Law Dictionary 1179 (5th ed. 1979) [hereinafter Black's].

[32] W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 69, at 500 (5th ed. 1984). The doctrine also applies to principal and agent. Black's, *supra* note 31, at 1179.

[33] *See* Matsumura v. County of Hawaii, 19 Haw. 496, 500 (1909); Abraham v. Onorato Garages, 50 Haw. 628, 632, 446 P.2d 821, 825 (1968); *see also* Black's, *supra* note 31, at 1179.

[34] 1 Haw. App. 487, 620 P.2d 763 (1980).

[35] The vehicle was leased to the corporation. *Id.*, 620 P.2d at 764.

neighborhood unrelated to the station's listening audience fell outside the scope of his employment. The evidence showed that the manager was in and out of the station during the day. Appellant contended that on these facts the manager was outside the scope of his employment at the time of the accident.[36] After noting that whether conduct falls within the scope of employment is a question of fact,[37] the court concluded that the doctrine of respondeat superior should not be so narrowly construed as to "preclude employer liability at every instance where it is shown that an employee conducts a personal activity in the course of the business day."[38]

In *Costa v. Able Distributors, Inc.*,[39] Richard Arata, the president and manager of Able, drank beer with friends for a few hours after work at his office.[40] Although the friends were employees of companies with which Able did some business, no business was discussed that evening or at similar gatherings in the past.[41] Afterwards, Arata secured the premises, and, driving home, was involved in the accident in which plaintiff was injured.[42] The trial court granted summary judgment for Able, and the court of appeals affirmed, explaining that Arata's actions were "purely for his own benefit and not the company's."[43]

Drawing on *Costa* and section 228 of the *Restatement (Second) of Agency*,[44] the Intermediate Court of Appeals in *Kang v. Charles Pankow Assoc.*[45]

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[36] 1 Haw. App. at 489, 620 P.2d at 765.

[37] *Id.* (citing Corden v. Paschoal's Ltd., 52 Haw. 242, 473 P.2d 561 (1970) (decedent driving company vehicle home and for delivery following evening of social activity); State v. Gibbs, 336 N.E.2d 703 (1975) (state employee involved in auto accident outside normal working hours)).

[38] *Id.*

[39] 3 Haw. App. 486, 653 P.2d 101 (1982).

[40] *Id.* at 487-88, 653 P.2d at 103.

[41] *Id.*

[42] *Id.* at 488, 653 P.2d at 103

[43] *Id.* at 490, 653 P.2d at 105.

[44] § 228 General Statement

(1) Conduct of a servant is within the scope of employment if, but only if:
(a) it is of the kind he is employed to perform;
(b) it occurs substantially within the authorized time and space limits;
(c) it is actuated, at least in part, by a purpose to serve the master, and
(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the time or space limits, or too little actuated by a purpose to serve the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

[45] 5 Haw. App. 1, 675 P.2d 803 (1984).

articulated a three part test for scope of employment. Under this test, the conduct must (1) be of the kind the employee is employed to perform, (2) occur substantially within the authorized time and space limits, and (3) be actuated, at least in part, by a purpose to serve the employer.[46]

While driving his Mazda RX-7 on Kauai, Glen Pluid, a resident of Oahu and employee of Pankow on a condominium project on Kauai,[47] was involved in an accident in which Richard Kang was rendered a paraplegic.[48] Pankow paid Pluid's transportation to Kauai, provided a subsistence allowance in addition to wages, and reimbursed travel to and from the job site on a mileage basis.[49] Pluid shipped the car to Kauai at his own expense.[50] Pluid had no responsibilities or duties, and was subject to no special regulations, after working hours.[51] The accident occurred several hours after work while Pluid was engaged in purely social activity.[52] The trial court granted summary judgment to Pankow.[53]

Applying its three part test,[54] the ICA affirmed.[55] The court also rejected an argument that Pluid's driving at the time was incidental to his employment because he would not have been on Kauai at all but for his employment, stating:

> We do not believe that the respondeat superior doctrine is so pliant that where an employee is hired in one locality and relocated to another by his employer for an indefinite period of time, any act of the employee before during, or after his working hours is one within the scope of his employment as long as he works for the employer in the latter locality.[56]

As noted by Prosser, the foundation for the doctrine as currently accepted is

> a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in

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[46] *Id.* at 8, 675 P.2d at 808.
[47] *Id.* at 3, 675 P.2d at 805.
[48] *Id.* at 4, 675 P.2d at 806.
[49] *Id.* at 3, 675 P.2d at 805.
[50] *Id.* at 4, 675 P.2d at 805-06.
[51] *Id.*
[52] *Id.*, 675 P.2d at 806.
[53] *Id.* at 5, 675 P.2d at 806.
[54] *Id.* at 9, 675 P.2d at 808.
[55] *Id.* at 12, 675 P.2d at 810.
[56] *Id.* at 9, 675 P.2d at 808.

> the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. . . . [H]aving engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that [the employer], rather than the innocent injured plaintiff, should bear [the cost]; . . . [and further, the policy provides] an employer . . . the greatest incentive to be careful in the selection, instruction and supervision of his servants . . .[57]

B. Negligent Failure to Control

An offshoot of respondeat superior and other cases of a special relationship to the tortfeasor, negligent failure to control[58] is discussed in *Costa*. The employer has a duty to control the conduct of his employee when the acts giving rise to the complaint are so connected in time and place with the employment as to give the employer a special opportunity to control the employee.[59] Although not limited to

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[57] KEETON et al., *supra* note 32, § 69, at 500-01.

[58] RESTATEMENT (SECOND) OF TORTS § 317:

> § 317. Duty of Master to Control Conduct of Servant
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> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.
>
> . . . .
>
> Comment:
>
> . . . .b. Master's duty to police his premises and use made of his chattels. . . . So too, he is required to exercise his authority as master to prevent them from misusing chattels which he entrusts to them for use as his servants. This is true although the acts of the servant . . . are done wholly for the servant's own purposes . . . [T]he master as such is under no peculiar duty to control the conduct of his servant while he is outside of the master's premises, unless the servant is at the time using a chattel entrusted to him as servant.

RESTATEMENT (SECOND) OF TORTS § 317 & cmt. b (1965).

[59] 3 Haw. App. at 490, 653 P.2d at 105 (citing Abraham v. Onorato Garages, 50 Haw. 628, 634, 446 P.2d 821, 826).

acts within the scope of employment,[60] the employer must know or should have known of the necessity and opportunity to exercise such control.[61] In *Costa*, the ICA said this duty would have arisen "only if Able knew or should have known that Arata had a propensity for causing automobile collisions while driving under the influence of alcohol."[62] The court suggested that at a minimum knowledge of a prior drunk driving arrest would be necessary.[63]

C. Negligent Entrustment

In *Abraham v. Onorato Garages*,[64] Everett McCoy, manager of one of defendant's garages,[65] frequently drove a Mustang stored at the garage[66] and on one of these excursions caused plaintiff's injuries.[67] McCoy was authorized to drive cars for repairs or polishing in accordance with customer instructions, but his use of the Mustang was not in that category.[68] McCoy had worked for the company for three years in another state prior to his transfer to Honolulu two months before the accident.[69] Nine months earlier he was convicted of the hit and run of a parked vehicle, and seventeen years before as a juvenile he was convicted of joyriding.[70] The court found no basis to proceed on a theory of negligent entrustment because there was no evidence that the employer knew or should have known of the employee's prior joyriding and hit and run convictions.[71] This, the court noted, was the only

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[60] *Id.* at 491, 653 P.2d at 105 (citing RESTATEMENT (SECOND) OF TORTS § 317 cmt. b (1965)).

[61] *Id.* at 491, 653 P.2d at 105.

[62] *Id.*

[63] *Id.*

[64] 50 Haw. 628, 446 P.2d 821.

[65] *Id.* at 629, 446 P.2d at 823.

[66] *Id.* at 630, 446 P.2d at 824.

[67] *Id.* at 629-30, 446 P.2d at 823-24.

[68] *Id.* at 630, 446 P.2d at 824.

[69] *Id.* at 629, 446 P.2d at 823-24.

[70] *Id.*, 446 P.2d at 823.

[71] *Id.* at 633, 446 P.2d at 825. The court also considered whether the employer should have known, concluding as a matter of law that an employer is not required to make a detailed investigation of an employee's possible criminal past prior to hiring or promotion. *Id.* Further, the court expressed doubt about the sufficiency of a "single accident" resulting in a hit and run conviction to support a finding that he was incompetent four years later. *Id.*, 446 P.2d at 825-26. In its reference to a temporal separation of four years, the court apparently confused the date of the hit and run

evidence[72] that might suggest to the employer that the employee was "incompetent" to be trusted with a vehicle.[73]

Hawaiian Insurance & Guaranty Co. v. Chief Clerk of the First Circuit Court,[74] an action on declaratory judgment, raised the question of whether negligent entrustment of a motor vehicle by an insured was covered by a homeowner's policy, thereby obligating the insurer to defend the suit.[75] The policy contained an exclusion for damages "arising out of the ownership, maintenance, operation, use, loading or unloading of . . . any motor vehicle [of the insured.]"[76] The policyholder and the Chief Clerk (who had tendered the suit for defense)[77] argued that the tort of negligent entrustment arises out of an individual's personal conduct independent of use of the vehicle.[78] The court acknowledged the viability in Hawai'i of the negligent entrustment theory of liability,[79] citing the *Restatement (Second) of Torts*:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.[80]

However, the court rejected the argument for a separate tort unrelated to the use of the vehicle and held that the insurer had no obligation to defend the action because the homeowner's policy did not cover negligent entrustment of a motor vehicle.[81]

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conviction with that of an assault and battery conviction. *See id.* at 629, 446 P.2d at 823-24. Note that although the *Henderson* court recites McCoy's record, 72 Haw. at 397, 819 P.2d at 90, and quotes the above-mentioned passage, 72 Haw. at 398, 819 P.2d at 91, this confusion on dates was not caught by the court.

[72] McCoy's driver's license had been suspended at various times, he had been convicted for driving with a suspended license, and Onorato may have known at the time of his transfer to Honolulu that he was without a valid license (perhaps believing it had simply lapsed). *Abraham*, 50 Haw. at 630, 446 P.2d at 824. The court apparently considered this evidence irrelevant, and in any event "[t]here [was] no evidence to indicate that Onorato knew that Hawaii law had not been complied with." *Id.*

[73] *Id.* at 632-33, 446 P.2d at 825-26.

[74] 68 Haw. 336, 713 P.2d 427 (1986).

[75] *Id.* at 339, 713 P.2d at 430.

[76] *Id.* at 340, 713 P.2d at 430.

[77] *Id.* at 339, 713 P.2d at 430.

[78] *Id.* at 340, 713 P.2d at 430.

[79] *Id.*

[80] RESTATEMENT (SECOND) OF TORTS § 308 (1965).

[81] 68 Haw. at 342, 713 P.2d at 431.

Hawaiian Insurance is typical of a category of cases[82] in which one or more of the parties attempt to overcome policy exclusions[83] by arguing that the entrustment is a separate, actionable negligent act independent of the negligent use or operation of the vehicle (or other instrumentality) directly causing the injury.[84] As the court explained, the two are "separate only in the fact that [the entrustment] preceded the collision."[85]

The earliest statement of negligent entrustment liability in Hawai'i was in *Correira v. Liu*,[86] where the court said:

> If the owner of an automobile breaches his common-law duty and his breach and the negligence of the hirer combined are the direct and proximate cause of an injury to another, the owner is liable therefor to such other.[87]

D. Summary Adjudication in Negligence Actions

In *Pickering v. State*,[88] plaintiff contended that the manner of design and construction of the medial strip and barrier either caused or increased the severity of an accident by providing a ramping effect for a car that crossed the median on Kalanianaole Highway near Kailua and struck the vehicle of plaintiff's decedent.[89] Plaintiff had attempted to support this argument based on the mere fact that the guardrail had been unable to contain the wayward vehicle.[90] The court declared that although "[i]ssues of negligence are ordinarily not susceptible of summary adjudication, . . . where there is no dispute in the evidence before the trial court, it has the duty to pass upon the question of

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[82] *See, e.g.*, Bankert v. Threshermen's Mutual Insurance Co., 329 N.W.2d 150, 154-57 (Wis. 1983), one such case which cites and discusses numerous others.

[83] These almost always are unsuccessful, primarily due to policy language and clear distinctions of purpose for various types of insurance. *See, e.g.*, cases cited in *Bankert*, 329 N.W.2d at 155-57; *see also infra* note 256.

[84] *See* 68 Haw. at 340, 713 P.2d at 430.

[85] *Id.* (citing Safeco Insurance Co. v. Gilstrap, 190 Cal. Rptr. 425, 427 (1983)) (internal quotations omitted).

[86] 28 Haw. 145 (1924).

[87] *Id.* at 148-49.

[88] 57 Haw. 405, 557 P.2d 125 (1976).

[89] *Id.* at 406-07, 557 P.2d at 127.

[90] *Id.* at 408, 557 P.2d at 127. Plaintiff offered two letters from experts, but these had not been timely presented to the trial court and thus could not be considered on appeal. *Id.* at 408-09, 557 P.2d at 128.

negligence and proximate cause as a matter of law."[91] Applying the previously established standard of care[92] and observing that "[the State] is not required to exercise extraordinary care to guard against unusual accidents,"[93] the court found "nothing in the record from which the negligence of the State in the design and construction of the guardrail may reasonably be inferred,"[94] indeed "nothing in the record or the circumstances of [the] case which [even] would have required the construction of the guardrail as a necessary component of the inherent safety of that portion of the highway,"[95] and affirmed the trial court's grant of summary judgment.[96]

In *Bidar v. Amfac, Inc.*,[97] a 200-pound woman injured herself when the towel bar she was using to pull herself up from the toilet in the bathroom of her hotel room gave way. She sued, alleging the placement of the towel bar where she might use it in this manner was negligent. The trial court's grant of summary judgment presented the question of existence of a genuine issue of material fact whether defendant had breached its duty maintain hotel bathrooms in a reasonably safe condition.[98] The supreme court found genuine issues relative to both breach of duty and causation:

> Whether the obligation to exercise reasonable care was breached is ordinarily a question for the trier of fact to determine. . . . "[r]easonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it." Whether the breach of duty was more likely than not a substantial factor in causing the harm complained of is normally a question for the trier of fact also.[99]

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[91] *Id.* at 407, 557 P.2d at 127. The court cited HAW. R. CIV. P. 56(c), Struzik v. City and County of Honolulu, 50 Haw. 241, 437 P.2d 880 (1968), and Carreira v. Territory of Hawaii, 40 Haw. 513 (1954) as authority. *Id.*

[92] "The duty of the State is to design and construct its highways in such a manner as to make them reasonably safe for their intended uses, and thereafter to maintain them in a reasonably safe condition." *Id.* at 409, 557 P.2d at 128 (citations omitted).

[93] *Id.*

[94] *Id.* at 408, 557 P.2d at 127. The court did not reach the question of whether the design and construction was a discretionary act for which the state would be immune from liability. *Id.* at 410 n.2, 557 P.2d at 129 n.2.

[95] *Id.* at 409-10, 557 P.2d at 128.

[96] *Id.* at 410, 557 P.2d at 129.

[97] 66 Haw. 547, 669 P.2d 154 (1983).

[98] *Id* at 552, 669 P.2d at 159.

[99] *Id.* at 552-53, 669 P.2d at 159 (citations omitted) (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 18.8, at 1059 (1956).

"[R]easonable minds could draw different inferences from the facts and arrive at conflicting conclusions on relevant factual issues," concluded the court.[100]

The trial court granted a directed verdict to the City in *McKenna v. Volkswagenwerk Aktiengesellschaft*[101] on grounds that the intoxication of an automobile driver was the proximate cause of the accident, superseding any negligence by the City in maintenance of the roadway.[102] The supreme court reversed, holding the City could be jointly liable if the accident was caused by a combination of its negligence and that of the driver.[103] The question is to be taken from the jury only where "no rational interpretation of the evidence" would support a finding that the negligence of the third party could have been reasonably foreseen, declared the court.[104]

Summary judgment was proper in *Costa*,[105] where the employee had testified that no business was discussed during an evening of drinking with friends, because plaintiff attempted to go to trial on the issue of the employee's credibility alone, without pointing to any discrepancies to make this a genuine issue[106] and absent a mere choice of the jury to disbelieve the witness,[107] there was no discernible theory under which the plaintiff could recover: neither respondeat superior, ratification, nor a negligent failure to control theory that the defendant had a duty to prevent the employee from drinking on the premises after work.[108]

In *Kang*,[109] where the employee had brought his own RX-7 automobile to Kauai and was out for a purely social evening at the time of the accident, the only reasonable inference from the facts was that the employee's action was not within the scope of his employment.[110]

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[100] *Id.* at 554, 669 P.2d at 160.

[101] 57 Haw. 460, 558 P.2d 1018 (1977).

[102] *Id.* at 462, 558 P.2d at 1021.

[103] *Id.* at 466, 558 P.2d at 1023.

[104] *Id.* (quoting Mitchell v. Branch, 45 Haw. 128, 139, 363 P.2d 969, 977 (1961) (quoting Jones v. City of South San Francisco, 216 P.2d 25, 30 (Cal. 1950))). *McKenna* is discussed in further detail *infra* text accompanying notes 136-153.

[105] 3 Haw. App. 486, 488-89; 653 P.2d 101, 104 (1982); *see also supra* notes 39-43 and accompanying text.

[106] *Id.* at 488-89, 653 P.2d at 104.

[107] *Id.* at 489, 653 P.2d at 104.

[108] *Id.* at 490-91, 653 P.2d at 105.

[109] 5 Haw. App. 1, 675 P.2d 803 (1984); *see also supra* notes 44-56 and accompanying text.

[110] *Id.* at 12, 675 P.2d at 810.

Plaintiff had contended that, based on an ambiguous entry in the accident report, there was a genuine issue of material fact regarding the ownership of the vehicle, which, if resolved in plaintiff's favor would generate a presumption that the employee was acting within the scope of his employment.[111] The court rejected this argument since the only reasonable inference from the accident report viewed as a whole was that the employee owned the vehicle.[112]

E. Alcohol and Negligence

Hawai'i appellate courts have had occasion to consider issues dealing with intoxication and the condition "under the influence of alcohol," and the relationship to legal questions including negligence, in a variety of contexts. In *State v. Kim*,[113] a negligent homicide prosecution, the government proved the element of grossly negligent operation of the vehicle through proof of intoxication. The state's proof was testimony by the attending physician at the hospital that the defendant had slurred speech, the possibility of blurred vision, and an overpowering smell of alcohol when she was brought in.[114] The court used the terms intoxication and under the influence of alcohol interchangably.[115]

In re Horner[116] required the court to determine if the facts of the case were sufficient to describe manslaughter and thereby qualify the applicant for compensation from the Criminal Injuries Compensation Commission,[117] which provided compensation to victims of certain enumerated crimes.[118] The applicant's husband and four others were killed when a vehicle travelling at a speed well in excess of the speed limit crossed over the center line to the opposite shoulder, striking the husband and another man as they poured gas into a jeep.[119] The driver

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[111] *Id.* at 6, 675 P.2d at 807.

[112] *Id.*

[113] 55 Haw. 346, 519 P.2d 1241 (1974).

[114] *Id.* at 349, 519 P.2d at 1243-44. The conviction was reversed for violation of the defendant's right to confrontation, *id.* at 351, 519 P.2d at 1245, but this has no bearing on the substantive issue of the relationship between alcohol and negligence. The court intimated no discomfort with the manner in which the government proceeded on that point.

[115] *Id.* at 347, 349, 519 P.2d at 1243, 1244.

[116] 55 Haw. 514, 523 P.2d 311 (1974).

[117] *Id.* at 514, 523 P.2d at 312.

[118] *Id.* at 516, 523 P.2d at 313.

[119] *Id.* at 515, 523 P.2d at 312-13.

had a blood alcohol level in excess of 0.20% and therefore was presumed by statute to be "under the influence of intoxicating liquor."[120] The commission had denied compensation on the grounds of insufficient evidence.[121] The supreme court disagreed, holding that "the evidence [was] sufficient to support a conclusion that the victim was killed by an act falling within the statutory definition of manslaughter," and therefore the commission in denying compensation had abused its discretion.[122]

In *State v. Grindles*,[123] the court held that Hawai'i's DUI law[124] created a single offense provable two different ways: by showing the person was under the influence of intoxicating liquor, or by showing the person had a blood alcohol content of 0.10% or more.[125] The Intermediate Court of Appeals held in *State v. Young*[126] that, proved by blood alcohol content, DUI is a strict liability or "per se" offense.[127]

In *State v. Mata*,[128] involving appeals from DUI convictions, the court stated that the terms "under the influence of intoxicating liquor" in the traffic code,[129] and "under the influence of liquor" in the alcoholic

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[120] *Id.* at 515, 523 P.2d at 313 (citing HAW. REV. STAT. § 291-5 creating the presumption at a BAC of 0.15%). The driver was not identified. It was one or the other of two people, both of whom were also killed in the accident, and both of whom were legally under the influence. *Id.*, 523 P.2d at 312-13.

[121] *Id.* at 516, 523 P.2d at 313.

[122] *Id.* at 518, 523 P.2d at 314.

[123] 70 Haw. 528, 777 P.2d 1187 (1989).

[124] HAW. REV. STAT. § 291-4(a) (Michie 1991)

[125] 70 Haw. at 531, 777 P.2d at 1189. Consequently, the bifurcation of the trial between the two methods of proof violated the defendant's due process right to a fair trial and the privilege against self-incrimination, *id.* at 532-533, 777 P.2d at 1190-91, and, had the trial reached the second stage, would have violated the constitutional prohibition of double jeopardy. *Id.* at 533 n.3, 777 P.2d at 1191 n.3. Defendant's due process rights were violated because "such a departure from the well-established order of proof in criminal cases [by requiring defendant to present his case before the state has presented its entire case] is fundamentally unfair." *Id.* at 532, 777 P.2d at 1190. Forcing the defendant to decide prematurely whether to take the stand and subject himself to the hazard of cross-examination unconstitutionally burdened the privilege against self-incrimination. *Id.* at 532-533, 777 P.2d at 1090-91.

See also State v. Lemalu, 72 Haw. 130, 809 P.2d 442 (plain error where instructions and multiple verdict forms gave the jury the impression that the two methods of proving DUI represented separate crimes).

[126] 8 Haw. App. 145, 795 P.2d 285 (1990).

[127] *Id.* at 153-54, 795 P.2d at 290-91.

[128] 71 Haw. 319, 789 P.2d 1122 (1990).

[129] HAW. REV. STAT. § 291-4(a) (Michie 1991).

beverage control law,[130] do not have the same meaning.[131] In any event, the instructions given went far beyond the language of the liquor control statute.[132] To be under the influence within the meaning of that statute requires (1) impairment of the person's normal mental faculties or ability to care for self and guard against casualty or (2) substantial impairment of the person's normal clearness of intellect and self-control.[133] The trial court instructed the jury that the defendant was under the influence if the person exhibited the "slightest perceptible, appreciable or noticeable degree" of impairment, including "any interference with or lessening of alertness, any weakening or slowing up of the action of the motor nerves, or any interference with the coordination of sensory and motor nerves."[134] The court noted that the instructions, in effect, reduced the proof required of the government to the level of the reasonable suspicion necessary for police officers to administer field sobriety tests in the first instance.[135]

An automobile left the paved portion of the roadway, bounced along the shoulder, then veered across the highway to collide with another car, resulting in an explosion and fire in *McKenna v. Volkswagenwerk Aktiengesellschaft*.[136] The occupants of both vehicles were killed.[137] Evidence of an uneven level between the shoulder and the highway and of ruts and holes in the shoulder suggested negligence by the City in the maintenance of the shoulder as a cause of the accident.[138] Other evidence pointed to negligence of the driver as a cause of the accident.

A witness stated that the vehicle had been going 40 to 50 miles per hour in a 30 mile per hour zone.[139] The deceased driver had a blood alcohol concentration of 0.224%.[140] The medical examiner testified to a near 100% correlation between clinical intoxication and a BAC of this level. On the other hand, the medical examiner conceded that

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[130] HAW. REV. STAT. § 281-1 (Michie 1992).

[131] 71 Haw. at 330, 789 P.2d at 1128.

[132] *Id.* The appellants had asked the court to compare the instructions with the statute, *id.*, which, ironically, is in fact exactly what the court did after declaring that the provisions were not in pari materia.

[133] *Id.*

[134] *Id.* at 329, 789 P.2d at 1127.

[135] *Id.* at 331, 789 P.2d at 1128.

[136] 57 Haw. 460, 461, 558 P.2d 1018, 1020-21 (1977).

[137] *Id.*

[138] *Id.* at 462, 558 P.2d at 1021.

[139] *Id.*

[140] *Id.* (224 milligrams per hundred cubic centimeters).

determination of clinical intoxication is subjective judgment, and, although a key measure of clinical intoxication is abnormality of gait, he could not say to what extent the driver's gait would have been impaired with this BAC.[141] Another witness testified that he talked with and observed the driver shortly before the accident, and that he walked and spoke normally and was not drunk.[142]

The City argued that the driver's intoxication was the proximate and superseding cause of the accident; the trial court agreed and directed a verdict in favor of the City.[143] The supreme court reversed, holding that the City could be liable where its negligence and that of a driver combine to cause an accident.[144] The issue for the jury was whether the driver's negligence, if present, should have been foreseen by the City.[145] "[O]nly where, under no rational interpretation of the evidence, could the later act of negligence have been reasonably foreseen" is it proper to take the question from the jury.[146] The trial court's decision was wrong because "[a]n entry upon the shoulder

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[141] *Id.*

[142] *Id.*

[143] *Id.* at 462, 558 P.2d at 1021.

[144] *Id.* at 466, 558 P.2d at 1023. *Compare id.* with Cordeiro v. Burns, 7 Haw. App. 463, 776 P.2d 411 (1989). In *Cordeiro*, in addition to negligence by the driver in an accident in which her decedent was killed, plaintiff alleged negligence by the state and Maui County by failure to post necessary signs. 7 Haw. App. at 465, 776 P.2d at 414. An expert testified to a "reasonable type of explanation as to what occurred," which could have been prevented if advisory signs regarding the curve and appropriate speed had been present. *Id.* at 466-67, 776 P.2d at 414-15. The Intermediate Court of Appeals affirmed the trial court's grant of summary judgment in favor of the state and county, holding that any negligence by the state or county could not possibly have caused the accident. *Id.* at 469, 776 P.2d at 416. The driver was thoroughly familiar with the section of highway involved. In addition, the driver had explained during deposition that he was distracted at the time of the accident and that the jeep he was driving had a wheel alignment problem, *id.* at 467-68, 776 P.2d at 415, and no contradictory evidence appeared to bring the credibility of this testimony into question. *Id.* at 470-71, 776 P.2d at 416-17. Additional evidence showed that the driver had been drinking for eight hours and had a BAC of .28%, *id.* at 465, 776 P.2d at 414, leading the court to say he was intoxicated. *Id.* at 469, 776 P.2d at 416. The court also said he was driving at an excessive rate of speed. *Id. See also* De Los Santos v. State, 65 Haw. 608, 608, 610, 655 P.2d 869, 870-71 (1982); Wiegand v. Colbert, 68 Haw. 472, 476, 718 P.2d 1080, 1083-84 (1986).

[145] 57 Haw. at 465-66, 558 P.2d at 1023.

[146] *Id.* at 466, 558 P.2d at 1023 (quoting Mitchell v. Branch, 45 Haw. 128, 139, 363 P.2d 969, 977 (1961) (quoting Jones v. City of South San Francisco, 216 P.2d 25, 30 (Cal. 1950))).

which was the result of the driver's negligence cannot be rationally excluded from the occurrences of such entry which the City was required to foresee."[147]

The court then proceeded to inquire into what bearing the intoxication of the driver,[148] by which it apparently meant the alcohol content of his blood,[149] might have on the jury's foreseeability determination.[150] In this context, "[i]t is the negligence of the driver which is significant and should be the subject of . . . inquiry, whether or not induced by intoxication."[151] "Although intoxication may be the cause of negligence, the question whether the acts of an intoxicated person are negligent is not determined by the fact of his intoxication but requires consideration of his conduct under the circumstances."[152] Thus, the court held that the jury's determination of foreseeability of the particular negligence must be based on "consideration of [the] conduct under the circumstances."[153]

The plaintiff in *Kaeo v. Davis*[154] was seriously injured when the vehicle in which she was a passenger hit a utility pole, after the group had spent part of the afternoon in a drinking establishment.[155] She sued, among others, the City and the driver.[156] The evidence supporting negligence by the driver was that he had consumed several beers and was feeling good,[157] that he was driving at an excessive speed,[158] and that he reached for cigarettes, either in the back seat or on the dash, while attempting to negotiate the curve.[159] The jury found the driver 99% at fault and the City 1% at fault. The city appealed, as the trial

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[147] *Id.*

[148] *Id.*

[149] *Id.* at 468, 558 P.2d at 1024 ("The evidence related to the alcoholic content of his blood . . .").

[150] *Id.* ("It follows that the jury could have found that such negligence . . . was reasonably foreseeable[.]"). While the opinion is not entirely clear, this part of the discussion apparently was necessary because the jury would be asked to apportion cause or fault.

[151] *Id.* at 467, 558 P.2d at 1023.

[152] *Id.* at 467-68, 558 P.2d at 1024.

[153] *Id.*

[154] 68 Haw. 447, 719 P.2d 387 (1986).

[155] *Id.* at 449, 719 P.2d at 389.

[156] *Id.* at 450, 719 P.2d at 390.

[157] *Id.*, 719 P.2d at 389.

[158] *Id.* at 450, 452, 719 P.2d at 389, 391.

[159] *Id.* at 452 & n.2, 719 P.2d at 391 & n.2.

court judge had excluded all evidence tending to show that the driver had consumed alcohol prior to the accident.[160] The supreme court vacated and remanded for a new trial.[161]

The court said "a jury could infer 'four beers,' although insufficient [for] . . . intoxicat[ion] in a strict penal sense, were 'sufficient to impair his capacity to perceive the dangers with the clarity, make the decisions with the prudence, and operate the vehicle with the skill and caution required by law.'"[162] The fact that the driver showed no outward signs of intoxication at the accident scene did not render the evidence of drinking irrelevant, because good authority shows that "alcohol adversely affects the ability to perform accurately and reason clearly"[163] and "studies have indicated that relatively low doses of alcohol may affect driving performance."[164]

The trial judge had excluded all evidence of drinking because, as he saw it, "in today's society, any indication of drinking . . . and driving can raise undue prejudice against [the driver]."[165] Unfair prejudice cannot be equated with evidence that is simply adverse to a party, pointed out the court.[166]

The *Kaeo* standard was followed in *Loevsky v. Carter*.[167] Laurie Carter and Michael Clark were riding Michael's motorcycle with Laurie as driver one morning. At approximately 10:52 a.m., as they rounded a "broken back" curve, the motorcycle slid into the guardrail and struck a jogger.[168] Inadequate driving,[169] excessive speed,[170] and gravel on the

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[160] *Id.* at 451, 719 P.2d at 390.

[161] *Id.* at 462, 719 P.2d at 396.

[162] *Id.* at 453, 719 P.2d at 391 (quoting Simon v. Commonwealth, 258 S.E.2d 567, 572-73 (Va. 1979)).

[163] *Id.* at 453 n.5, 719 P.2d at 391 n.5 (citing STEPHEN M. BRENT & SHARON P. STILLER, HANDLING DRUNK DRIVING CASES § 14.2, at 51 (1985)).

[164] *Id.* (citing BRENT & STILLER, *supra* note 163, § 4.5; N.G. Flanagan et al., *The Effects of Low Doses of Alcohol on Driving Performance*, 23 Med. Sci. Law. 203 (1983)).

[165] *Id.* at 452, 719 P.2d at 390-91 (brackets and ellipses in original).

[166] *Id.* at 454, 719 P.2d at 392.

[167] 70 Haw. 419, 773 P.2d 1120 (1989).

[168] *Id.* at 421, 773 P.2d at 1122.

[169] *Id.* at 422, 773 P.2d at 1122-23. Laurie's motorcycle permit was expired. In any event, she had never qualified to operate a motorcycle at night or to carry a passenger. Roughly a year had passed since she had last operated a motorcycle. *Id.* at 421 & n.2, 773 P.2d at 1122 & n.2. Also, Michael testified that she took the turn a little wide. *Id.*, 773 P.2d at 1122.

The court speaks of Laurie's "loss of control and balance" and "failure to properly

roadway were possible causes of the accident.[171] In addition, contradictory evidence on the possible involvement of alcohol was presented.

Laurie testified that she awakened around 10:00 a.m., drank two or three cups of coffee, brushed her teeth, didn't eat anything, took a shower and dressed, then set off on the motorcycle ride.[172] Laurie's employer visited her at the hospital emergency room after the accident and testified that at that time she smelled alcohol on Laurie's breath and Laurie tearfully said "we were wasted." She also spoke with Michael in the hospital waiting room and testified that he said Laurie had had enough to drink to hinder her driving ability. A paramedic testified that at the accident scene, Laurie said she had a couple of beers, when asked if she had consumed any alcohol.[173] No reference to alcohol consumption appeared in any of the written reports generated by the accident, however, and, apparently, neither the investigating officers nor the treating physicians suspected intoxication.[174] In their trial testimony, both Michael and Laurie denied that she had been drinking prior to the accident.[175]

Plaintiffs bolstered the alcohol evidence with testimony by an expert on the effects of alcohol on the human body and behavior. Based on hypothetical facts roughly similar to those of the case, including consumption of two beers, the expert testified what the female's blood alcohol level would have been shortly before the accident.[176] In addition, a driving under the influence instruction, proposed by the County, which was seeking to avoid liability for alleged negligent maintenance of the highway by allowing the presence of gravel,[177] was given to the

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react." *Id.*, 773 P.2d at 1123. By the latter, the court may have had in mind her testimony that she applied the hand brake as they approached the turn, *id.*, 773 P.2d at 1122, since the hand brake works the front wheel, and applying it without the rear (foot) brake can easily throw a motorcycle into a skid, especially if there is any sand or gravel on the roadway.

[170] *Id.*, 773 P.2d at 1122-23. This point was far from established, however. Laurie's uncontroverted testimony was that she was moving at 30-35 m.p.h. as she entered the turn, *id.*, 773 P.2d at 1122, and the speed limit in that area was 35. *Id.* at 421 n.1, 773 P.2d 1122 n.1.

[171] *Id.* at 422-23, 773 P.2d at 1123. Laurie testified that she didn't see any gravel and wasn't looking for any. Michael testified that he saw gravel and that they hit the gravel with the front wheel just before starting to skid. *Id.* at 422, 773 P.2d at 1122.

[172] *Id.* at 421, 773 P.2d at 1122.

[173] *Id.* at 422-23 n.5, 773 P.2d at 1123 n.5.

[174] *Id.* at 429 n.11, 773 P.2d at 1126 n.11.

[175] *Id.* at 422-23 n.5, 773 P.2d at 1123 n.5.

[176] *Id.* at 424, 773 P.2d at 1124.

[177] *Id.* at 423, 773 P.2d at 1123.

jury. The instruction read: "The statute of the State of Hawaii provides that: No person shall operate or assume physical control of the operation a motor vehicle while under the influence of intoxicating liquor."[178]

Contending unfair prejudice, Laurie and Michael argued the alcohol consumption evidence should have been excluded on Rule 403 grounds.[179] Applying the *Kaeo* standard, the supreme court rejected this claim. The evidence, to be "considered in combination with all other conduct," was "highly relevant to the issue of the causal relationship between Laurie's conduct and Plaintiff's injuries."[180] It was necessary to vacate and remand for a new trial,[181] however, because the expert's opinion was not based on specific enough facts to be more than speculation,[182] and, further, the instruction proffered by the county was erroneous.[183]

The instruction entangled civil negligence with a DUI penal standard in a misleading manner, said the court, and was not a correct statement of the law.[184] While the statute simply codified one of the methods of establishing whether a driver was under the influence, the instruction stated prohibitory language. Violation of a statute may be evidence of negligence, but it is not negligence per se, held the court, and the instruction improperly conveyed the latter impression.[185]

F. The Dram Shop Cases

In *Ono v. Applegate*,[186] a statute prohibiting liquor establishments from serving individuals under the influence of liquor[187] was held to impose a duty on a tavern keeper,[188] and a jury special verdict finding the driver 75% at fault and the tavern 25% at fault was affirmed.[189] The old common law rule barring recovery from the liquor supplier by injured third parties was based, first, on a view that the proximate cause of the injury was alcohol consumption, not its sale or service,

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[178] *Id.* at 425, 773 P.2d at 1124.
[179] *Id.* at 429, 773 P.2d at 1126.
[180] *Id.* at 430, 773 P.2d at 1127.
[181] *Id.* at 433, 773 P.2d at 1129.
[182] *Id.* at 430-32, 773 P.2d at 1127-28.
[183] *Id.* at 432, 773 P.2d at 1128.
[184] *Id.*
[185] *Id.* at 432-33, 773 P.2d at 1128.
[186] 62 Haw. 131, 612 P.2d 533 (1980).
[187] HAW. REV. STAT. § 281-78(a)(2)(B) (1976).
[188] 62 Haw. at 138, 612 P.2d at 539.
[189] *Id.* at 133, 612 P.2d at 536-37.

and, further, where causation was admitted, the injury was nonetheless considered unforeseeable.[190] The court found the latter assumption untenable in the light of modern conditions[191] and rejected the proximate cause position based on a review of other jurisdictions.[192]

In *Bertelmann v. Taas Associates*,[193] the survivors of an automobile driver killed in a crash attempted to recover from the Sheraton Royal Waikoloa Hotel which had served him drinks. The trial court granted Sheraton's 12(b)(6) motion to dismiss.[194] The supreme court saw the question as one of "balancing the policy considerations to allow recovery against those factors limiting liability,"[195] and, after assessing the issue, affirmed.[196] The court noted that the statute was enacted to protect the public from the consequences of drunkenness, "not to reward intoxicated liquor consumers for the consequences of their voluntary inebriation."[197] Unlike the victim in *Ono*, the victim here was not within the class of persons protected and hence not a person to whom the duty was owed.[198]

The duty of a bar or tavern to avoid affirmative acts that increase the peril to an intoxicated customer, suggested in *Bertelmann*, was the issue in *Feliciano v. Waikiki Deep Water, Inc.*[199] Albert Feliciano, an unsophisticated nineteen year old from Waianae, was rendered a

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[190] *Id.* at 134, 612 P.2d at 537.

[191] *Id.* at 141, 612 P.2d at 540. "We hold that the consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers, are foreseeable to a tavern owner." *Id.* (citations omitted).

[192] *Id.* at 134-36, 612 P.2d at 537-38 (citing the reasoning of Vesely v. Sager, 486 P.2d 151 (Cal. 1971) (fact that consumption of an alcoholic beverage is a voluntary act and a link in chain of causation is no basis for a proximate cause distinction) and the "clear trend" of over twenty other cited cases).

[193] 69 Haw. 95, 735 P.2d 930 (1987).

[194] 69 Haw. at 98-99, 735 P.2d at 932-33.

[195] *Id.* at 99, 735 P.2d at 933.

[196] *Id.* at 102, 735 P.2d at 934.

[197] 69 Haw. at 101, 735 P.2d at 934. The court observed, however, that some jurisdictions view the question as one of foreseeability, with the causal connection between continued service and the subsequent injury posing a question for the jury, along with the defenses of contributory negligence and assumption of the risk. 69 Haw. at 101-02, 735 P.2d at 934.

[198] *Id.* at 101, 735 P.2d at 934. The court indicated that an affirmative act that increased the peril to the customer (as opposed to merely serving and allowing to leave) could give rise to liability, however. *Id.*

[199] 69 Haw. 605, 752 P.2d 1076 (1988).

quadriplegic when his truck left the road after he had been drinking at the Kiku Hut, a Waikiki hostess bar. Feliciano, who grew up in a sheltered environment due to an accident as a teenager, was not an experienced drinker and had never before been to Waikiki. At the Kiku Hut, three hostesses sat with Feliciano and his friends while a naked woman danced on a stage in the center of the room. Drinks arrived "automatically" and Feliciano was "afraid because he had never been in an environment like th[at] before and he was intimidated by the aggressiveness of the waitresses." He alleged that he was "encouraged and coerced into consuming alcohol" and this was the cause of his injuries.[200] In affirming the trial court's grant of summary judgment, the court agreed with defendant's argument that requiring consideration of the qualities of the intoxicated customer would place an intolerable burden on tavern owners and considered that to have been outside the contemplation of *Bertelmann*.[201] It was significant that Feliciano paid for the drinks and voluntarily drank them.[202]

In *Winters v. Silver Fox Bar*,[203] on certified question from the United States District Court for the District of Hawaii, the court reviewed the history of the dram shop action in Hawai'i and held that a minor is not within the class of persons protected by the liquor control statute prohibiting the sale of liquor to minors and hence such a minor or his survivors cannot recover from the liquor supplier for injuries resulting from consumption of liquor so obtained. The court declined to follow those jurisdictions holding that the public interest in prevention of alcohol abuse by immature and inexperienced minors requires liability, preferring the majority rule.[204] Significantly, the minor in purchasing and drinking the liquor is also in violation of statutes designed to protect the public.[205]

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[200] *Id.* at 606-07, 752 P.2d at 1077-78.

[201] *Id.* at 608, 752 P.2d at 1078-79.

[202] *Id.* at 608-09, 752 P.2d at 1079. The reader might observe that this is the usual and ordinary situation in a bar. The court appears to have reasoned that he could have declined to drink the beverage and contested the bill, but this seems a bit much to expect of a person who feels "intimidated." One is left to wonder also just what sort of affirmative acts are necessary before liability will ensue.

[203] 71 Haw. 524, 797 P.2d 51 (1990).

[204] *Id.* at 528-29, 797 P.2d at 53.

[205] *Id.* at 526, 529-30, 797 P.2d at 52-54. Additionally, the court considered that creation of a special protected class for persons under 21 would be problematic in view of the fact that the legislature has treated persons between the ages of 18 and 21 as responsible adults in all respects other than the purchase and consumption of

G. *Duty, Proximate Cause, and Foreseeability*

Notably, duty and proximate cause are almost inextricably interwoven, since there is a policy element and a foreseeability aspect to both.[206] In *Ono*, for example, the court's analysis finding a duty to exist based on the statute[207] could have been applied with equal pertinence to the old common law position on proximate cause which the court rejected by following the lead of other jurisdictions.

Foreseeability serves different functions in the differing contexts, however. With respect to duty, the process is to accumulate all the reasonably foreseeable risks and balance the burden involved in taking precautions against the total risk. In the terms of venerable Judge Learned Hand, duty is imposed whenever the burden of avoiding the risk is less than the aggregate magnitude of harm multiplied by its probability.[208] Put another way, the function is to "globally minimize[] social cost."[209]

It is well settled in Hawai'i that intervening acts will not relieve the original wrongdoer of liability if those acts are reasonably foreseeable.[210]

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alcohol. *Id.* at 531-32, 797 P.2d at 54-55. Some may not agree that the court's demarcations provide a realistic and reasonable approach—or at least not an ineluctable conclusion. *See* Richard S. Miller & Geoffrey K.S. Komeya, *Tort and Insurance "Reform" in a Common Law Court*, 14 U. HAW. L. R. 55 (1992). The court has provided protection for innocent victims and found liability where there is no conflict in the legislative policies reflected in statutes. However, as the authors note, the *Ono* opinion also suggests a common law basis for liability independent of any statute. *Id.* at 94.

[206] This is most evident by contrasting the majority and dissenting opinions in Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

[207] 62 Haw. at 137-38, 612 P.2d at 539.

[208] United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947).

[209] Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139, 139 (1989) (citing John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 63 (1987)).

[210] Ono v. Applegate, 62 Haw. 131, 140, 612 P.2d 533, 540 (1980) (citing Collins v. Greenstein, 61 Haw. 27, 43-46, 595 P.2d 275 (1979) (negligent attorney not relieved of liability by possible negligence of replacement); Mitchell v. Branch, 45 Haw. 128, 138, 363 P.2d 969, 976 (motor vehicle operator negligently obstructing highway may be responsible for injury despite active contribution of negligence of the operator of another motor vehicle) (1961); Elder v. Fisher, 217 N.E.2d 847, 852 (Ind. 1966) (after employee negligently sold alcohol to minor, druggist liable for auto accident injuries of passenger in vehicle driven by minor); RESTATEMENT (SECOND) OF TORTS § 447 (Negligence of Intervening Acts); Comment, *Beyond the Dram Shop Act: Imposition of Common-Law Liability on Purveyors of Liquor*, 63 IOWA L. REV. 1282, 1292 (1978)).

The *Restatement* deals with the question of negligence of intervening acts:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
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> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.[211]

Justice Nakamura provided a thorough exposition of the law of negligence in *Knodle v. Waikiki Gateway Hotel, Inc.*[212] Linda Kay Knodle, a Continental Air Lines, Inc. flight attendant from Guam heading to Chicago on holiday, was murdered by George Patrick Murphy at the Waikiki Gateway Hotel, which regularly housed Continental flight crews on layover. After a conversation at the front desk and a phone call, Knodle secured a key to a room where another flight attendant was already staying. She then carried two of her bags to one of the elevators and returned for the rest of her luggage. While she was doing so, Murphy entered the lobby and headed toward the elevators. Seeing this, the assistant manager shouted to Murphy, "Hold the elevator." Murphy held the door open, Knodle entered with her remaining bags, and the two ascended in the elevator at about 5:15 a.m. Around 6:30 a.m., alerted by a guest, the night auditor discovered that Knodle's luggage was still in the elevator. He discussed it with the assistant manager, but the two assumed she was asleep in her room and decided to do nothing further. At 7:00 a.m. a maintenance worker found a tenth-floor guest room key (Knodle's) on the fourth floor and turned it in at the front desk, reporting where he found it. Shortly after 9:00 a.m., a guest discovered Knodle's body in a fourth floor restroom.[213] The jury, acting on complex and, as it turned out, defective instructions, found that the hotel had not breached its duty to take reasonable

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[211] RESTATEMENT (SECOND) TORTS § 447 (1965).

[212] 69 Haw. 376, 742 P.2d 377 (1987).

[213] *Id.* at 380-82, 742 P.2d at 380-82.

action to protect the plaintiff from unreasonable risk of harm.[214]

Justice Nakamura first explained the applicable law. The existence of a duty "'simply [put], whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant,' is entirely a question of law,"[215] while breach is a question for the trier of fact.[216] Thus, "what is reasonable and unreasonable and whether the defendant's conduct was reasonable in the circumstances are for the jury to decide."[217] However, "what is reasonable and prudent in the particular circumstances is marked out by the foreseeable range of danger,"[218] and while "'[r]easonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it,'"[219] it remains the duty of the judge to submit the foreseeability issue to the jury "with such instructions as will enable the jury to deal with [it] intelligently."[220]

The instructions informed the jury that liability would follow if it found that inadequate security created a reasonably foreseeable risk of criminal harm to Knodle, and defined a reasonably foreseeable act as one that is ordinary or usual under all the circumstances.[221] The court observed that "murder can[not] be 'ordinary or usual' under any circumstance," and pointed out that the proper test "is whether 'there is some probability of harm sufficiently serious that [a reasonable and prudent person] would take precautions to avoid it.'"[222] Since the jury must assess reasonable foreseeability of harm to determine whether there is a breach of duty or not, the instruction was reversible error.[223]

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[214] *Id.* at 380-81, 383, 386-87, 742 P.2d at 380-81, 382, 384.

[215] *Id.* at 385, 742 P.2d at 383 (quoting Bidar v. Amfac, Inc., 66 Haw. 547, 552, 669 P.2d 154, 158 (1983) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 37, at 206 (4th ed. 1971)) (The identical language may be found in the 5th edition. KEETON et al., *supra* note 32, § 37, at 236.)).

[216] *Id.* at 385, 742 P.2d at 383 (quoting Bidar v. Amfac, Inc., 66 Haw. 552-53, 669 P.2d at 159).

[217] *Id.* at 387, 742 P.2d at 384.

[218] *Id.* at 385,387, 742 P.2d at 383, 384-85 (citing Bidar v. Amfac, Inc. 66 Haw. at 552, 669 P.2d at 159).

[219] *Id.* at 385, 742 P.2d at 383 (quoting Bidar v. Amfac, Inc., 66 Haw. at 552-53, 669 P.2d at 159 (quoting 2 HARPER & JAMES, *supra* note 99, § 18.8, at 1059 (1956))).

[220] *Id.* at 386, 388, 742 P.2d at 384, 385.

[221] *Id.* at 392-93, 742 P.2d at 387.

[222] *Id.* at 393, 742 P.2d at 388 (quoting Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 8 (1926)). *See also*, KEETON et al., *supra* note 32, § 31, at 171.

[223] *Id.* at 394, 742 P.2d at 388.

IV. Analysis

Henderson's complaint contained eight counts. The first four, which were not at issue in the appeal, pertained to the personal liability of Hughes and McLean individually for their own negligence—Hughes in his driving causing plaintiff's injuries and McLean in his entrustment of the vehicle to Hughes.[224] The fifth, sixth, and seventh counts were grounded in respondeat superior.[225] Professional Coatings was alleged to be vicariously liable, based on the employer-employee relationship, for either or both Hughes' negligent driving (Count Five) and McLean's negligent entrustment of the vehicle to Hughes (Count Six).[226] The seventh and eighth counts alleged the personal liability of Phelps: first, on the grounds that as the alter ego of Professional Coatings he was likewise liable by respondeat superior (Count Seven), and second, on the grounds that his entrustment of the vehicle to McLean was negligent and the proximate cause of plaintiff's injuries.[227] The several counts established the structure for the court's analysis of the appeal.

A. The Court Tightened the Boundaries of Respondeat Superior Liability Where Use of An Employer's Automobile Is Involved

1. The court focused on the highly specific conduct of the employees rather than the larger context or their general responsibilities

The court found that "the facts of the case . . . lead only to the conclusion that neither Hughes nor McLean was acting within the scope of their respective employments when committing the allegedly negligent acts"[228] and respondeat superior liability was thus precluded. In so doing, the court did not examine what those "respective employments" might be. Instead, it focused on the employees' activities in touring the island, visiting friends, and partying. In view of bedrock state precedent placing such activity outside the scope of employment,[229]

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[224] 72 Haw. at 391 n.1, 819 P.2d at 88 n.1.
[225] *Id.* at 391, 819 P.2d at 88.
[226] *Id.*
[227] *Id.*
[228] 72 Haw. at 393, 819 P.2d at 89.
[229] *See supra* notes 31-56 and accompanying text.

it is not surprising that this portion of the opinion was unanimous.[230] The court's approach assumed that the viability of counts five through seven would be determined by an examination of the doctrine. In fact, each count properly demanded a distinct analysis.

Absent an extension of existing law, the holding is clearly correct with respect to Count Five, Hughes's negligent driving. Count Seven was simply derivative, as the court recognized,[231] merely alleging Phelps's liability if respondeat superior liability existed. In contrast, Count Six asserted respondeat superior liability on the grounds that McLean was acting within the scope of his employment when he negligently entrusted the vehicle to Hughes. Henderson had alleged that McLean had supervisory responsibilities including the vehicle.[232] The court did not explain why whether McLean was within the scope of his employment when he entrusted the vehicle to Hughes did not present a question of fact for the jury. The court identified the relevant acts for scope of employment purposes as McLean "entrusting the car to Hughes so that he could spend time with a female acquaintance" and Hughes "driving the car to return to the party after spending time with the woman."[233] With respect to McLean, this simply demonstrates the truism that, described narrowly enough, any conduct which causes injury falls outside the scope of employment.[234]

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[230] Another reason might be a sense that direct liability is to be preferred to imputed liability, and hence the focus should be on a clear, strong case for direct liability. *Cf.* KEETON et al., *supra* note 32, § 40, at 260-61 (discussing rule, sometimes held, that plaintiffs who plead or offer evidence of specific negligence cannot proceed on res ipsa loquitur). However, from the employer's standpoint, respondeat superior liability would actually be preferable, since the company could then seek indemnification from the employees whose torts resulted in the liability. *Id.* § 51, at 341-45.

[231] *Id.* at 395, 819 P.2d at 90.

[232] Henderson specifically asserted that an issue of material fact had been raised "on whether McLean had authority to entrust the vehicle to Hughes." Plaintiff-Appellant's Opening Brief at 22-23, *Henderson* (No. 14541); Record at 60-61, *Henderson* (No. 14541). It was undisputed that McLean was Phelps "acting supervisor" or "superintendent" for the Waimea Canyon project. Reply Brief of Plaintiff-Appellant at 1, *Henderson* (No. 14541) (citing Record on Appeal, Vol. 2 at 458-59, 464, 494); Record at 103, *Henderson* (No. 14541). Henderson made the point clear, asserting that Phelps gave authority over the vehicle to McLean, including authority to entrust it to others, and thus McLean was acting within the scope of his employment when he entrusted the car to Hughes. Reply Brief of Plaintiff-Appellant at 2, *Henderson* (No. 14541); Record at 104, *Henderson* (No. 14541).

[233] 72 Haw. at 394, 819 P.2d at 89.

[234] As Henderson pointed out, the logic of so narrowing the focus ineluctably leads

When the court stated that "[t]he acts involved were not of the kind that Hughes or McLean were employed to perform,"[235] it ignored the question of whether care for the car and supervision of its use were part of McLean's responsibilities as "acting supervisor" or "superintendent" for the project.

2. The court neither examined nor applied the policy basis for respondeat superior liability

Surprisingly, the court acknowledged the enterprise theory of respondeat superior liability, under which the employer is liable if "the enterprise of the employer would have benefited by the context of the act of the employee but for the unfortunate injury."[236] Again the question becomes: at what level does the court analyze the conduct? An employer does not obtain a vehicle and make it available to its employees for no reason at all. Reasonable inferences include generosity, boosting morale, ensuring that employees get to work on time each day,[237] or simply disinclination to be bothered with refusing use for nonwork purposes after the vehicle had been obtained for work purposes. That is one level of analysis—a set of conflicting inferences,

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to denying liability for any negligent conduct (including personally causing a collision), since no one could benefit or intend to benefit their employer by such negligent acts. Reply Brief of Plaintiff-Appellant at 1, *Henderson* (No. 14541); Record at 103, *Henderson* (No. 14541). *See also* KEETON et al., *supra* note 32, § 43, at 299 ("The problem is in no way simplified by the quite universal agreement that what is required to be foreseeable is only the 'general character' or 'general type' of the event or the harm, and not its 'precise' nature, details, or above all manner of occurrence. . . . [and] becomes . . . a matter for the skill of the advocate who can lay stress upon broad, general, and very simple things, and stay away from all complications of detail." (footnotes omitted)). The point is further illustrated by the case of Hines v. Morrow, 236 S.W. 183 (Tex.Civ.App. 1922). Plaintiff, who had a wooden leg, secured a rope to an auto mired in the mud on a roadway, and was injured when his leg got stuck in the mud and tangled in the tow rope while they attempted to pull the vehicle out. He prevailed by arguing simply that he "was on the highway using it in a lawful manner, and slipped into this hole, created by appellant's negligence, and was injured in attempting to extricate himself." Clarence Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 193 (1950).

[235] 72 Haw. at 394, 819 P.2d at 89.

[236] *Id.* at 394, (citing Kang v. Charles Pankow Assoc., 5 Haw. App. 1, 11, 675 P.2d 803, 809 (quoting Fruit v. Schreiner, 502 P.2d 133, 140 (Alaska 1972))).

[237] The dissent recognized this function, although it did not identify it as serving a purpose of the employer. 72 Haw. at 407, 819 P.2d at 95, quoted *infra* text accompanying note 365.

some of which would, and some not, support liability. The court chose a narrow focus on the specific conduct in which the employees were engaged at the time of or leading to the accident.[238]

The court found "no evidence . . . that Professional Coatings had the potential, or even the desire, to control the behavior of its employees outside of work hours[,]" and concluded "[t]he fact that . . . the employer rented the car involved in the accident does not alter the analysis[.]"[239] The "even the desire" phraseology is peculiar, since lack of desire, rather than being exculpatory, would be at least incriminatory in the context of a duty to control.[240] Aside from this oddity, the court did not explain why the fact that the employer rented the car "does not alter" the analysis of its ability to control the conduct of the employees using the vehicle outside of work hours.[241]

Having thus disposed of three of the grounds of liability, the court proceeded to the sole remaining ground: negligent entrustment with an intervening reentrustment in the chain of causation.

B The Court Declared Negligent Entrustment a "Specific Cause of Action"

The notion of negligent entrustment as "a specific cause of action" apparently is taken from a statement in *Hawaiian Insurance*[242] explaining that negligent entrustment "is not exclusive of [i.e. not an independent tort], but, rather, is derived from the more general concepts of ownership, operation, and use of a motor vehicle."[243] This fact is significant when one considers that homeowner's policies generally exclude dam-

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[238] See *supra* text accompanying notes 229, 233.

[239] *Id.* at 395, 819 P.2d at 90.

[240] Duty to control, of course, is not an aspect of respondeat superior but a particular ground of direct negligence. *See supra* notes 58-63 and accompanying text. Like other aspects of independently actionable negligence, it is, however, often offered as an explanation or rationale for respondeat superior liability. *See* KEETON et al., *supra* note 32, § 69, at 501 (describing these justifications as "makeweight argument[s]").

[241] Indeed, such an assumption defies logic and common sense, since one who supplies an instrumentality for use after working hours obviously has a greater ability to control related after hours conduct than one who does not.

[242] A Lexis search confirmed that *Henderson* and *Hawaiian Insurance* are the only Hawaii appellate decisions in which the term "specific cause of action" appears.

[243] Hawaiian Insurance & Guaranty Co. v. Chief Clerk of the First Circuit Court, 68 Haw. 336, 341, 713 P.2d 427, 431 (quoting Barnstable County Mutual Fire Insurance Co. v. Lally, 373 N.E.2d 966, 969 (Mass. 1978)) (brackets added).

ages arising from such ownership, operation, and use,[244] at least when the accident occurs off the insured premises.[245] This was exactly the point in *Hawaiian Insurance*.[246]

From another perspective, the reference to "ownership, operation, and use of a motor vehicle" suggests that negligent entrustment as a basis for liability is grounded in recognition of the fact that a vehicle has unique potential to inflict grievous harm.[247] As invoked by the *Henderson* court, however, the term describes a narrow form of action in which, according to the court, the injury must have been inflicted by the entrustee's "negligent use and operation of the vehicle" personally.[248] No action lies if the entrustee entrusts the vehicle to another person whose negligence causes the damages, even if both the secondary entrustment and the negligence of the secondary entrustee were foreseeable.[249] None of cases cited stands for such a proposition.[250]

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[244] *See* Fortune v. Wong, 68 Haw. 1, 702 P.2d 299 (1985), where the court held that statutory parental liability for the torts of their children under HAW. REV. STAT. § 577-3 did not override comparable language in a homeowner's policy exclusion.

[245] In Bankert v. Threshermen's Mutual Insurance Co., 329 N.W.2d 150 (Wis. 1983), the policy excluded coverage of "the ownership, operation, maintenance or use . . . of (1) automobiles while away from the premises or the ways immediately adjoining[.]" *Id.* at 151.

[246] *See supra* notes 74-85 and accompanying text. The complications that arise at the intersection of tort and contract in insurance cases are further illustrated by the California case of City of San Buenaventura v. Allianz Insurance Co., 11 Cal. Rptr. 2d 742 (Cal. Ct. App. 1992). The city settled an action alleging that the police negligently entrusted a van to the passenger after arresting the driver, then sought to recover the amount of the settlement from the insurance covering the van. The policy provided coverage for "[a]nyone liable for the conduct of an insured . . . to the extent of that liability." The city argued that under the negligent entrustment theory, it was liable for the negligence of the passenger driver, who was an insured because he operated the van with the owner's permission. The court disagreed, observing that the police had no authorization to choose another driver or operate the van themselves. While they could prevent the passenger from driving, their failure to do so did not amount to an entrustment. "That the complaint is labeled "negligent entrustment does not make it so," concluded the court. 11 Cal.Rptr.2d at 744.

[247] Negligent entrustment has its roots in the doctrine of dangerous instrumentalities. *See* Parker v. Wilson, 50 So. 150, 153 (Ala. 1912), the leading case relied upon by Berry in his authoritative work. C.P. BERRY, LAW OF AUTOMOBILES § 1040, at 972 n.60 (3rd ed. 1921).

[248] Henderson v. Professional Coatings Corp., 72 Haw. 387, 398-99, 819 P.2d 84, 91-92.

[249] *Id.* at 399, 819 P.2d at 91-92.

[250] What's more, the dissent cited "ample authority to the contrary." 72 Haw. at

To support its position, the court converted dicta from the Wisconsin Supreme Court's decision in *Bankert v. Threshermen's Mutual Insurance Co.*[251] into a rule: "[I]t is the negligent use and operation of the vehicle by the entrustee which makes the negligent entrustment relevant at all."[252] The court then implicitly construed "use and operation" narrowly to exclude entrustment to a third person to reach its conclusion that negligent entrustment was irrelevant in the instant case.[253] The Wisconsin court was more careful. It made clear that the scope of its opinion was limited to the scope of coverage under the policy and was not an analysis of the viability of negligent entrustment claims.[254] Part of the confusion appears to stem from a quotation from *Berry on Automobiles* in *Bankert*:

> the liability of the owner would rest . . . upon the combined negligence of the owner and the driver; negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation.[255]

411, 819 P.2d at 97. "If an owner is negligent in permitting a person to use his car because of the user's intoxication, or the likelihood that the user would become intoxicated, the owner is also liable for every act which contributes to a subsequent accident, including the act of the person intrusted in permitting another person, incompetent because of intoxication, to operate the vehicle." 60A C.J.S. *Motor Vehicles* § 431(2), at 955 (1969); Deck v. Sherlock, 75 N.W.2d 99, 103 (1956) (same); Richton Tie & Timber Co. v. Smith, 48 So.2d 618 (1950) ("The antics of a drunken man are unpredictable, and it might reasonably have been anticipated that Johnson when intoxicated would engage with another equally intoxicated in the reckless operation of the truck.") 72 Haw. at 411-12, 819 P.2d at 97. Clearly, the majority attaches a special meaning to the word intoxication in these authorities, apparently "inebriated to the point of behaving irresponsibly," or "having a blood alcohol level above the legal limit for driving," or some such similar standard, the probability of which must be proven by competent evidence. The court did not acknowledge this directly, however, but only characterized the dissent's use of the word as "vague and ambiguous." *Id.* at 403, 819 P.2d at 93. Language in a recent opinion by Justice Moon suggests that in at least his view evidence of a blood alcohol level above the legal limit alone is not enough to be termed intoxication. Methven-Abreu v. Hawaiian Ins. & Guaranty Co., 73 Haw. 385, 401, 834 P.2d 279, 287 (1992). *See also* discussion *infra* accompanying note 416.

[251] 329 N.W.2d 150 (Wis. 1983).

[252] 72 Haw. at 398-99, 819 P.2d at 91; Bankert v. Threshermen's Mutual Insurance Co., 329 N.W.2d at 153.

[253] 72 Haw. at 399, 819 P.2d at 91-92.

[254] 329 N.W.2d at 151 ("We treat only the question of coverage under Threshermen's farmowners policy . . . [and] assume . . . the facts are sufficient to state a claim under both theories: Negligent entrustment . . .").

[255] 329 N.W.2d at 153 (quoting Berry on *Automobiles* § 1040, at 410 (3d ed.) [sic])

In fact, *Bankert* was dealing with exactly the same problem as *Hawaiian Insurance*, and resolving it in precisely the same way.[256] The court's analysis in *Bankert* was directed solely to determining the locus of the negligent act—the occurrence—within the meaning of the policy language.[257]

Bankert is instructive in other ways as well. The court notes that the torts of negligent entrustment and failure to supervise or control "merge almost imperceptibly, depending on a court's interpretation of the facts."[258] The court pointed out that such theories are a species of joint tortfeasance.[259] As in joint liability generally, while the entruster's negligence is a separate act of negligence, no action can lie unless the direct cause of the injury is tortious.[260]

Given the situations where the entrustee personally causes the injury and where the entrustee negligently entrusts to another who directly causes the injury, the difference between the two is only the degree of attenuation of causation—a problem of intervening and superseding causes that is not unfamiliar to tort law.[261] Nor is foreseeability foreign to negligent entrustment, where the question is whether defendant knew or should have known the entrustment would create an unreasonable risk of harm.[262]

Hawai'i courts historically have turned to the *Restatement of Torts* for guidance.[263] An examination of the pertinent sections of the *Restatement*

(In fact, the page reference to Berry is incorrect, apparently having been given erroneously in the earlier Wisconsin case of Hopkins v. Droppers, 198 N.W. 738 (Wis. 1924), and carried forward without correction through *Bankert* to *Henderson*. The correct page number is 972.). Berry's statement is a generalization of two cases: Bevill v. Taylor, 80 So. 370 (Ala. 1918); and Parker v. Wilson, 60 So. 150 (Ala. 1912). BERRY, *supra* note 247, § 1040, at 972 n.60.

[256] Twenty-eight of the 31 states that have considered this question have decided it the same way. Standard Mutual Ins. Co. v. Bailey, 868 F.2d 893, 898 & n.6 (7th Cir. 1989).

[257] *See supra* notes 74-85 and accompanying text. As the court noted: "The insurance policy . . . does not insure against theories of liability. It insures against 'occurrences' which cause injuries." 329 N.W.2d at 154. *See also* Miller & Komeya, *supra* note 205, at 67-68.

[258] 329 N.W.2d at 152.

[259] *Id.* at 153.

[260] *Id.* at 154.

[261] *See e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 440-453 (1965); KEETON et al., *supra* note 32, § 44; 2 HARPER & JAMES, *supra* note 99, § 20.5, at 1141-50.

[262] *See e.g.*, RESTATEMENT (SECOND) OF TORTS § 308 (1965), quoted *supra* text accompanying note 80.

[263] *See e.g.* Mitchell v. Branch, 45 Haw. 128, 132, 363 P.2d 969, 973 (1961)

is illuminating. The *Restatement* provides the following illustration of a

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(proximate cause); Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 386, 390, 393, 742 P.2d 377, 384, 386, 388 (1987) (same, and duty of hotel to guests, §§ 314A, 431); Abraham v. Onorato Garages, 50 Haw. 628, 633, 446 P.2d 821, 826 (negligent entrustment, § 390); Hawaiian Insurance & Guaranty Co. v. Chief Clerk of the First Circuit Court, 68 Haw. 336, 340, 713 P.2d 427, 430 (1986) (same, § 308); Bidar v. Amfac, Inc., 66 Haw. 547, 556, 559, 669 P.2d 154, 161-62 (1983) (product liability, §§ 402A, 343A); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., ___ Haw. ___, 839 P.2d 10 (1992) (§ 908 cmt. d); Larson v. Pacesetter Sys., Inc., ___ Haw. ___, 837 P.2d 1273 (1992) (§ 402A cmt. k); Birmingham v. Fodor's Travel Publications, Inc., 73 Haw. 359, 833 P.2d 70 (1992) (§ 311); Doe v. Grosvenor Properties (Hawaii), Ltd., 73 Haw. 158, 829 P.2d 512, 515, 517 (1992) (§§ 314A, 315, 383); Smith v. Cutter Biological, Inc., 72 Haw 416, 823 P.2d 717 (1991); Cuba v. Fernandez, 71 Haw. 627, 631-33, 801 P.2d 1208, 1211-12 (1990) (§§ 315, 314A, 332 cmt. b); Leibert v. Finance Factors, Ltd., 71 Haw. 285, 788 P.2d 833 (1990); Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989); Makaneole v. Gampon, 70 Haw. 501, 777 P.2d 1183, *aff'g* 7 Haw. App. 448, 776 P.2d 402 (1989); Corbett v. Association of Apt. Owners of Wailua Bayview Apts., 70 Haw. 415, 772 P.2d 693 (1989); Armstrong v. Cione, 69 Haw. 176, 738 P.2d 79 (1987); Armstrong v. Cione, 6 Haw. App. 652, 736 P.2d 440 (1987); Dicenzo v. Izawa, 68 Haw. 528, 723 P.2d 171 (1986); Wolsk v. State, 68 Haw. 299, 711 P.2d 1300 (1986); Beamer v. Nishiki, 66 Haw. 572, 670 P.2d 1264 (1983); Ontai v. Straub Clinic and Hosp., Inc., 66 Haw. 237, 659 P.2d 734 (1983); Ravelo v. County of Hawaii, 66 Haw. 194, 658 P.2d 883 (1983); First Ins. Co. of Hawaii, Ltd. v. International Harvester Co., 66 Haw. 185, 659 P.2d 64 (1983); Fong v. Merena, 66 Haw. 72, 655 P.2d 875 (1982); Littleton v. State, 66 Haw. 55, 656 P.2d 1336 (1982); Kohn v. West Hawaii Today, Inc., 65 Haw. 584, 656 P.2d 79 (1982); Rodriguez v. Nishiki, 65 Haw. 430, 653 P.2d 1145 (1982); Kaneko v. Hilo Coast Processing, 65 Haw. 447, 654 P.2d 343 (1982); Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982); Fernandes v. Tenbruggencate, 65 Haw. 226, 649 P.2d 1144 (1982); Fochtman v. Honolulu Police & Fire Depts., 65 Haw. 180, 649 P.2d 1114 (1982); Towse v. State, 64 Haw. 624, 647 P.2d 696 (1982); Chedester v. Stecker, 64 Haw. 464, 643 P.2d 532 (1982); Brown v. Clark Equip. Co., 62 Haw. 530, 62 Haw. 689, 618 P.2d 267 (1980); Namauu v. City & County of Honolulu, 62 Haw. 358, 614 P.2d 943 (1980); Ono v. Applegate, 62 Haw. 131, 612 P.2d 533 (1980); Figueroa v. State, 61 Haw. 369, 604 P.2d 1198 (1979); Seibel v. City & County of Honolulu, 61 Haw. 253, 602 P.2d 532 (1979); Collins v. Greenstein, 61 Haw. 26, 595 P.2d 275 (1979); Haworth v. State, 60 Haw. 557, 592 P.2d 820 (1979); Molokoa Village Dev. Co., Ltd. v. Kauai Elec. Co., Ltd., 60 Haw. 582, 593 P.2d 375 (1979); Friedrich v. Department of Transp., 60 Haw. 32, 586 P.2d 1037 (1978); Ajirogi v. State, 59 Haw. 515, 583 P.2d 980 (1978); Geremia v. State, 58 Haw. 502, 573 P.2d 107 (1977); Farrior v. Payton, 57 Haw. 620, 562 P.2d 779 (1977); McKenna v. Volkswagenwerk Aktiengesellschaft, 57 Haw. 460, 558 P.2d 1018 (1977); Pickering v. State, 57 Haw. 405, 557 P.2d 125 (1976); Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975); House v. Ane, 56 Haw. 383, 538 P.2d 320 (1975); Runnels v. Okamoto, 56 Haw. 1, 525 P.2d 1125 (1974); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Pacheco v. Hilo Elec. Light

situation in which the defendant would be liable for negligent entrustment:

> A and B have agreed to take two young women, in A's car, to a dance at a roadhouse and have stocked the car with liquor. A, the owner of the car, is prevented from going on the party and lends his car to B. The party takes place and B gets drunk, as A knows that he has done on other similar occasions, and while drunk drives the car recklessly, causing harm to C. A is negligent toward C.[264]

The parallel to the facts of *Henderson* is striking; the only relevant difference is that McLean turned the car over to Hughes rather than driving—and colliding with Mrs. Henderson—himself.

Co., Ltd., 55 Haw. 375, 520 P.2d 62 (1974); Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972); Russell v. American Guild of Variety Artists, 53 Haw. 456, 497 P.2d 40 (1972); Petersen v. City & County of Honolulu, 53 Haw. 440, 496 P.2d 4 (1972); Aku v. Lewis, 52 Haw. 366, 477 P.2d 162 (1970); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970); Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970); Chun v. Park, 51 Haw. 462, 462 P.2d 905 (1969); Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969); Levy v. Kimball, 50 Haw. 497, 443 P.2d 142 (1968); Struzik v. City & County of Honolulu, 50 Haw. 241, 437 P.2d 880 (1968); Tagawa v. Maui Publishing Co., Ltd., 49 Haw. 675, 427 P.2d 79 (1967); Burrows v. Hawaiian Trust Co., Ltd., 49 Haw. 351, 417 P.2d 816 (1966); Ikeda v. Okada Trucking Co., Ltd., 47 Haw. 588, 393 P.2d 171 (1964); Young v. Price, 47 Haw. 309, 388 P.2d 203 (1963); Johnson v. Sartain, 46 Haw. 112, 375 P.2d 229 (1962); State v. Kaimimoku, ___ Haw. App. ___, 841 P.2d 1076 (1992); Keomaka v. Zakaib, 8 Haw. App. 518, 811 P.2d 478 (1991); Wong v. Panis, 7 Haw. App. 414, 772 P.2d 695 (1989); Messier v. Association of Apt. Owners of Mt. Terrace, 6 Haw. App. 525, 735 P.2d 939 (1987); Hawaiian Ins. & Guar. Co., Ltd. v. Blair, Ltd., 6 Haw. App. 447, 726 P.2d 1310 (1986); Kau v. City & County of Honolulu, 6 Haw. App. 370, 722 P.2d 1043 (1986); Shaffer v. Earl Thacker Co., Ltd., 6 Haw. App. 188, 716 P.2d 163 (1986); Moody v. Cawdrey & Assocs., Inc., 6 Haw. App. 355, 721 P.2d 708 (1986); Leary v. Poole, 5 Haw. App. 596, 705 P.2d 62 (1985); Marsland v. Pang, 5 Haw. App. 463, 701 P.2d 175 (1985); Cootey v. Sun Inv., Inc., 6 Haw. App. 268, 690 P.2d 1324 (1984); Myers v. Cohen, 5 Haw. App. 232, 687 P.2d 6 (1984); McCarthy v. Yempuku, 5 Haw. App. 45, 678 P.2d 11 (1984); Vlasaty v. The Pacific Club, 4 Haw. App. 556, 670 P.2d 827 (1983); Kainz v. Lussier, 4 Haw. App. 400, 667 P.2d 797 (1983); Costa v. Able Distrib., Inc., 3 Haw. App. 486, 653 P.2d 101 (1982); Fink v. Kasler Corp., 3 Haw. App. 270, 649 P.2d 1173 (1982); Noguchi v. Nakamura, 2 Haw. App. 655, 638 P.2d 1383 (1982); King v. Ilikai Properties, Inc., 2 Haw. App. 359, 632 P.2d 657 (1981); Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n, Inc., 2 Haw. App. 316, 631 P.2d 600 (1981); Kajiya v. Department of Water Supply, 2 Haw. App. 221, 629 P.2d 635 (1981); Giuliani v. Chuck, 1 Haw. App. 379, 620 P.2d 733 (1980); Okada v. State, 1 Haw. App. 101, 614 P.2d 407 (1980).

[264] RESTATEMENT (SECOND) OF TORTS § 308 cmt. b, illus. 3 (1965).

Thus, the line drawn by Justice Moon is pointedly artificial. The court did not hold that no liability could attach where an entrustee subsequently entrusts the vehicle to another who in turn causes the accident, only that in such cases the plaintiff must proceed on a general negligence theory.[265] In this way, the court sidestepped both the issue of whether entrustment to McLean was negligent and the rule of foreseeable results of unforeseeable causes, under which a negligent defendant is liable if the plaintiff is within the class of persons to whom the duty was owed and the injury is of the type the avoidance of which gave rise to the duty, even though the particular means by which the injury came about may have been unforeseeable.[266]

Under this rule, Phelps would have been liable if the initial entrustment to McLean was negligent.[267] The duty of care in entrusting a

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[265] Henderson v. Professional Coatings Corp. 72 Haw. 387, 399, 819 P.2d 84, 92 (1991).

[266] KEETON et al., *supra* note 32, § 44, at 316-17; 2 HARPER & JAMES, *supra* note 99, § 20.5, at 1147; RESTATEMENT (SECOND) OF TORTS § 442B (1965). This is set out in the Restatement as follows:

> § 442B. Intervening Force Causing Same Harm as That Risked by Actor's Conduct
>
> Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

RESTATEMENT (SECOND) OF TORTS § 442B (1965). Comment b sheds additional light on the subject:

> . . . it is immaterial to the actor's liability that the harm is brought about in a manner which no one in his position could possibly have been expected to foresee or anticipate. This is true . . . also where [the result] is brought about through the intervention of other forces which the actor could not have expected, whether they be forces . . . of third persons which are not intentionally tortious or criminal.

RESTATEMENT (SECOND) OF TORTS § 442B cmt. b (1965).

[267] States considering the precise issue of negligent entrustment involving a reentrustment take this position. *E.g.* LeClaire v. Commercial Siding and Maint. Co., 826 P.2d 247 (Ark. 1992). Deck v. Sherlock, 75 N.W.2d 99 (Neb. 1956), cited by the dissent, *see supra* note 250, involved facts very similar to *Henderson*. Sherlock, the owner of the car, had been driving around all afternoon with one Hull. In the early evening, they picked up one Duffy, to whom Sherlock later entrusted the auto. The three drove around and drank beer until 9:30 p.m., when Sherlock had Duffy drop him at home. At no time had Hull driven the vehicle, and Sherlock had no reason

vehicle is to avoid injury to pedestrians and auto drivers and passengers, among others. Mrs. Henderson was clearly a member of that class. Her injuries, sustained in a head-on collision, likewise were exactly of the type foreseeable as a consequence of placing an automobile in the hands of a person who cannot be relied upon to operate the vehicle safely. The fact that she was injured as a result of McLean's negligent reentrustment, rather than directly by McLean's driving, therefore, should have been without significance.

An additional point is that the foreseeability analysis changes substantially if Phelps is seen as entrusting the vehicle to the employees generally, knowing that they drink and drive. This is particularly the case if driving while intoxicated is considered per se negligent.[268] Indeed, the shift to viewing the entrustment as being to the group of employees rather than to McLean specifically would in itself surmount the limitation on the negligent entrustment action imposed by the court. Significantly, there was evidence in the record, albeit controverted, that all the employees, including Hughes, were authorized to drive the automobile[269]—a fact the majority failed to acknowledge.

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to expect that he might drive, since he knew Hull's license had been revoked. Sherlock told Duffy he could continue to use the car. Duffy later allowed Hull to take the car, which led to the accident. *Id.* at 101-02. The court held that Sherlock would be liable if a jury found the initial entrustment negligent. *Id.* at 103.

[268] The Hawaii Supreme Court has held that driving under the influence, as that offense is defined in the traffic code, does not constitute negligence per se. *See supra* notes 181-185 and accompanying text. Notably, in so holding, the court did not analyze the statute in the manner of *Ono v. Applegate* and the subsequent dram shop cases, *see supra* notes 186-205 and accompanying text, to determine if a standard of conduct was created. Had it done so, a different result may have been required. The DUI act clearly is designed to protect the users of public thoroughfares from injuries in traffic accidents caused by alcohol-impaired drivers, thereby fulfilling the two tests for a statutorily created standard of conduct: the class of persons protected and the type of harm to be prevented. *See* KEETON et al., *supra* note 32, § 36, at 229-31.

[269] 72 Haw. at 405, 819 P.2d at 94. *See also* Plaintiff-Appellant's Opening Brief at 17, *Henderson* (No. 14541) (citing Record on Appeal, Vol. 2 at 362, 370, 405-06); ; Record at 55, *Henderson* (No. 14541). Reply Brief of Plaintiff-Appellant at 9-10, *Henderson* (No. 14541) (citing Record on Appeal, Vol. 2 at 359, 362, 364-66, 370, 405-06, 416-17); ; Record at 111-12, *Henderson* (No. 14541). Henderson also pointed out that Phelps admitted that Hughes drove the preceding night, and that there was no evidence of any punitive or remedial actions addressed to that fact. Plaintiff-Appellant's Opening Brief at 23 (citing Record on Appeal, Vol. 2 at 435); Record at 61, *Henderson* (No. 14541).

Phelps acknowledged that in deposition testimony McLean could not recall any

C. The Court Ruled Sua Sponte on the Admissibility of Some of the Evidence

1. Phelps's "opinion"

The court applied Hawaii Rule of Evidence 701[270] to bar consideration of Phelps testimony of his belief regarding McLean's alcoholism and drinking habits.[271] The threshold question is always determination of the purpose for which the evidence is offered.[272] The court apparently viewed the evidence as having been offered to prove that McLean was an alcoholic, when it was—or at least should have been—offered to show Phelps's state of mind regarding McLean's propensity for negligent behavior.[273] The dissent came closer but muddied the waters by discussing the testimony as an admission against interest or an admission by a party opponent—points that, as far as admissibility is concerned,[274] are significant only in a hearsay context.[275]

Looking at it as an admission, which the Federal Rules treat as nonhearsay,[276] reveals an important aspect which the dissent, unfortu-

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specific instruction that Hughes was not to drive. Since McLean did recall a rule that all drivers must have a valid license, Phelps grounded his argument that Hughes was explicitly prohibited from operating the vehicle on evidence that his license was suspended. Defendant-Appellee's Answering Brief at 3, *Henderson* (No. 14541); Record at 72, *Henderson* (No. 14541).

[270] HAW. R. EVID. 701 reads:

> Opinion by lay witnesses. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

HAW. R. EVID. 701.

[271] 72 Haw. at 401, 819 P.2d at 93.

[272] *See* ADDISON M. BOWMAN, HAWAII RULES OF EVIDENCE MANUAL § 801-2A, at 305 (1990); 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE (4th ed.) § 185, at 773 (1992) [hereinafter MCCORMICK].

[273] This fact was recognized by the dissent. 72 Haw. at 407, 819 P.2d at 95 ("Phelps's state of mind . . . was in issue").

[274] This is not to say that the fact that a statement is against interest might not be significant in another context, such as what inferences might reasonably be drawn from it and the fact that it was made. *See* discussion *infra* following note 335.

[275] *See* HAW. R. EVID. 803(a)(1), HAW. R. EVID. 804(b)(3).

[276] The Hawaii rules treat admissions as hearsay exceptions, *see* HAW. RULE EVID. 803, consistent with the fact that admissions frequently fall within the definition of

nately, did not make explicit. The evidentiary treatment of admissions is rooted not in reliability, the underpinning of most of the evidence rules, but in the nature of the adversary system itself.[277] The principle is that the trier of fact is always entitled to consider the adversaries' own out of court statements.

The dissent was correct in another respect when it said the majority's evidentiary ruling was "simply wrong."[278] The Hawaii Supreme Court has acknowledged the special character of admissions[279] and specifically stated that these statements are "universally deemed admissible"[280] and "*may be in the form of an opinion.*"[281] Despite the court's broad language, the specific holding was in the hearsay context. Nonetheless the point is apposite to *Henderson*, since none of the functions of the hearsay bar—protection against problems of sincerity, perception, articulation, and memory[282]—were implicated. Perhaps articulation, that is, exactly what he meant by the statement, could be called into question. Still, it is safe to assume that in trial testimony Phelps would have been eager to explain what he meant, and, significantly, it was not the out of court character of the statement the court found objectionable.

Most significant of all, perhaps, Rule 701 was intended more as a rule of inclusion than one of exclusion. Central to the reasoning behind the rule was recognition of the "'practical impossibility' of distinguishing fact from opinion."[283] The point was to end the exclusion of

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hearsay as out of court statements offered to prove the matter asserted. *See* HAW. RULE EVID. 801. Both approaches are valid, and Hawaii does recognize the special character of admissions. *See* HAW. R. EVID. 803 (1980 commentary), *reproduced in* BOWMAN, *supra* note 272, at 329.

[277] HAW. R. EVID. 803 (1980 commentary); BOWMAN, *supra* note 272, at 329; 2 MCCORMICK, *supra* note 272, § 254, at 141; Kekua v. Kaiser Foundation Hospital, 61 Haw. 208, 217 n.4, 601 P.2d 364, 371 n.4 (1979) (citing EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 265-66 (4th ed. 1963)).

[278] Henderson v. Professional Coatings Corp., 72 Haw. 387, 405, 819 P.2d 84, 95 (1991).

[279] Kekua v. Kaiser Foundation Hospital, 61 Haw. 208, 601 P.2d 364 (1979).

[280] *Id.* at 217, 601 P.2d at 371. Indeed, the statement should have been admissible to show not only Phelps state of mind but the facts stated: McLean's alcoholism and the frequency of his drinking. Shea v. City & County of Honolulu, 67 Haw. 499, 507, 692 P.2d 1158, 1165 (1985).

[281] *Id.* at 216 n.3, 601 P.2d at 370 n.3 (emphasis added).

[282] *See* BOWMAN, *supra* note 272, § 801-2, at 305.

[283] HAW. R. EVID. 701 (1980 commentary), *reproduced in* BOWMAN, *supra* note 272, at 276.

relevant, probative evidence by arbitrary distinctions between fact and opinion, and to facilitate the presentation of testimony by witnesses who otherwise would be hard pressed to separate opinion from the facts on which it was based.

2. Character in issue

Further, in negligent entrustment, the entrustee's character is an essential element of the claim,[284] making Hawaii Rule of Evidence 405 applicable.[285] The rule specifically provides for character to be proved by opinion.[286] Though the court held there was no cause of action for negligent entrustment in this case, the substance of the claim under at least one theory of general negligence—not incidentally, the one on which the court based its general negligence decision[287]—remained an assertion that the act of entrusting the vehicle to McLean was negligent. Thus, character remained in issue—although, arguably, a different trait of character was in issue: McLean's tendency to behave carelessly relative to his responsibilities as opposed to his propensity to drive unsafely.

3. Statistics

The court also found the "statistics" in Phelps's testimony ("990 out of 1,000 days") wanting for lack of foundational evidence.[288] An

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[284] *See* advisory committee's note to FED R. EVID. 404; 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 404-10 (1992) [hereinafter WEINSTEIN]; BOWMAN, *supra* note 272, § 404-2A, at 103. Note that Rule 404's exclusion of character evidence offered to prove action in conformity therewith is not applicable because character itself and not action on the occasion in question is the issue. *See also* WEINSTEIN, *supra*, at 404-131, 405-52.

[285] HAW. R. EVID. 405 provides:

> Methods of proving character. (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
>
> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of the person's conduct.

HAW. R. EVID. 405.

[286] *Id.*

[287] 72 Haw. at 403, 819 P.2d at 94. At no point in its discussion of general negligence did the court consider anything other than McLean's characteristics as a possible ground for negligence. *Id.* at 399-403, 819 P.2d at 92-94.

[288] *Id.* at 401, 819 P.2d at 92-93.

assertion of this sort savors more of advocacy than jurisprudence, particularly considering its implication as a rule: that any testimony with numerical content might be inadmissible unless a foundation is laid. It also fails to recognize that this particular phraseology could be considered a figure of speech designed to convey both a sense of proportion and the extent of the observations upon which the proportion is based. Further, treating lack of foundation for the "statistics" as significant assumes alcoholism is a fact of consequence, that is, a fact to be proven or not by the "statistics." This in turn assumes that plaintiff was arguing that (1) McLean was an alcoholic and (2) alcoholics are known to act unreasonably, therefore (3) Phelps knew or should have known that McLean was prone to act unreasonably. As discussed elsewhere,[289] it is by no means clear that this was Henderson's argument. Moreover, there is no foundational requirement for statistical evidence outside[290] the general requirement of personal knowledge[291] or expert testimony using statistics to support a hypothesis.[292]

4. Personal knowledge

The court's reference to Phelps's opinions as "without any foundational evidence"[293] may be accepted as a reference to the personal knowledge requirement of Rule 701,[294] even though it is not possible

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[289] *See infra* notes 304-306, 362-363 and accompanying text.

[290] *See* BOWMAN, *supra* note 272, § 12.1(4), at 407-08 (discussing objection for "lack of foundation").

[291] HAW. R. EVID. 602, which reads:

> Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

HAW. R. EVID. 602.

[292] HAW. R. EVID. 702 provides for the introduction of "scientific, technical, or other specialized knowledge" by "a witness qualified as an expert" if it "will assist the trier of fact." HAW. R. EVID. 703 deals with the type of "facts or data" upon which an expert can base an opinion given in court. HAW. R. EVID. 705 simply requires disclosure of the facts or data underlying an expert opinion.

[293] 72 Haw. at 401, 819 P.2d at 93.

[294] Rule 701 requires that lay opinions be "rationally based on the perception of the witness." HAW. R. EVID. 701, set out in full *supra* note 270. This is a requirement of "firsthand," *id.* (1980 commentary), *reproduced in* BOWMAN, *supra* note 272, at 275, or personal, knowledge, *id.* § 701-2, at 276.

for the court to have seriously argued that Phelps's references to McLean's drinking habits were based on anything other than personal knowledge. Further, the fact that the statement was an admission[295] arguably makes the personal knowledge requirement inapplicable. The Advisory Committee on the Proposed Federal Rules of Evidence observed that admissions have "enjoyed" "freedom . . . from . . . the rule requiring firsthand knowledge," to the "apparently prevalent satisfaction" of bench and bar.[296] The Hawaii Supreme Court has stated the same position.[297] In any event, on appeal from summary judgment, given, as in *Henderson*, evidence from which personal knowledge can be inferred[298] and absent anything in the record demonstrating the contrary, an appellate court ordinarily would presume the offering party can establish the necessary foundation at trial.[299] Indeed, if on the evidence reasonable persons could differ regarding the presence of personal knowledge, the question is for the jury.[300] Alternatively, the court could have had Rule 701's helpfulness prong in mind. Here too, it is difficult to find a peg on which the court could have hung its argument.

5. Helpfulness

The rule requires that opinion or inference be "helpful to . . . the determination of a fact in issue."[301] Helpfulness would appear to include

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[295] *See supra* notes 274-282 and accompanying text.

[296] 28 U.S.C. Federal Rules of Evidence (Rule 801), at 138 (1984); Mahlandt v. Wild Canid Survival & Research Ctr., 588 F.2d 626, 631 (1978).

[297] Kekua v. Kaiser Foundation Hospital, 61 Haw. 208, 216 n.3, 601 P.2d 364, 370 n.3 (1979) (citing WEINSTEIN, *supra* note 284, ¶ 801(d)(2)[01] (1977)).

[298] *See supra* note 14 and accompanying text; consider also the fact that Phelps said that McLean drank 990 out of 1,000 days rather than 9 out of 10 or 99 out of 100, *supra* notes 288-289 and accompanying text, as an additional element in the inferential chain. *See also infra* note 334.

[299] On a motion for summary judgment, all facts in the record must be viewed in the light most favorable to the nonmoving party, Rodriguez v. Nishiki, 65 Haw. 430, 438, 653 P.2d 1145, 1151 (1982), and all inferences must be drawn in favor of the nonmoving party. Lau v. Bautista, 61 Haw. 144, 147, 598 P.2d 161, 163 (1979); City & County of Honolulu v. Toyama, 61 Haw. 156, 158, 598 P.2d 168, 171 (1979). Every discernable theory must be considered. Abraham v. S.E. Onorato Garages, 50 Haw. 628, 632, 446 P.2d 821, 825 (1968); Giuliani v. Chuck, 1 Haw. App. 379, 383, 620 P.2d 733, 736 (1980).

[300] HAW. R. EVID. 602 (1980 commentary), *reproduced in*, BOWMAN, *supra* 272, at 206.

[301] HAW. R. EVID. 701, set out in full *supra* note 270.

elements of need, probative value, and capacity to facilitate understanding of unusual or complex facts. If Phelps's state of mind was in issue, the evidence is very helpful. If the question was the risk that McLean would drink and drive and therefore was incompetent to be trusted with a vehicle, the evidence is also helpful to determining the issue, especially in view of the apparent paucity of other evidence. Its probative value can be disputed, but defense counsel would have every opportunity to examine Phelps and bring out any limitations in his knowledge of McLean's habits and abilities.[302] Thereafter, weighing the evidence would be well within the competence—and traditional function—of the jury. If the putative fact of consequence was whether McLean actually was an alcoholic or not, then, in view of the court's ruling irresponsibility an impermissible inference from alcoholism,[303] the evidence was simply irrelevant and there would have been no need to invoke Rule 701.

6. *Identifying the fact of consequence*

The court focused on language in plaintiff's brief that Phelps gave the vehicle to McLean "knowing that McLean was an alcoholic prone to act unreasonably,"[304] then stated: "Henderson offers no competent evidence to support this blatant assertion."[305] This statement itself could be considered a "blatant assertion" of sorts, since the court did not explain how it arrived at this conclusion. The statement that McLean was an alcoholic prone to act unreasonably is subject to more than one interpretation, and what evidence might be missing (if any) depends on what construction it is given.

It could be construed as meaning McLean was an alcoholic *and* prone to act unreasonably or, as the court apparently viewed it, as meaning McLean was an alcoholic *and as such* prone to act unreasonably.[306] A third construction is the most direct: that the statement

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[302] *See* BOWMAN, *supra* note 272, § 701-2, at 276.

[303] *See infra* notes 329-350 and accompanying text.

[304] 72 Haw. at 400, 819 P.2d at 92.

[305] *Id.*

[306] Other constructions are also possible. For example, the statement could be shorthand for the following inferential chain. Defendant considers McLean "an alcoholic who drinks 990 out of 1,000 days." Defendant is basically right, and McLean drinks heavily almost every day. Thus, there is a high risk that McLean will drink heavily while in possession of the automobile if it is entrusted to him, particularly in

meant literally what it said, and the fact of consequence was knowledge. This construction in many ways is the most sensible, given that McLean was prone to unreasonable conduct—and he did in fact act unreasonably in the events under consideration. Knowledge thus could be inferred from the fact that Phelps made the statement.

Under the first construction, alcoholism per se is irrelevant and potentially prejudicial but evidence of a tendency to unreasonable behavior of which Phelps knew or should have known would be highly relevant. Although one might expect habitual drinking and driving to be evidence of this sort, and probably continues to be so, the court held such evidence insufficient absent other evidence such as defendant's driving record, alcohol tolerance, behavior under the influence, and the like.[307]

If the statement is seen as asserting that McLean was an alcoholic and consequently prone to unreasonable behavior, the missing evidence would be (1) expert testimony as to McLean's alcoholism (as the court appears to be saying when Phelps testimony regarding McLean's drinking habits is deemed incompetent as lay opinion testimony), and (2) expert support for the proposition that alcoholics act unreasonably. On this later construction, however, missing evidence is not really the problem, in view of the court's rejection as a matter of law that any greater tendency of alcoholics to act unreasonably compared to the general population is sufficient to give rise to a duty not to entrust an automobile to an alcoholic.[308]

7. Unfair prejudice

The court also indicated that it was rejecting this evidence on Hawaii Rule of Evidence 403[309] grounds—that the risk of unfair prejudice or

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view of the other facts regarding the time and purpose of borrowing the vehicle. Drinking heavily increases the danger of impairment, and impairment increases the danger of accidents and harm to others. Therefore, Phelps was negligent in entrusting the vehicle to McLean. Further, people who have been drinking heavily are more likely to turn vehicles in their control over to others. Given the other facts, it was especially likely that McLean would turn the vehicle over to Hughes. Therefore, Phelps's negligence was compounded.

[307] 72 Haw. at 402, 819 P.2d at 93; *see also infra* text accompanying notes 335, 354-355.

[308] See *infra* notes 329-350 and accompanying text.

[309] HAW R. EVID. 403 reads:

misleading the jury outweighed probative value.[310] Such decisions are committed to the sound discretion of the trial court judge. Yet the trial court judge in granting summary judgment provided no discussion of the state of the evidence.[311] There was, therefore, no evidence that the decision to grant summary judgment was based on a determination that this evidence would not be admissible at trial.

The court provided little discussion in support of its conclusion and it is difficult to speculate since the probative value of this particular evidence varies depending on how plaintiff's argument is framed. If Phelps's state of mind is the issue, the evidence is highly probative and reliable. If the question is McLean's drinking habits, the value is reduced but still significant. It is at its weakest when offered to prove the fact of McLean's alcoholism. All of these are bolstered by Henderson's obvious need for the evidence. The prejudice side is easily overstated, given the availability of a Rule 105 limiting instruction.[312]

The court's finding of unfair prejudice and danger of misleading the jury substantially outweighing probative value is directly contrary to prior holdings in *Kaeo*[313] and *Loevsky*.[314] In *Kaeo*, the trial judge had excluded any evidence that the driver had been in a drinking establishment and drank four beers that afternoon, on the grounds that this would be unduly prejudicial in view of prevailing public attitudes toward drinking and driving. The supreme court rejected this argument, holding that a jury would be entitled to infer negligence, despite the minimal evidence of alcohol consumption, given the effects of even small amounts of alcohol.[315] Similarly, in *Loevsky*, the court upheld

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> Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

HAW. R. EVID. 403.

[310] 72 Haw. at 401, 819 P.2d at 93.

[311] *See supra* note 30 and accompanying text.

[312] HAW. R. EVID. 105 states in relevant part.

> Limited admissibility. When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

HAW. R. EVID. 105.

[313] Kaeo v. Davis, 68 Haw. 447, 719 P.2d 387 (1986).

[314] Loevsky v. Carter, 70 Haw. 419, 773 P.2d 1120 (1989).

[315] *See supra* notes 154-166 and accompanying text.

admission of evidence of alcohol consumption against an unfair prejudice objection, even though none of the contemporaneous reports or observations gave any indication of intoxication.[316]

Finally, the Rule 403 balance struck by the court stands in striking contrast to the subsequent decision in *Klafta v. State*.[317] Klafta was convicted of attempted murder in the abandonment of her 16 month old daughter and appealed on the grounds that the admission of certain evidence violated Rule 403 and deprived her of a fair trial. When found, the infant was "dehydrated, dirty, with dirt in her mouth, numerous bruises, and infested with maggots which were eating her."[318] Maggots were recovered from her diaper.[319] The challenged evidence, which Klafta contended was unfairly prejudicial and needlessly cumulative,[320] included several nude, color photographs of the infant showing "open red sores" and "red craters" in her vaginal and buttock area, depicting her naked body eaten by maggots, repetitive testimony by the doctors who treated the child (during which the graphic photographs were again passed to the jury), two vials of maggots, and the testimony of an entomologist on the "life cycle of a fly," complete with color slides of larva under magnification to show the incisors in the mouth used to burrow into flesh.[321] The court rejected Klafta's assertion of unfair prejudice, stating, "Probative evidence always 'prejudices' the party against whom it is offered since it tends to prove the case against that person."[322] Justice Wakatsuki dissented.[323]

Majority and dissent agreed the evidence was relevant to show Klafta's intent to cause the death of the child,[324] an essential element

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[316] *See supra* notes 167-180 and accompanying text.

[317] 73 Haw. 109, 831 P.2d 512 (1992).

[318] *Id.* at 112, 831 P.2d at 514.

[319] *Id.* at 113, 831 P.2d at 515.

[320] *Id.* at 114, 831 P.2d at 516.

[321] *Id.* at 126-27, 831 P.2d at 521.

[322] *Id.* at 115, 831 P.2d at 516.

[323] *Id.* at 125, 831 P.2d at 521.

[324] *Id.* at 114 (Padgett, J.), 126 (Wakatsuki, J.), 831 P.2d at 515-16 (Padgett, J.), 521 (Wakatsuki, J.). The dissent appears more to have conceded relevance, in order to focus on the Rule 403 issues, than to have decided it. *Id.* at 126, 831 P.2d at 521 (stating the evidence "may have been relevant") (Wakatsuki, J.). A persuasive argument against relevance can be formulated, however. The issue for the jury to decide was whether she intended or knew her conduct in abandoning the baby would cause the death of another person. For the detailed evidence about maggots, including their life cycle, to be relevant to intent or knowledge to cause death, a maggot attack

of the offense of attempted murder.[325] On the issues of cumulativeness and prejudice, on the other hand, they were poles apart. The majority perceived no difficulty, dismissing the danger of unfair prejudice and asserting that this was not a case where the prosecution was "piling Pelion on Ossa."[326] Justice Wakatsuki correctly pointed out that Rule 403 requires that probative value be weighed against the danger of unfair prejudice.

The prosecution already had ample evidence to prove intent. The evidence showed the baby had been abandoned approximately 34 hours before she was found. Klafta lied, telling the divorced father that the infant had been taken by a social services agency and telling investigating officers that the child had been kidnapped three days earlier by two black men. The infant's six year old sister was present at the abandonment and pleaded with her mother to go back and get the baby the next day. Instead, Klafta instructed the girl to support the kidnapping and social services stories. An investigating officer observed a mongoose roughly 50 feet from where the infant was found. Testi-

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must be among the ways a reasonable person would anticipate that a child abandoned in an outdoor area might die. This is a doubtful premise. Death by exposure (hypothermia), falling, drowning, starvation, dehydration, getting hit by a car, and attack by wild animals, for example, are all expectable modes of death, but the possibility that maggot infestation of a living creature would occur to the consciousness of an ordinary person seems remote. Indeed, the very fact that the prosecution found it necessary to present entomological testimony demonstrates that this particular possibility is not within the common knowledge and understanding of lay persons. A counter to this argument is to take the position that the evidence is offered not to prove intent but the show that defendant's conduct was a substantial step toward the death of another person. Under this approach, the evidence is clearly relevant since it vividly demonstrates the risk to this particular helpless human being in the wild on this occasion and thus is "strongly corroborative of the defendant's criminal intent," although not in itself probative of intent. *See* HAW. REV. STAT. § 705-500(3) (Michie 1988). However, neither the court nor the prosecution appears to have relied on this argument.

[325] *See* HAW. REV. STAT. § 707-701.5 (Michie 1988) (defining second degree murder as "intentionally or knowingly caus[ing] the death of another person"), HAW. REV. STAT. § 705-500(2) (Michie 1988) ("When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if . . . [s]he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.").

[326] *Id.* at 116, 831 P.2d at 516. The allusion is to Greek mythology, in which the Aloads, sons of the sea god Poseidon, attempted to reach heaven by stacking Ossa, a mountain in eastern Thessaly, on Mt. Olympus and the Pelion mountains on Ossa. 8 THE NEW ENCYCLOPAEDIA BRITANNICA 1031 (15th ed. 1989).

mony of a police officer and one treating physician regarding the circumstances and condition in which the child was found clearly would have been proper. In addition, there was the testimony of six neighbors with knowledge of the baby's physical condition prior to the abandonment, who had observed Klafta with the baby, and who had observed Klafta after the abandonment but before the child was found.[327] Absent need, probative value is low, and the inflammatory nature and unnecessary cumulativeness of the challenged evidence therefore "substantially prejudiced Sharon Klafta's right to a fair trial," in Justice Wakatsuki's view.[328]

D. The Court Rejected Any Presumption that Alcoholics Act Unreasonably

The court resoundingly rejected the proposition that alcoholics have a propensity to behave unreasonably:[329]

> While the label of "heavy drinker" or "alcoholic" may conjure images of a person who is untrustworthy, has a devil-may-care attitude, or exhibits reckless, unruly, intoxicated or drunken behavior, it is common knowledge that many who may be considered heavy drinkers or may suffer from alcoholism are law abiding citizens who hold responsible positions in society. Many own their own vehicles, which they operate in a safe manner. Many are financially self-supporting and are otherwise respected members of our community. It is also common knowledge that the judgment and behavior of heavy drinkers or alcoholics may vary depending on the person's level of tolerance to alcohol, which may be dependent on such factors as body size, weight, and metabolism. The level of consumption may also vary when they drink at home, at work,

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[327] *Id.* at 112-13, 831 P.2d at 514-15.

[328] *Id.* at 127, 831 P.2d at 521.

[329] This proposition might be considered the analogue of the suggestion, implicitly dismissed by the court in *Onorato Garages*, that suspension of a driver's license for failure to submit proof of financial responsibility constituted evidence of a propensity to take cars without authorization and operate such cars in a reckless manner. *See supra* note 72 and accompanying text. Note, however, that to the extent negligent entrustment constitutes "character in issue," *see supra* note 284 and accompanying text, such evidence would be probative of a tendency to disregard rules and regulations directly relevant to the question of whether defendant knew or should have known he might disregard rules and regulations and take cars without authorization, thereby creating an increased risk of an automobile accident whether he operated the vehicle recklessly or not. The result likely would be the same, however, since without recklessness the increased probability of harm would probably be too small constitute a breach of duty.

or at social events. What may be heavy or excessive drinking to one may be de minimis to another. Thus, one cannot presume that "heavy drinker" or "alcoholic" equates to "unreasonable or irresponsible behavior."[330]

The Virginia supreme court took a strikingly different view in *Crowell v. Duncan*,[331] quoted by the dissent:[332]

> Incompetence, recklessness, and accident are so universally the sequel of drinking that an owner of an automobile is put on notice of what is likely to occur if he does not take active steps to prevent any one addicted

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[330] 72 Haw. at 401-02, 819 P.2d at 93. The court's language is reminiscent of the dissent of then Chief Justice of the California Supreme Court Rose Bird in People v. Watson, 637 P.2d 279 (Cal. 1981). The court held that homicide by a drunk driver could be prosecuted as second-degree murder rather than vehicular manslaughter with gross negligence and further held that despite evidence that the defendant was speeding through a *green* light at the time of the accident, the evidence was sufficient for finding the implied malice (actual awareness and disregard of the risk of death of another person) necessary to a conviction. Chief Justice Bird wrote:

> The fact that respondent was under the influence of alcohol made his driving more dangerous. A high percentage of accidents is caused by such drivers No one holds a brief for this type of activity. However, a rule should not be promulgated by this court that driving while under the influence of alcohol is sufficient to establish an act "likely to kill." Death or injury is not the probable result of driving while under the influence of alcohol. "Thousands, perhaps hundreds of thousands, of Californians each week reach home without accident despite their driving intoxicated."
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> . . .
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> The majority's reasoning also perpetuates the fiction that when a person drinks socially, he wilfully drinks to come under the influence of alcohol and with this knowledge drives home at a later time. This unfounded conclusion ignores social reality. "Typically a person sets out to drink without becoming intoxicated, and because alcohol distorts judgment, he overrates his capacity, and misjudges his driving ability after drinking too much."

637 P.2d at 288-89 (internal citations and brackets omitted). Chief Justice Bird drew from the dissent of Justice Clark in Taylor v. Superior Court of Los Angeles County, 598 P.2d 854 (Cal. 1979), in which the Supreme Court of California approved the finding of "malice" necessary to award punitive damages where a person, knowing he must later drive, drinks to the point of intoxication. Notably, the California legislature in 1983 specifically endorsed the *Watson* holding, thus rejecting (at least implicitly) Chief Justice Bird's analysis. *See* CAL. PENAL CODE § 191.5(d) (West 1988). In any event, an alcoholic who drinks nearly every day and regularly drives after drinking would not appear to be the typical person Chief Justice Bird had in mind.

[331] 134 S.E. 576 (Va. 1926).

[332] 72 Haw. at 408, 819 P.2d at 96.

> to drinking from driving it. If he fails in the performance of this duty, he should suffer the consequences of his neglect.[333]

To assess the viability of an alcoholics act unreasonably theory, the question is not whether alcoholics are more prone than nonalcoholics to act unreasonably, but whether this putative tendency is itself sufficient to give rise to a duty.

The court criticized the lack of evidence that Phelps "had ever observed McLean in an intoxicated condition"[334] or that he knew McLean "act[ed] negligently or recklessly whenever he drank."[335] This criticism, however, neglects the fact that the issue is not merely what Phelps knew but what he should have known. In other words, an employer who knows or believes the person to whom he is entrusting a vehicle is a heavy drinker, "an alcoholic who drinks 990 out of 1,000 days," who intends to go party and drink with other employees, might have a duty to investigate and take precautionary measures. Certainly this should have presented a question of standard of conduct for the jury. It also neglects the fact that Phelps statements about McLean's drinking habits—statements which if not directly against interest clearly were not self-serving—by their very nature could support an inference

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[333] 143 S.E. at 582.

[334] Apparently this evidence must be explicit testimony, since the court makes this statement despite evidence that the crew regularly drank together, see *supra* note 14 and accompanying text, which could support an inference that Phelps had observed McLean in an intoxicated condition. However, if the problem was the foundational requirement of personal knowledge, see *supra* notes 270, 291, 294, it may be noted that this would normally be dealt with by an objection at trial, at which point there would be an opportunity to elicit testimony on that point. *Cf.* BOWMAN, *supra* note 272, §§ 602-2C to 602-3A, at 209-10; *id.* § 701-2, at 276. Requiring this evidence to appear in pre-trial depositions adds a new dimension to both pre-trial and summary judgment practice. In addition, the court's holding would seem to fly in the face of the rule 602 commentary, stating that the personal knowledge requirement is "a specialized application of Rule 104(b)[,]" under which the ultimate decision is by the jury, and the "preliminary determination [by the judge] . . . need not be explicit but may be implied from the witness' testimony." HAW. R. EVID. 602 (1980 commentary), *reproduced in*, BOWMAN, *supra* note 272, at 206. *See also* discussion *supra* notes 293-300 and accompanying text.

> The dissent's view of the evidence reflected in the record was strikingly different: Phelps and McLean had known each other for a considerable period of time, had worked together, and had drunk together. Phelps had had ample opportunity to observe McLean . . .

72 Haw. at 407, 819 P.2d at 95.

[335] 72 Haw. at 401, 819 P.2d at 93.

that Phelps knew McLean was prone to act unreasonably, an inference that does not depend in any way on an assumption that alcoholics in general act unreasonably. What reasonably can be inferred need not be proved by direct evidence.[336]

E. The Court Discerned No Grounds For Liability Under Principles of General Negligence

In its assessment of Henderson's case on a general negligence theory, the court failed to recognize the differing uses of foreseeability in the two contexts—breach of duty and causation. Concluding his discussion of general negligence Justice Moon stated, "the facts as presented in this case support only one reasonable conclusion, that is, it was not reasonably foreseeable to Phelps that allowing McLean to use the rental car would pose an unreasonable risk of harm."[337] The dissent framed the question in different words, as being whether or not under the circumstances Phelps acted as a reasonable person when he entrusted the vehicle to McLean,[338] but the issue raised was the same.[339]

Both statements are clear references to the principal negligence question—duty and breach—to which the Hand formula applies and the task is to aggregate all the foreseeable risks. But the court opened its general negligence discussion on a quite different tack. While purporting to "accept Henderson's position that the issue is . . . foreseeability,"[340] Justice Moon proceeded to describe the foreseeability in question as "whether Phelps knew or should have known at the time he loaned the vehicle to McLean, that McLean would act unrea-

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[336] Kaeo v. Davis, 68 Haw. 447, 453, 719 P.2d 387, 391 (1986) (holding jury could infer negligent impairment from "four beers"); Bidar v. Amfac, Inc., 66 Haw. 547, 554, 669 P.2d 154, 160 (1983) (reasonable minds could draw differing inferences); McKenna v. Volkswagenwerk Aktiengesellschaft, 57 Haw. 460, 466, 558 P.2d 1018, 1023 (1977) (any rational interpretation of the evidence); Mitchell v. Branch, 45 Haw. 128, 139, 363 P.2d 969, 977 (1961) (same); 2 McCormick, *supra* note 272, § 338, at 433, 435-36; Bowman, *supra* note 272, § 401-2B(2), at 72.

[337] *Id.* at 403, 819 P.2d at 94.

[338] *Id.* at 406-07, 819 P.2d at 95.

[339] The majority's language, "not reasonably foreseeable to Phelps," could be read as stating a subjective standard. But, despite its insistence on other evidence of knowledge chargeable to Phelps, it is improbable the court intended that construction, given the central position in traditional tort law occupied by the objective "reasonable person" standard.

[340] *Id.* at 399-400, 819 P.2d at 92.

sonably by loaning the vehicle to persons such as Hughes, who in turn would negligently operate the vehicle and cause injury to others."[341]

That specific question refers to only one of the risks involved in lending the vehicle and therefore cannot supply the answer to the central question of whether the total risk of harm was unreasonable (and, hence, the conduct negligent). The function of foreseeability with respect to such highly specific actual conduct is to determine causation issues. By conflating the questions of duty-breach and causation, the court was able, first, to understate the risk (by focusing on the one thing that actually happened) and, second, to avoid both established doctrine and Hawai'i precedent, by not mentioning causation.

Penultimate to its conclusion that an unreasonable risk of harm was not foreseeable, the court asserted that the minority, in arguing that "Phelps knew McLean 'was likely to become intoxicated[,]'" "seemingly misunderstands the issue."[342] "The issue," maintained the court, "is whether he was likely to become intoxicated to the point of acting unreasonably or irresponsibly."[343] The legal standard, however, is not whether the risk is "likely" but whether it is unreasonable.[344]

In assessing unreasonable risk, the risks a person is required to guard against are those "which society, in general, considers sufficiently great to demand preventive measures."[345] The probability of a harmful event need not be great if the gravity of the harm that would result is substantial.[346] Determination of the unreasonableness of a risk thus requires that the probability and gravity of the risk be balanced against the utility of the conduct.[347] As Prosser sums it up, the assessment requires "balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect[.]"[348]

The court explicated no assessment of the risk of harm involved in the entrustment, aside from its apparent taking of judicial notice of the putative fact that many alcoholics drive safely. It also did not consider the extremely grave consequences of alcohol-related traffic

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[341] *Id.* at 400, 819 P.2d at 92.
[342] *Id.* at 403, 819 P.2d at 93.
[343] *Id.*
[344] KEETON et al., *supra* note 32, § 31, at 169-73.
[345] *Id.* at 170.
[346] *Id.* at 171.
[347] *Id.*
[348] *Id.* at 173.

accidents, regardless of the probability that any given drinker will be involved in an accident. Most critical of all, the court neglected to make the required utility assessment. The social value of the interest threatened, safe highways, is very high. In contrast, the value of the interest protected, the company's unbridled freedom to lend vehicles to employees for recreational use, was zero, a fact made clear by the court's respondeat superior holding that the employees' use of the car involved no benefit to Phelps and Professional Coatings.[349]

To the extent that McLean was an alcoholic or heavy drinker, and to the extent he had, as a consequence or otherwise, a propensity to act unreasonably or irresponsibly with respect to his use or supervision of an automobile in his care, the law required that Phelps take account of this risk in his decision to entrust the vehicle to McLean. But this was only one element of the risk involved in the entrustment. As the dissent recognized, other aspects of the factual context enhanced the risk.[350]

The majority perceived insufficient risk in the evidence of drinking habits and irresponsibility to demand that Phelps refuse use of the vehicle, but in so doing neglected to consider that the facts as a whole strongly suggested a probability not only that drinking and driving would be mixed, but that others besides McLean, and Hughes in particular, would drive the vehicle. Thus, even if the sole risk relevant to determine whether or not the entrustment was negligent was the risk McLean would allow another to drive, the court underestimated the risk.

The general rule is that one who fails to act as a reasonable prudent person would under the circumstances is negligent[351] and responsible for the natural and probable consequences of his or her acts.[352] Therefore, the question could be posed: would a reasonable prudent person entrust an automobile to a person he or she knew or believed was an alcoholic who drank 990 out of 1,000 days? Even if this question is answered in the negative, a further question might remain whether the entrustee's negligent entrustment to another who actually causes the injury is a natural and probable consequence of the original negligent conduct. In the abstract, it would seem not, but on the facts of the

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[349] *See supra* notes 228-241 and accompanying text.

[350] Henderson v. Professional Coatings Corp., 72 Haw. 387, 407, 819 P.2d 84, 95 (1991), quoted *infra* text accompanying note 365.

[351] KEETON et al. *supra* note 32, § 32, at 174, § 37, at 237.

[352] *See id.* § 43, at 282.

case, where the person who drove the car and caused the injuries had in fact operated the vehicle the previous day, such reentrustment seems entirely foreseeable. Thus, even if the law required the precise manner in which the injury occurred to be foreseeable, a reasonable juror could have so found on the facts of *Henderson*.

Moreover, the language, "natural and probable consequences," is ambiguous and readily becomes a source of confusion. It simply means, as Prosser notes, foreseeability. In other words, the consequences must be "normal, not extraordinary, not surprising in the light of ordinary experience," or those "within the scope of the original risk."[353] In *Henderson*, that risk was the danger that another user of the highway would be injured by an intoxicated driver of the company vehicle.

The court noted the dearth of "evidence that McLean was involved in any accidents, automobile or otherwise," or that he "was ever involved in any drunk driving incidents, or exhibited drunken or negligent behavior of any kind at any time, on or off the job," during the period of his association with Professional Coatings.[354] The court then declined to "speculat[e]" on the result if evidence had been presented regarding "Phelps knowledge of McLean's behavior when he drank, his level of tolerance to alcohol, [or] his driving or accident history," thus suggesting that such evidence might have been sufficient to create a genuine issue of material fact regarding whether "Phelps knew or should have known that McLean was 'prone to act unreasonably or irresponsibly.'"[355]

The court did not explain, however, why this sort of supplemental evidence was needed when Phelps's own statement both speaking directly to his knowledge and belief, and from which his knowledge and belief could be inferred, was available. Rather, the court was unwilling to consider evidence of Phelps's state of mind, characterizing it variously as irrelevant,[356] prejudicial or misleading,[357] and as inadmissible lay opinion testimony.[358]

The court did not discuss it, but presumably comparable evidence of driving history and behavioral patterns when drinking also would

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[353] *Id.*

[354] *Id.* at 402, 819 P.2d at 93.

[355] *Id.* The dissent posed the question differently, as whether, in entrusting the automobile, Phelps acted as a reasonable person would under the circumstances. *Id.* at 406-07, 819 P.2d at 95.

[356] 72 Haw. at 399, 819 P.2d at 91.

[357] *Id.* at 401, 819 P.2d at 93.

[358] *Id.*

be appropriate to demonstrate that Hughes was likely to act unreasonably or irresponsibly, and necessary to an argument that Phelps was negligent in entrusting the vehicle because he knew or should have known that Hughes was likely to drive.

But the court did not address this theory of general negligence. It simply acknowledged that the dissent relied on the fact that Hughes had driven the car the day before the accident[359] and did not deny that the dissent's suggestion that Phelps knew Hughes would probably drive[360] was supported by evidence in the record. Instead, the court dismissed the minority argument that "Phelps['s] kn[o]w[ledge] that McLean 'was likely to become intoxicated'" created a genuine issue of material fact regarding Phelps's negligence, because it found the term intoxicated to be "vague and ambiguous" and hence indicative of an unreasonable presumption of irresponsible propensities in the same manner as "heavy drinker" or "alcoholic."[361]

The court's conclusion that "[t]he minority's determination that there exists a genuine issue of material fact in this case is premised on the acceptance of Phelps's conclusions and opinions"[362] is correct only if liability depends upon the truth or accuracy of those conclusions and opinions. In fact, liability did not depend on whether McLean was indeed an alcoholic or actually drank 990 out of 1,000 days. Liability depended on whether Phelps knew or should have known that entrustment of the vehicle to McLean under the circumstances would pose an unreasonable risk of harm.

One way to show that might be the "alcoholics act unreasonably" line of reasoning, which does depend on the validity of Phelps's conclusions and opinions and which the court thoroughly and properly repudiated. Another way, however, is to show that Phelps knew or believed that McLean was prone to behave unreasonably, in which case it is the fact that Phelps held those opinions and conclusions that is significant rather than their validity.[363]

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[359] *Id.* at 402, 819 P.2d at 93.

[360] *Id.* at 405, 407, 414-15, 819 P.2d at 94, 95, 98-99.

[361] *Id.* at 403, 819 P.2d at 93. Ironically, the court itself speaks of "intoxicated or drunken behavior" with apparent meaning in its rejection of a tendency toward unreasonable or irresponsible behavior as a reasonable inference from the mere fact that a person is a heavy drinker or alcoholic. See *supra* note 330 and accompanying text.

[362] *Id.* at 403, 819 P.2d at 93.

[363] Under this approach to liability, it might be argued that plaintiff should show

Fundamentally disagreeing with the court's position that not only must "the lender kn[o]w that the individual to whom the automobile was lent had . . . driven while intoxicated, but that that individual had driven negligently while intoxicated,"[364] the dissent succinctly set forth its view of the effect of the court's holding:

> The majority's opinion lays down, as the law of Hawaii, that turning over an automobile to a known heavy drinker, who the lender believed drank 990 days out of 1,000, to go to a week-end party (from which they would have to return since their work started the next day) with a group of fellow workers, all of whom were known to drink together, and any of whom might drive the automobile, is not evidence of negligence on the part of the person who turned over the automobile.[365]

In contrast, the dissent believed a proper rule would be to impose liability for all injuries resulting from an entrustment of a motor vehicle to a habitual drinker, unless explained or justified,[366] a position both consistent with the policy of the dram shop cases and well-grounded in available precedent.[367]

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that the entrustee in fact was inclined toward negligent conduct, in other words, that the incident was not a fluke. The court's statement that "[t]he issue is not whether McLean was likely to become intoxicated" but "whether he was likely to become intoxicated to the point of acting unreasonably or irresponsibly," *id* at 403, 819 P.2d at 93, could perhaps be read as indicating an absence of such evidence. Coming as it does, however, only a few lines after stating the view that the minority's opinion depended exclusively on acceptance of Phelps's opinions and conclusions renders this unlikely. If this was the point, the court's opinion at the very least would have profited from greater clarity.

[364] *Id.* at 407, 819 P.2d at 95.

[365] 72 Haw. at 407, 819 P.2d at 95.

[366] *Id.* at. 407-10, 819 P.2d at 95-96. The dissent cited numerous authorities in support of such a rule: V.L. Nicholson Construction Co. v. Lane, 150 S.W.2d 1069, 1070 (1941) ("The great weight of authority is that an owner who entrusts his automobile to an individual addicted to habits of intoxication is liable for damage caused by such individual becoming intoxicated and operating the automobile negligently while in that condition."); Crowell v. Duncan, 134 S.E. 576, 582, quoted *supra* text accompanying note ; Murray v. Pasotex Pipe Line Co., 161 F.2d 5, 7 (5th Cir. 1947) ("While the record discloses no evidence that the appellee knew that Chenoweth had previously driven while intoxicated, . . . appellee's liability could be predicated upon appellee's reasonable anticipation of Chenoweth's driving while drunk . . . duty . . . to exercise reasonable care to see to it that [he] to whom it intrusted its car(s) . . . [is a] competent sober driver(s)[]"); 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 646, at 877 (1980) ("The test of the owner's liability is . . . whether the person to whom he entrusted the motor vehicle . . . was, to the knowledge of the owner, addicted to habits of intoxication . . ").

[367] *See supra* note 250; *see also* RESTATEMENT (SECOND) OF TORTS § 442B (1965).

Unfortunately, the dissent apparently overlooked the fact that what befell Mrs. Henderson was exactly the type of injury risked if McLean had been driving, thus effectively conceding the foreseeability of Hughes driving and doing so negligently to be in issue.[368] Although reaching a different result from the majority on this question, the dissent's approach left an appearance of resting on a near conclusive presumption of liability, rejected by the majority, where a vehicle is entrusted to a habitual drinker. This allowed the majority to focus on the viability of an alleged relationship between McLean's drinking habits and his allowing Hughes to drive rather than the real issue of the foreseeability of an alcohol-related accident with the vehicle.

The court apparently believed that plaintiff's argument that "Phelps knew or should have known . . . McLean would permit Hughes to drive" was solely "based on McLean's drinking habits."[369] Plaintiff based a significant part of her argument on the proposition that employer Phelps knew employee McLean was "an alcoholic prone to act unreasonably."[370] This line of reasoning was consistent with her negligent entrustment theory but was vulnerable as a foundation for an argument under general negligence. While the court read plaintiff's brief liberally to assert general negligence,[371] it made no effort to reformulate plaintiff's argument (grounded in the same facts) to fit the alternative theory.[372] Focusing on the entrustment to the individual McLean and testing whether that entrustment was negligent based on the extent to which alcoholism is a reliable predictor of behavior posing an unreasonable risk of harm left plaintiff a tough row to hoe.

F. The Court Took A Relaxed Approach To Summary Judgment

Until now, the court generally precluded summary judgment in negligence cases whenever a possibility of conflicting inferences existed.[373] A high standard has likewise applied where state of mind is at

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[368] 72 Haw. at 410, 819 P.2d at 96-97.

[369] 72 Haw. at 399, 819 P.2d at 91.

[370] *Id.* at 400, 819 P.2d at 92.

[371] *Id.* at 399, 819 P.2d at 92.

[372] Some support for court's cursory look at a general negligence theory, although not cited, can be found in the statement in *Bertelmann* that a judgment will not ordinarily be reversed based on a theory not raised at trial unless justice so requires. 69 Haw. at 103 (citing Earl M. Jorgensen Co. v. Mark Construction, Inc., 56 Haw. 466, 540 P.2d 978 (1975)).

[373] Eric K. Yamamoto et al., *Summary Judgment at the Crossroads: The Impact of the* Celotex *Trilogy*, 12 U.H. L. Rev. 1, 15 (1990).

issue.[374] The *Henderson* court acknowledged that "[o]rdinarily, issues of negligence, including foreseeability, are not susceptible to summary adjudication."[375] Ordinarily the question on defendant's motion for summary judgment would be whether plaintiff can prove any set of facts giving rise to liability.

Plaintiff should not have to reveal her entire case in order to withstand summary judgment. Indeed, the United States Supreme Court, construing essentially the identical rule in the federal system, has specifically stated that the nonmoving party is not required to "produce evidence in a form that would be admissible at trial in order to avoid summary judgment."[376] By its pronouncement on evidence in this case,[377] the court appears to be taking a contrary direction and allowing summary judgment more readily than the federal judiciary. It is important to recognize the distinction between the form of evidence and showing sufficient evidence to present an issue for trial. The affidavits envisioned by Hawaii Rule of Civil Procedure 56, for example, constitute hearsay and hence are not admissible in form, but do amount to evidence demonstrating existence of a genuine issue for trial.

The majority began its explanation of why no genuine issue of material fact precluded summary judgment by quoting Hawaii Rule of Civil Procedure 56(c), then, alluding to the well-known rule that a party cannot avoid summary judgment by mere conclusory statements, cited a respected treatise for the apparent proposition that "conclusions" are inadequate evidence to block summary judgment. The stage set, the court pointed to Phelps's "conclusions" about McLean's drinking habits.[378] This artful juxtaposition allowed the court to insinuate that Henderson's evidence was in direct conflict with the rule, despite the fact the word "conclusions" appears nowhere in the rule.

The question, properly posed, was not only whether Phelps actually knew but whether he should have known the entrustment would pose an unreasonable risk of harm to others. Given the facts, the jury could reasonably have found that Phelps knew or should have known that any one of the employees, including Hughes, might drive the vehicle and that whoever drove was likely to mix drinking with driving. The

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[374] *Id.*

[375] 72 Haw. at 400, 819 P.2d at 92.

[376] Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (Rehnquist, J.).

[377] *See supra* notes 270-328 and accompanying text.

[378] 72 Haw. at 400-01, 819 P.2d at 92-93.

question then is what the requisite standard of care is under such circumstances.

As noted by the eminent jurist Oliver Wendell Holmes, "the general foundation of legal liability in blameworthiness[] [is] determined by the existing average standards of the community[.]"[379] As Holmes described the function of the jury:

> When . . . the standard of conduct, pure and simple, is submitted to the jury, . . . the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve [persons] taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.[380]

Is not the standard of care applicable to an employer who provides a vehicle to his employees for purely recreational use knowing they intend to drink and drive one involving "the existing average standards of the community" upon which it would be consummately appropriate to take the opinion of the jury? Apparently the court thought not.

The dissent strenuously disagreed with the court's holding that a showing that the lender of an automobile "knew that the individual to whom the automobile was lent had . . . driven while intoxicated" is insufficient and expressed grave concern that to withstand summary judgment an additional showing "that that individual had driven negligently while intoxicated" is now required to take the question before the jury.[381] It can be observed that the result in the dram shop cases might have been markedly different if the standard for liability had been not only that the shop owner served the intoxicated driver in violation of the statute but that at the time he served him, the shop owner knew or should have known that the individual served had previously driven negligently while intoxicated.

V. Impact

A. Mixing Issues or Limiting Duty Not to Facilitate Irresponsible Conduct of Others?

In *Henderson*, the court confused the question of the scope of coverage under an insurance policy with the issue of liability for negligent

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[379] Oliver Wendell Holmes, The Common Law 125 (1881).

[380] *Id.* at 123 (footnote omitted).

[381] 72 Haw. at 407, 819 P.2d at 95.

entrustment. In so doing, the court unwittingly illustrated the hazards of applying the rule from a case without thoughtful examination of the underlying factual context. Alternatively, *Henderson* can be read as a clear signal by the court, or at least Justice Moon, that it intends to limit the extent to which the law by threat of liability demands that persons regulate or control the conduct of others. While such a policy minimizes the extent to which employers, relatives, and others intrude upon individual freedom (or license), such a policy is clearly unsound when viewed from any of the purposes of tort liability.

From the standpoint of providing compensation to accident victims, the effect is to reduce the chances that the victim will ever recover the full amount of his or her damages. From the standpoint of deterring or preventing activity that involves an unreasonable risk of harm, it removes all incentive from a party that could have a significant role in furthering this objective. The facts of this case illustrate this point perfectly. An employer, conscious of the threat of tort liability, would be less likely to provide a vehicle to employees he knows probably will party, drink and drive. Free of the threat of liability, the employer most likely will provide the vehicle, no questions asked and no conditions imposed, with the expectation of benefiting from enhanced employee morale and satisfaction.

Rather than a technical form[382] dependent upon what specifically the entrustee did and did not do, one would expect the meaning of negligent entrustment to be that contained in the ordinary sense of the words, that is, that the entrustment was negligent. Then the question would be whether the conduct which gave rise to the injury was of the type that made the entrustment negligent, that is, was foreseeable in the legal sense.[383] Thus, one who entrusts a firearm to a child who in turn

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[382] Justice Moon himself has criticized the making of interpretations "in a hypertechnical manner, elevating form over substance." State v. Dow, 72 Haw. 56, 64, 806 P.2d 402, 406 (1991).

[383] 2 HARPER & JAMES, *supra* note 99, § 20.5, at 1136. In *Henderson*, at least two kinds of risk made the entrustment to McLean negligent: (1) that he would cause an accident himself and (2) that he would allow another to use the vehicle so that an accident results. Thus, the reentrustment would have been legally foreseeable as part of the package of risks even if the risk of its occurrence was not by itself sufficient to impose a duty of avoid the harm. Even in isolation, however, the risk of reentrustment and ensuing harm was sufficient to make the entrustment to McLean negligent. "The duty to take precautions against the negligence of others . . involves . . . the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care." KEETON et al., *supra* note 32 § 33, at 199.

gives it to another child who causes injury would be liable.[384] Under the Henderson specific cause of action formulation, however, such a person would not be liable,[385] at least not for negligent entrustment.

Henderson could, but shouldn't, be read for the proposition that there is no negligence if defendant assumed a set of circumstances that would constitute an unreasonable risk of harm unless the circumstances are proved actually to have been what defendant believed them to be.[386] In other words, mistake of fact should not become a new tort defense.

The court may have been concerned that any judgment in favor of Henderson would be paid by Professional Coatings' insurance or that

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Regardless of how small the risk that McLean would negligently entrust the vehicle to another, and the point is debatable, the magnitude of the possible harm and the de minimus burden of avoiding it combine to demand avoidance. The often serious nature of injuries resulting from automobile accidents cannot be contested, and no burden existed, since the company could simply refuse use of the vehicle, and, inasmuch as it gained nothing from the employees' use of the car, could lose nothing by refusing use.

[384] *See* KEETON et al., *supra* note 32, § 44, at 303. The entrustor would not, on the other hand, be liable for injuries caused if the child dropped the gun on someone's foot, since the risk that someone would be injured by the child dropping a heavy object (unlike the risk of an alcohol-related traffic accident in *Henderson*) was not one of the dangers that made the entrustment negligent. 2 HARPER & JAMES, *supra* note 99, § 20.5, at 1136-37; *see also* KEETON et al., *supra* note 32, § 43, at 283-84.

[385] Unless the child to whom the gun was entrusted personally caused the injuries.

[386] *Cf.* HAW. REV. STAT. § 705-500:

> Criminal attempt. (1) A person is guilty of an attempt to commit a crime if he:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be . . .

HAW. REV. STAT. § 705-500(1)(a) (1985). If fortuitous facts (those that differ from the defendant's belief at the time in such a way that an element of the crime is not made out) cannot save a person from responsibility in the criminal context, then *a fortiori* fortuitous facts should not save a person from responsibility in the context of the lesser tort sanction. More directly, it is senseless to say an individual acted as a reasonable, prudent person would simply because the actual facts turned out to be more favorable than he or she believed them to be.

A defendant is held liable for negligence grounded in his actual, correct knowledge even if that knowledge is fortuitous or the result of special training and an ordinary prudent person would not know. 2 HARPER & JAMES, *supra* note 99, § 16.5, at 907-08; KEETON et al., *supra* note 32, § 32, at 185. Between two defendants, one with correct knowledge of the prevailing facts and another who merely believed in the existence of such facts, it would be anomalous to hold the first liable because he knew (if he had thought about it) his conduct was irresponsible but excuse the second on grounds he merely thought his conduct was irresponsible. If the basis of liability is fault, i.e. culpable behavior, it is equally present in the either instance.

liability in this case would expose insurers to increased costs in other cases. If the court was in fact influenced by such considerations, it should have so stated.[387] Moreover, such considerations are properly a question of statutory insurance law[388] and regulation.[389] The issues to be addressed in that context include the ability of insurers to seek indemnification from the tortfeasor, the extent to which the insurer can recover from the insured through increased premiums, and the extent to which other consumers of commercial insurance will pay through increased premiums.[390]

It is unlikely *Henderson* presented any real threat of increased cost to other consumers, since the events involved were certainly within the insurer's preexisting risk assessment, on which current premiums are based. The fortuity of a break in the chain of negligent entrustment causation is of extremely low probability; hence any change in the risk assessment would be negligible. Even if the consequence of allowing liability in such cases would be to raise the cost of commercial insurance, the effect of denying liability is to redistribute wealth[391] from the victim to the beneficiaries of commercial enterprise.

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[387] Unless all elements of the true grounds of decision are stated explicitly, litigants are deprived of a reasoned explanation of the result, development and maintenance of a sound jurisprudence is impossible, and litigants through counsel, officers of the court, are denied the opportunity to participate in the process of the rational and orderly development of the law. Where decision-making is polycentric, involving many elements, as in the typical negligence action, there is a need for courts to focus argument. This is impossible if the true grounds of decision are unknown.

[388] *See* HAW. REV. STAT. tit. 24 (Michie 1988 & Supp. 1992).

[389] *See* HAW. REV. STAT. § 431:2-201(c)(1) (Michie 1988).

[390] The issues on the one hand fall in the province of the legislature, and on the other were not presented in *Henderson*—and are neither effectively, appropriately, nor adequately dealt with by indirection, an indirection with the untriffling consequence of possibly depriving faultless plaintiffs of compensation for their injuries.

[391] The loss of value (wealth) may be in the direct, pecuniary form of medical and related expenses, lost earnings, and the like, or the less tangible pain and suffering, loss of enjoyment of life, familial consortium, and so forth, which one can only crudely monetize. Some may be tempted to rationalize the result on the grounds that an employee denied use of the company car would nevertheless obtain a car by rental, the accident would still occur, and the plaintiff would be in the same position: only able to recover from direct tortfeasors. Such reasoning is at least speculative. Some deterrence can be expected if only for the reason that at least some employees compelled to make an out of pocket expenditure will decide to forego the planned activity. In any event, even if imposition of liability had no deterrent effect, that would be no reason for the employer to reap the benefits.

Further, any problem very possibly would better lend itself to private sector creative solutions (industry practices, contract policy language) and executive and legislative regulation and should not be permitted to undermine the deterrence and compensation functions of tort law. From an economic, allocative efficiency standpoint, liability represents an investment in highway safety. Any concern that liability would increase construction costs is likewise misplaced. Employers could avoid all risk of liability simply by refusing to lend vehicles to employees for recreational use. If the employer's rented cars were strictly confined to work use, and employees rented their own car and were involved in an accident, few would quarrel with a rule of no employer liability.

Another consideration which could have laid in the background of the court's reasoning is fear that a decision for Henderson might make ordinary citizens vulnerable to lawsuits for lending their cars to friends, relatives, or neighbors. This suggestion further illustrates the critical importance of bringing the supposed policy grounds for a decision forward for examination in the light. Upon scrutiny, this putative concern evaporates. First, the court could have foreclosed that possibility easily by finding a basis for liability in negligent failure to control. Second, a contrary result in *Henderson*, would have added nothing to the liability that already exists in appropriate cases.[392] And, lastly, in the hypothetical situation, the balancing of the interests involved, and the utility of the conduct threatened—there the general social relationships of ordinary citizens—likely might dictate a different result.[393]

From a policy perspective, the observation that many drinkers are responsible people and never have alcohol-related accidents, so persuasive to the majority, misses the point. The question was not whether habitual drinkers should be allowed to drive but whether the greater social value is their freedom to borrow cars or the safety of the person and property of others;[394] whether those who control a vehicle will

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[392] *See eg.*, ____ (cases imposing liability on owner of vehicle).

[393] *See eg.*, Johnston v. KFC National Management Co., 71 Haw. 229, 788 P.2d 159 (1990); Feliciano v. Waikiki Deep Water, Inc., 69 Haw. 605, 752 P.2d 1076 (1988), discussed *supra* text accompanying notes 199-202. *See generally* discussion *supra* notes ____ and accompanying text.

[394] Prosser states that the proper basis for determining the standard of conduct is "a risk-benefit form of analysis" involving a balancing risks and interests. KEETON et al., *supra* note 32, § 31, at 173. As discussed *supra* text accompanying notes 345-349, by this measure, persons such as Phelps and Professional Coatings should be held to the very highest standard of care, since the interest of the employer in providing a

entrust it to a known habitual drinker at their own peril or be immune from liability for the results except in the most egregious circumstances; whether the innocent victim or the person who, indifferent to the consequences, entrusts a vehicle to a known habitual drinker will be made to bear the loss.

While the court's rejection of any stereotyping of alcoholics as prone to act unreasonably is plainly correct, and its implicit concern about a rule of law that potentially could encourage or stimulate discrimination against alcoholics is commendable, the *Henderson* result is plainly wrong and should be corrected at the earliest opportunity. *Henderson* should be read primarily as rejecting the inequitable notion and holding that it would be improper to argue to a jury liability premised on alcoholism.

Driving under the influence is against the law.[395] Nevertheless, the court apparently held that one who entrusts a motor vehicle to another who drives drunk and causes injury is not negligent, absent evidence of prior drunk driving convictions or at least evidence that would support an inference that the entrustor knew or should have known the entrustee was likely to drink and drive with a blood alcohol level over the legal limit.[396] Mere knowledge that the entrustee had a habit of drinking and driving would not be enough. Further, there is no breach of duty even when (1) it is an employer entrusting the vehicle (2) for non-business recreational use (3) knowing the employees intend to drink and drive.

The court has held as a matter of law that an employer that provides a car to employees for purely recreational use is under no duty[397] to ensure that it is operated in a safe manner.[398] Indeed, no duty arises

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vehicle to employees approaches zero where, as held here by the court, *supra* note 236, such entrustment is not intended to serve or benefit the employer. Under such a high standard of care, the very act of entrusting a vehicle under circumstances where the employer knew or should have known the employee or employees would drink and drive would be negligent, giving rise to liability for any injuries resulting from such drinking and driving.

[395] *See* HAW. REV. STAT. § 291-4 (Michie 1991).

[396] Note, however, that this may not be enough. *See supra* notes 250, 181-185, 354-355, *infra* note 416.

[397] "When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability . . ." HOLMES, *supra* note 379, at 120-21.

[398] This is implicit in the court's framing of the appropriate foreseeability question as the foreseeability of whether McLean would entrust the vehicle to another incompetent driver. *See supra* notes 341, 369 and accompanying text; *see also supra* note 234.

even when the employer knows the employees intend to drink and drive. Mothers Against Drunk Driving (MADD) and others of like mind might find such a rule to "offend the conscience."[399] If the courts are to withhold the question of employer responsibility from juries, the subject would appear ripe for legislative correction.[400]

Where it not for the court's decision in this case, one might have thought that the entrustment of an automobile to a person knowing that that person had previously been convicted for drunk driving, rather than being the bare minimum necessary for liability, would have been grounds for punitive damages.[401]

B. Form and Process

By demonstrating its willingness to apply a discretionary evidentiary rule, absent any indication it was applied below, the court, ironically, encourages trial court judges to rule on motions without explanation, thus depriving litigants of one of the benefits of a judicial system—an explanation for the result. It also sends a clear message that summary

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[399] By holding that an employer has no responsibility when he knows his employees intend to use his car to drink and drive, the court in effect endorses and contributes to a social climate in which driving under the influence is okay. In contrast, employers concerned about potential liability would display attitudes and behavior that contribute to the solution of the problem, rather than acquiescing in its persistence. The question of responsibility when entrusting a vehicle where alcohol may be involved is not the same as the question of whether a drinker's conduct is negligent.

[400] *See* Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. (1962). Professor Keeton compares and discusses the relative competence of courts and legislatures in making major tort law policy changes. While he concludes that courts should play a creative role in the extension of tort law to meet modern needs, relying on the legislature to limit any overbroad effects of modifying outdated precedent, the principle is equally applicable in the other direction. Although political influence may be an impediment, the legislature is a proper vehicle for adjustment whenever the courts adopt too narrow a definition of responsibility in tort.

[401] In Hawaii, punitive damages are available where "the defendant has acted wantonly . . ., or where there has been . . . that entire want of care which would raise the presumption of a conscious indifference to consequences." Masaki v. General Motors Corp., 71 Haw. 1, 16-17, 780 P.2d 566, 575 (1989). *See also*, KEETON et al., *supra* note 32, § 31, at 169-70 ("As the probability of injury to another, apparent from the facts within the acting party's knowledge becomes greater, his conduct takes on more of the attributes of intent, . . . [resulting in] intermediate mental states . . . commonly called 'reckless,' 'wanton,' or even 'wilful.'"), § 34, at 212-13 (noting that such aggravated negligence "is held to justify an award of punitive damages" and referring, similarly to *Masaki*, to "conscious indifference to the consequences.").

judgment is in favor, and that efficiency—clearing court dockets—is given a higher place than other judicial values.

The greater tendency of the courts to rely on summary judgment increases the importance of the pleadings and diminishes the value of civil procedure Rule 15(b) amendments to conform to the evidence. This fact is further evident in the way the *Henderson* court structured its analysis around the pleadings. The court's approach demonstrates that plaintiffs now need to argue clearly on summary judgment exactly why defendant's conduct was negligent.

Given the court's rambling discussion of the state of the evidence, relevance, what inferences are—or more precisely, are not—permissible from a person's drinking habits, specific causes of action, foundational requirements, lay opinion testimony, probative value and risk of unfair prejudice or misleading the jury, it is difficult to be sure what the court actually held.

Perhaps the case illustrates nothing more than the hazards of imprecise writing and the dangers of fuzzy reasoning. Attorneys ordinarily present their evidence and arguments in a manner to maximize the number of potentially favorable inferences. Thus, Henderson developed the evidence of McLean's drinking habits and alleged alcoholism with an eye to a number of different theories and possible evidentiary hypotheses. Quite naturally, an attorney at the pretrial stage will avoid revealing the theory she will emphasize and other aspects of trial strategy.[fn2] The court's decision undercuts the viability of this approach, and attorneys are counseled, at least on appeal if not in opposing a motion for summary judgment, to be more specific about the theory of their case. Either way, the advantage is shifted to the moving party, usually the defendant, since in every case more will have to be revealed before the nonmoving party can get to trial.

In one sense, the court never made the basis of its decision clear. Plainly, the court would require some evidence of the quantity the person in question tended to drink and his or her behavior when drinking but how much of such evidence is required to give rise to a jury question is not clear.

[fn2] The legitimacy of this approach is not to be doubted; indeed, it is so fundamental a part of the adversary system that it is enshrined in the work product rule, protecting an attorney's mental impressions, conclusions, opinions, or legal theories from discovery. HAW. R. CIV. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947); Upjohn Co. v. United States, 449 U.S. 383 (1981).

C. Change In Court Composition

It is unclear to what extent Henderson signals the future with respect to summary judgment, evidence, and negligence issues. Of the justices involved in *Henderson*, only Justice Moon remains on the court. He has been joined by Justices Robert Klein, Steven Levinson, Mario Ramil, and Paula Nakayama.[403] Governor Waihee appointed Ramil to fill the seat left vacant by Justice Wakatsuki's unfortunate passing,[404] after the Senate rejected his earlier appointment of Sharon Himeno.[405] Justice Frank Padgett retired when his term expired March 29, 1992,[406] as did Justice Yoshimi Hayashi.[407] Chief Justice Lum, who was excused in *Henderson*, Judge Heen from the Intermediate Court of Appeals sitting in his place, retired April 1, 1993. Governor Waihee appointed

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[403] *See* Thomas Kaser, *Nakayama Gets Unanimous Senate Approval*, HONOLULU ADVERTISER, Apr. 9, 1993, at A7.

[404] Thomas Kaser, *Ramil Picked for Supreme Court*, HONOLULU ADVERTISER, Mar. 6, 1993, at A1.

[405] Thomas Kaser, *Senate Rejects Himeno 17-7*, HONOLULU ADVERTISER, Feb. 25, 1993, at A1. The Himeno appointment was met with considerable criticism. Ken Kobayashi, *Moon, Himeno Picked for Court*, HONOLULU ADVERTISER, Feb. 6, 1993, at A1, A2 [hereinafter Kobayashi, *Picked*]; William Kresnak, *Kobayashi: Himeno to Draw Fire*, HONOLULU ADVERTISER, Feb. 6, 1993, at A2; Benjamin Seto, *Supreme Court Choices Draw Praises, Moans*, HONOLULU STAR-BULLETIN, Feb. 6, 1993, at A1, A8; Jon Yoshishige, *Aki 'Confident Senate Would Reject Himeno. Urges Waihee to Pull Nomination*, HONOLULU ADVERTISER, Feb. 22, 1993, at A1; Thomas Kaser, *Opposition to Himeno Mounts*, HONOLULU ADVERTISER, Feb. 23, 1993, at A1; Thomas Kaser, *Himeno Vote Slated Today—15 Senators to Say No. Governor Told Nomination Will Fail*, HONOLULU ADVERTISER, Feb. 24, 1993, at A3; Thomas Kaser, *11th-Hour Letters to Senate. Himeno, Dad Say She Had No Role in Sale*, HONOLULU ADVERTISER, Feb. 24, 1993, at A3, including, remarkably, some from Lt. Governor Ben Cayetano, although the Lt. Governor's concern was directed more toward the appointment process than the actual merits of the individual nominee. Richard Borreca, *Cayetano Urges Reform In Way Judges Picked*, HONOLULU STAR-BULLETIN, Feb. 17, 1993, at A3; Ken Kobayashi, *Cayetano Calls Himeno 'Political Insider'*, HONOLULU ADVERTISER, Feb. 18, 1993, at A3. *See also* Thomas Kasyer, *Cayetano Questions Choice of Ramil for Court*, HONOLULU ADVERTISER, Mar. 9, 1993, at A1; Thomas Kasyer, *Waihee Defends Choice of Ramil. Rebuts the Criticism of His Lieutenant Governor*, HONOLULU ADVERTISER, Mar. 10, 1993, at A3.

[406] Ken Kobayashi, *Retiring Padgett Bowed to Opposition*, HONOLULU ADVERTISER, Oct. 2, 1991, at A1. Justice Padgett's plan to seek reappointment to serve the approximately 11 months before he reached mandatory retirement age apparently met with opposition from attorneys who resented his stinging criticism from the bench. *Id.* at A4. Attorneys don't need coddling, however, and gentleness is a no basis for judicial selection decisions.

[407] *Id.*

Justice Moon, whose influence on the court already was considerable,[408] to fill his shoes.[409] He was readily confirmed as Chief Justice.[410]

The future direction of law in Hawai'i will be set by the dynamics of court with Ronald Moon as Chief Justice and four new justices. Governor Waihee expects the new court's resolution of the legal issues it faces to "define Hawai'i into the next century."[411] Ramil is said to possess "integrity, compassion, a deep sense of fairness and social justice, excellent analytical skills . . . [, and sensitivity to] workers' rights."[412] He is expected to be "fair, courageous, conscientious and decisive . . . with compassion for the people"[413] and a jurist in the tradition of former Supreme Court Justices Edward H. Nakamura and Benjamin Menor.[414] Judge Nakayama was highly regarded in her year on the circuit court bench.[415]

In one area at least, Chief Justice Moon has demonstrated his continued commitment to the ideas he articulated in *Henderson*. In *Methven-Abreu v. Hawaiian Insurance & Guaranty Co., Ltd.*,[416] he recently wrote:

> Evidence of McClintock's having consumed beer before driving and of his blood alcohol level does not automatically lead to the conclusion that his alleged intoxication legally caused the accident. "Although intoxication may be the cause of negligence, the question whether the acts of

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[408] *See* Miller & Komeya, *supra* note 205, at 116.

[409] Kobayashi, *Picked*, *supra* note 405, at A1.

[410] Ken Kobayashi, *Moon Sails Through Confirmation Vote*, HONOLULU ADVERTISER, Feb. 25, 1993, at A3.

[411] Ken Kobayashi, *Moon Will Reassess Judiciary Needs*, HONOLULU ADVERTISER, Apr. 1, 1993, at A2.

[412] Thomas Kaser, *Committee Favors Confirming Ramil*, HONOLULU ADVERTISER, Mar. 17, 1993, at A1. *See also* Helen Altonn, *Ramil Confirmed for Supreme Court*, HONOLULU STAR-BULLETIN, Mar. 19, 1993, at A4 (quoting Sen. Randy Iwase saying Ramil will "bring heart and soul and compassion to our highest court.").

[413] Helen Altonn, *Barbs Are Mild at Ramil's Hearing for Bench*, HONOLULU STAR-BULLETIN, Mar. 17, 1993, at A1, A6 (quoting testimony of former Justice Nakamura; other witnesses echoed similar views).

[414] Kaser, *supra* note 402, at A2 (quoting Governor Waihee). *See also* Jon Yoshishige, *Supreme Court Nominee Cites Ethnicity, Political Experience*, HONOLULU ADVERTISER, Mar. 8, 1993, at A3 (noting that what some consider a weakness, his lack of judicial or trial experience, may in fact be an asset).

[415] *See* Thomas Kaser, *Judge Nakayama Named to High Court*, HONOLULU ADVERTISER, Mar. 31, 1993, at A1; Thomas Kaser, *Court Nominee Garners Wide Support*, HONOLULU ADVERTISER, Mar. 31, 1993, at A5.

[416] 73 Haw. 385, 834 P.2d 279 (1992).

> an intoxicated person are negligent is not determined by the fact of his intoxication but requires consideration of his conduct under the circumstances." It is common knowledge that the judgment and behavior of persons who have been drinking may vary depending on that person's level of tolerance to alcohol, which may be dependent on such factors as body size, weight, and metabolism. In this case, there is a complete absence of any evidence presented by Abreu or any other witness regarding McClintock's behavior just prior to the accident. There is also no expert testimony in the record regarding how a person such as McClintock would have behaved with a .286% level of blood alcohol."[117]

Thus, it appears clear that Justice Moon intends to severely limit the application of evidence of alcohol use and consumption in the proof of negligence.

D. Increased Cost of Litigation and Reduced Incentive for Settlements

The court has narrowly circumscribed negligent entrustment as a description of a particular class of tort liability. This makes it more difficult for plaintiffs to frame their argument in actions implicating the duty to exercise reasonable care to ensure that one's entrustment of a potentially dangerous instrumentality to another will not expose others to an unreasonable risk of harm. The resultant effect will be to increase the cost of litigation and reduce the incentive for settlements.

Defendants will lack incentive to settle, emboldened by the knowledge that the court has placed more hurdles in plaintiff's path and made summary judgment for the defense more easily obtainable. Plaintiffs with meritorious claims will of course proceed, but will be forced to endure the time, effort, and expense of compiling an exhaustive evidentiary foundation to preclude summary judgment. Law firms may simply refuse to handle smaller claims on a contingency basis.

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[117] *Id.* at 401, 834 P.2d at 287 (citations omitted) (quoting McKenna v. Volkswagenwerk Aktiengesellschaft, 57 Haw. 460, 467-68, 558 P.2d 1018, 1024 (1977). Notably, the question in *McKeena* was not whether the driver's intoxication constituted negligence; it was whether the driver's intoxication and alleged excessive speed was an independent cause insulating the city from liability for defective maintenance of the highway shoulder. The precise holding of the court was that even if the driver was negligent, the City could be liable if its negligence combined with the driver's to cause the injuries. *McKeena*, 57 Haw. at 466, 558 P.2d at 1023. *See also supra* notes 136-153 and accompanying text.

The result in *Ono v. Applegate* suggests the appropriate solution to the problem of multiple tortfeasors contributing to the ultimate injury is to require the jury to apportion the fault. This would have been a sensible result in *Henderson*.

VI. Conclusion

In *Henderson*, the Hawaii Supreme Court quite properly held that a plaintiff may not rest on the mere fact of a person's alcoholism or habitual drinking to support an inference of irresponsibility. Alcoholics, after all, should not be made the new social pariahs. Enroute to this position, however, the court made a number of expansive and doubtful assertions that, if left unmodified, could have rather significant implications in Hawai'i not only for the torts process but litigation and pretrial practice generally.

The court's respondeat superior ruling, although open to criticism on policy grounds, is consistent with existing precedent and confirms that Hawai'i has joined those jurisdictions declining to expand the meaning of scope of employment. In this respect, the decision serves the values of clarity and certainty.

The wisdom of the court's holding in the evidence and summary judgment context, on the other hand, is more doubtful. For appellate courts to either invent reasons to uphold a trial court's grant of summary judgment or to rule on evidentiary issues without development of a record below or briefing and argument appears to be clearly inadvisable. The court's failure to provide much discussion explaining or supporting its admissibility ruling, combined with the difficulty of reconciling that holding with the existing body of evidence law, renders it well nigh impossible to predict its significance for future cases. In the evidence context, therefore, *Henderson* should be confined to its facts as applied to the narrow theory of liability perceived by the court.

The court's holding negligent entrustment a "specific cause of action" limited to instances where there is no intervening negligence other than that of the entrustee appears peculiar and unnecessarily formalistic. Finally, in finding no basis to proceed under a general negligence theory, the court failed to look beyond the specific risks and particularized conduct it considered in reviewing Henderson's claim under the truncated negligent entrustment specific cause of action. The court also overlooked the distinct roles of foreseeability in standard of conduct and causation assessments, and, consequently, both understated

the risk created by defendants' conduct and failed to identify and properly analyze the causation question.

Stephen C. Woodruff*

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* Class of 1994, Wm. S. Richardson School of Law

Gussin v. Gussin: Appellate Courts Powerless to Mandate Uniform Starting Points in Divorce Proceedings

Simply stated, *Gussin* is the most significant Hawaii divorce case decided by the Hawaii Supreme Court in the last thirty-two years.[1]

I. Introduction

In *Gussin v. Gussin* (*Gussin*),[2] the Hawaii Supreme Court held that the "Uniform Starting Points" (USPs), developed by the Intermediate Court of Appeals of Hawaii (I.C.A.) for the division and distribution of marital assets in divorce proceedings, were invalid because they created rebuttable presumptions that limit the discretion conferred upon family courts by section 580-47(a) of the Hawaii Revised Statutes.[3] The decision was based upon the supreme court's strict interpretation of the statute and its view of the scope of the appellate court's authority in reviewing family court decisions.[4]

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[1] *Special Edition*, H.S.B.A. Fam. L. Sec. J. Haw. Fam. L. No. 7, Sept. 2, 1992, at 1 [hereinafter *Special Edition*].

[2] 836 P.2d 498 (Haw. App. 1991), *cert. granted*, 72 Haw. 618, 838 P.2d 860 (1991), *vacated*, 73 Haw. 470, 836 P.2d 484 (1992).

[3] Section 580-47(a) provides:

> (a) Upon granting a divorce . . . the court may make such further orders as shall appear just and equitable . . . (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate . . . . In making such further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case.

Haw. Rev. Stat. § 580-47(a) (1985).

[4] *See infra* notes 67-97 and accompanying text.

This note will review the ongoing debate over USPs in Hawaii's highest courts and explore the impact of their prohibition by *Gussin*. Part II will review the facts and procedural history of *Gussin*. Part III will examine the history of section 580-47(a), Hawaii Revised Statutes, and the development of USPs by the I.C.A. Part IV will analyze the Hawaii Supreme Court's rationale for prohibiting USPs, and Part V will address the potential impact of the Hawaii Supreme Court's decision.

II. Facts and Posture

The Gussins' marriage ended with a divorce decree entered by the Family Court of the First Circuit of Hawaii on January 17, 1991.[5] Mrs. Gussin appealed the family court's division and distribution of the parties' marital estate.[6] Specifically, the wife contended that certain assets should have been treated as jointly owned marital property and not the husband's separately owned property because these monies "were 'transmuted' into marital property when [the husband] commingled them in joint accounts with earnings and utilized them to purchase a joint marital residence."[7] Mrs. Gussin also argued that the family court abused its discretion by deviating from the uniform decisional process mandated by the I.C.A.[8]

The I.C.A. affirmed the family court's divorce decree and distribution of the Gussins' marital estate.[9] The I.C.A. rejected Mrs. Gussin's transmutation theory[10] on the grounds that such a theory required a tracing of funds which was inconsistent with the I.C.A.'s categorical definitions of marital property and uniform distribution process.[11] In addition, the I.C.A. found no evidence that the husband

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[5] *Gussin*, 836 P.2d at 500.

[6] *Id.*

[7] *Id.* at 504.

[8] *Id.* at 505.

[9] *Id.* at 500.

[10] For a discussion of the tracing and the transmutation theory, see J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 Fam. L.Q. 219 (1989).

[11] 836 P.2d at 504. The I.C.A. previously held in Gardner v. Gardner, 8 Haw. App. 461, 476, 810 P.2d 239, 247 (1991), that the distribution process mandated by the I.C.A. did "not involve tracing beyond the transaction by which the husband or wife acquired the property." The I.C.A. went on to explain that tracing would be relevant only in the equitable discretion phase where the family court would determine if deviation from the USP was appropriate. *Id.*

had legally gifted the contested funds to the wife during the marriage thereby changing its characterization from the husband's separately owned property.[12] Finally, the I.C.A. found that the wife was awarded more than she would have been awarded had the family court correctly followed the division and distribution process mandated by the I.C.A.[13] Therefore, the court held that the wife had not sustained her burden on appeal by showing more than a harmless error.[14]

The Hawaii Supreme Court granted certiorari to review the I.C.A.'s affirmance of the family court's division and distribution of the Gussins' marital estate and in doing so passed judgment on the validity of USPs.[15]

III. History

Hawaii law governing the division and distribution of a divorcing couple's marital estate has continued to evolve in response to a quest for justice and equity. Section 580-47(a) of the Hawaii Revised Statutes, which allows family court judges to make property settlements between divorcing parties, was enacted for efficiency and, more importantly, to strengthen the wife's standing in divorce proceedings.[16] The I.C.A. has attempted to further improve the property distribution process by developing a uniform decisional procedure for family court judges to use in dividing and distributing marital assets.[17]

A. Hawaii Revised Statutes, Section 580-47(a)

The division and distribution of property in divorce proceedings is governed by section 580-47(a) of the Hawaii Revised Statutes which was first enacted in 1955.[18] Prior to its enactment, the family court upon granting a final decree of divorce, lacked the power to make property settlements between the parties.[19] The court was limited to

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[12] *Gussin*, 836 P.2d at 504.

[13] *Id.* at 505.

[14] *Id.*

[15] *Gussin*, 73 Haw. 470, 836 P.2d 484 (1992). Significantly, neither party argued against the validity of the USP process.

[16] *See infra* notes 18-24 and accompanying text.

[17] *See infra* notes 27-66 and accompanying text.

[18] Act 77, 1955 Haw. Sess. Laws 60. See *supra* note 2 for text of Haw. Rev. Stat. § 580-47(a).

[19] Haw. Sen. Stand. Comm. Rep. No. 595, 28th Terr. Leg., Reg. Sess. (1955) *reprinted in* 1955 Haw Senate. J. 632, 632.

ordering the defendant to provide maintenance for the children and spousal support.[20] The legislature enacted the revision because it reasoned that the then present law placed "a hardship on the wife and may deprive her of her just share of property that she might have been instrumental in acquiring."[21] In addition, the legislature explained that because the family court was powerless to affect property settlements, additional litigation was required before the parties' interests were finally settled.[22] Following the enactment of Act 77, 1955 Session Laws of Hawaii, the family court, upon granting a divorce, had the authority to divide and distribute "the estate of the parties, real, personal, or mixed, whether community, joint, or separate."[23] In dividing and distributing the parties' estate, the family court is directed to take into consideration the circumstances of the case and finally settle the estate according to what is "just and equitable."[24]

B. Uniform Starting Points

Section 580-47(a) does not provide specific guidelines to the family court for distributing a divorcing couple's estate.[25] In an attempt to facilitate consistency, predictability and appellate review, the I.C.A., through a series of appellate decisions, had developed a uniform process to guide the family court in their decision making.[26]

The I.C.A., in its review of the family court's equitable distribution decisions, outlined five categories of property to be used in dividing and distributing marital assets in divorce proceedings.[27] These "Categories of NMVs" are as follows:

> Category 1. The net market value (NMV), plus or minus, of all property separately owned by one spouse on the date of marriage (DOM) but excluding the NMV attributable to property that is subsequently legally gifted by the owner to the other spouse, to both spouses, or to a third party.
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> Category 2. The increase in the NMV of all property whose NMV on the DOM is included in category 1 and that the owner separately

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] HAW. REV. STAT. § 580-47(a) (1985).
[24] *Id.*
[25] *Id.*
[26] *See infra* notes 27-66 and accompanying text.
[27] *See* Malek v. Malek, 7 Haw. App. 377, 768 P.2d 243 (1989).

owns continuously from the DOM to the [date of the conclusion of the evidentiary part of the trial (DOCOEPOT)].

Category 3. The date-of-acquisition NMV, plus or minus, of property separately acquired by gift or inheritance during the marriage but excluding the NMV attributable to property that is subsequently legally gifted by the owner to the other spouse, to both spouses, or to a third party.

Category 4. The increase in the NMV of all property whose NMV on the date of acquisition during the marriage is included in category 3 and that the owner separately owns continuously from the date of acquisition to the DOCOEPOT.

Category 5. The difference between the NMVs, plus or minus, of all property owned by one or both of the spouses on the DOCOEPOT minus the NMVs, plus or minus, includable in categories 1, 2, 3 and 4.[28]

The I.C.A. has also developed USPs[29] corresponding to each Category of NMV:

Categories	Percentage
1 and 3	100% to the owner and 0% to the non-owner
2 and 4	75% to the owner and 25% to the non-owner
5	50% to the husband and 50% to the wife[30]

The USPs determined how the Categories of NMVs were to be divided and distributed:

(1) if the evidence in the record establishes only the date of the marriage, the entitlement to a divorce, and the ownership of Categories of NMVs; and (2) if there is no evidence relevant to the "respective merits of the parties, the relative abilities of the parties, the condition in which each

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[28] *Id.* at 381 n.1, 768 P.2d at 247.

[29] The label "uniform starting point" was first used by the I.C.A. in Hashimoto v. Hashimoto, 6 Haw. App. 424, 426, 725 P.2d 520, 523 (1986), *modified*, Woodworth v. Woodworth, 7 Haw. App. 11, 740 P.2d 36 (1987), *abrogated by* Gussin v. Gussin, 73 Haw. 470, 836 P.2d 484 (1992).

[30] Woodworth v. Woodworth, 7 Haw. App. 11, 17, 740 P.2d 36, 41 (1987), *overruled in part by* Myers v. Myers, 70 Haw. 143, 764 P.2d 1237 (1988).

> party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case."[31]

The party seeking a deviation from the USPs had the burden of proof.[32] If the division and distribution was appealed, the family court was required to specify the factual and legal considerations for its deviation or nondeviation from the USPs.[33] USPs evolved in the I.C.A. from "general rules."[34] In 1984, the I.C.A. in *Mochida v. Mochida*[35] summarized four "general rules of equitable distribution" as follows:

> 1. As a general rule, it is equitable to award each divorcing party the date of marriage net value of the property that he or she brought into the marriage. *Raupp v. Raupp*, 3 Haw. App. 602, 658 P.2d 329 (1983).
>
> 2. As a general rule, it is equitable to award each divorcing party the date of acquisition net value of the property that he or she received during the marriage by gift or inheritance. *Id.*
>
> 3. At this time there is no general rule governing the division of the net increase in value during the marriage of property separately owned at the time of divorce. *Takara v. Takara*, 4 Haw. App. 68, 660 P.2d 529 (1983).
>
> 4. As a general rule, it is equitable to award each party one-half of the net value of property jointly owned at the time of divorce. *Id.*[36]

In 1985, this list of general rules was amended by *Cassiday v. Cassiday*,[37] where the I.C.A. established a general rule for the division and distribution of the during marriage increase in value of a couple's separately owned assets. The I.C.A. stated, "[a]s a general rule, it is equitable to award each divorcing party one-half of the after acquisition but during marriage real increase in the net value of property separately owned at the TOM [time of marriage] or acquired during the marriage

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[31] *Gussin*, 836 P.2d 498, 503.

[32] Hatayama v. Hatayama, 9 Haw. App. 1, 9 n.2, 818 P.2d 277, 281 n.2 (1991).

[33] Muraoka v. Muraoka, 7 Haw. App. 432, 439, 776 P.2d 418, 422 (1989). See also HAWAII DIVORCE MANUAL § 4 (James S. Burns et al. eds., 1991) for an overview of the "pre-Gussin" procedures followed by the family courts.

[34] See Amy H. Kastely, *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody*, 6 U. HAW. L. REV. 381, 384-406 (1984) for an analysis of the emergence and significance of "general rules."

[35] 5 Haw. App. 348, 691 P.2d 771 (1984).

[36] *Id.* at 349, 691 P.2d at 772.

[37] 6 Haw. App. 207, 716 P.2d 1145 (1985), *cert. granted*, 67 Haw. 685, 744 P.2d 781 (1985), *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986), *receded from by* Gussin v. Gussin, 73 Haw. 470, 836 P.2d 484 (1992).

by gift or inheritance and still separately owned at the TOD [time of divorce]."[38] On certiorari, the Hawaii Supreme Court rejected this general rule on the grounds that "[t]he effect of such a rule is to create a rebuttable presumption that separate property should be evenly divided."[39] The court found that such fixed rules bound family court judges in violation of section 580-47(a) of the Hawaii Revised Statutes, which confers upon the family court the "discretion to divide marital property according to what is just and equitable."[40] The supreme court then held "instead that the trial court may award up to half of this appreciation to the non-owning spouse if, under the totality of the circumstances, it is just and equitable to do so."[41] It is important to note that although the Hawaii Supreme Court eschewed "general rules," the court, in essence, replaced the I.C.A.'s general rule with its own. In addition, the court also affirmed two general rules articulated by the I.C.A in *Mochida*[42] when it stated, "[i]t is generally accepted that each divorcing party is entitled to the date of marriage net value of his or her premarital property and the date of acquisition net value of gifts and inheritances which he or she received during the marriage."[43]

In *Hashimoto v. Hashimoto*,[44] the I.C.A. responded to the Hawaii Supreme Court's admonition against "fixed rules" and explained:

> Our "general rules" are not intended to be "fixed rules for determining the amount of property to be awarded to each spouse in a divorce action[.]" They are merely "uniform starting points" from which to commence equitable distribution analysis and application of statutory and case law mandates.[45]

The I.C.A. declared that it was replacing the label of "general rule" with "uniform starting point."[46] The I.C.A. reasoned that, if the family courts were required to start at USPs and explain their reasons

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[38] 6 Haw. App. at 213, 716 P.2d at 1149-50.

[39] 68 Haw. 383, 388, 716 P.2d 1133, 1137 (1986).

[40] *Id.*

[41] *Id.* at 389, 716 P.2d at 1138.

[42] *See supra* note 36 and accompanying text.

[43] *Cassiday*, 68 Haw. at 390, 716 P.2d at 1138.

[44] 6 Haw. App. 424, 725 P.2d 520 (1986), *modified by* Woodworth v. Woodworth, 7 Haw. App. 11, 740 P.2d 36 (1987), *abrogated by* Gussin v. Gussin, 73 Haw. 470, 836 P.2d 484 (1992).

[45] *Id.* at 426, 725 P.2d at 522 (citations omitted).

[46] *Id.*

for deviating from them, "then their decisions will be more uniform and predictable and the process of appellate review under the abuse of discretion standard will be greatly facilitated."[47] The I.C.A. explained that without the consistency of USPs, "[t]he ultimate decision will depend less on the facts and the law and more on who is the judge assigned to hear and decide the case."[48] Based upon the Hawaii Supreme Court's prohibition of a 50%-50% USP for dividing the during marriage increase in the value of separately owned property, the I.C.A. selected a new USP of 75% to owner, 25% to non-owner.[49] The I.C.A. then articulated USPs for all five categories of NMVs.[50]

The I.C.A. subsequently refined the categories of NMVs. In 1987, the I.C.A. added a sixth category of NMV in *Woodworth v. Woodworth*.[51] Category 6 was defined as follows:

> The difference between the NMVs plus or minus, of all the property owned by one or both of the spouses at the conclusion of the evidentiary part of the trial and the total of the NMVs, plus or minus, includable in categories 1, 2, 3, 4, and 5.[52]

In *Woodworth*, the court was attempting to deal with the increase in value of the parties' marital assets during the time between the separation of the parties and of the divorce.[53]

But the Hawaii Supreme Court expressly invalidated the sixth category in *Myers v. Myers*.[54] The court stated, that it did not agree with the I.C.A. "that family court judges 'should be bound by [a] rule that automatically presumes' a legal owner spouse is entitled to the appreciation in marital assets between the date of final separation in contemplation of divorce and the conclusion of the evidentiary part of the divorce trial."[55] The Hawaii Supreme Court found that such a presumption was inconsistent with section 580-47(a). Nevertheless, the supreme court declined to rule on the validity of categories 1 - 5.[56]

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[47] *Id.* at 427, 725 P.2d at 523.

[48] *Id.* at 427, 725 P.2d at 522-23.

[49] *Id.* at 427, 725 P.2d at 523.

[50] *Id.* at 427-28, 725 P.2d at 523.

[51] 7 Haw. App. 11, 740 P.2d 36 (1987), *overruled by* Myers v. Myers, 70 Haw. 143, 764 P.2d 1237 (1988).

[52] *Id.* at 16, 740 P.2d at 40.

[53] *Woodworth*, 7 Haw. App. at 16, 740 P.2d at 40.

[54] 70 Haw. 143, 764 P.2d 1237 (1988), *reconsideration denied*, 70 Haw. 661, 796 P.2d 1004 (1988).

[55] *Id.* at 154, 764 P.2d at 1244.

[56] *Id.* at 155 n.9, 764 P.2d at 1244.

The I.C.A. continued to mandate the use of categories of NMVs 1 - 5 and of their corresponding USPs in subsequent decisions. In 1989, the I.C.A. in *Muraoka v. Muraoka*,[57] clarified the "authorized decisional process" for family court judges in the division and distribution of assets in divorce cases which involved the categorization of marital assets and the determination of USP results. Following the determination of the applicable USPs, the family court judges were then required to exercise their equitable discretion pursuant to section 580-47(a) to determine if the particular facts of the case warranted a deviation from the USPs.[58] If the distribution was appealed due to a party's dissatisfaction with family court's deviation or nondeviation, the family court was required to "specify the factual considerations upon which the difference is based."[59]

In 1991, the I.C.A. elaborated on its reasons for developing the USP process in *Bennett v. Bennett*.[60] The I.C.A. explained:

> The process we have developed is designed to standardize and facilitate the factual analysis, facilitate settlements, identify the reasons for a particular decision, facilitate appellate review, facilitate the continued case-by-case development of express and uniform ranges of choice applicable statewide in similar fact situations, and bring as much statewide consistency, uniformity, and predictability as is possible to family court decisions dividing and distributing property in divorce cases. This process is designed and intended to replace the prior system where the family court decided and the appellate court reviewed each case on an ad hoc basis and without expressly identifying all the relevant facts and specific reasons for the decision.[61]

Bennett is significant in that it involved the first instance where an opinion against USPs was expressed from within the I.C.A. Justice Heen declared that he had "gradually come to realize that the imposition of the USP on the family court judges is contrary to the legislative intent of Hawaii Revised Statutes (HRS) § 580-47(a) (Supp. 1990)."[62] Justice Heen agreed with the supreme court that USPs were fixed rules

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[57] 7 Haw App. 432, 438, 776 P.2d 418, 422 (1989).

[58] *Id.*

[59] *Id.* at 439, 776 P.2d at 422.

[60] 8 Haw. App. 415, 807 P.2d 597 (1991), *abrogated by* Gussin v. Gussin, 73 Haw. 470, 836 P.2d 484 (1992).

[61] *Id.* at 421, 807 P.2d at 601.

[62] *Id.* at 427-28, 807 P.2d at 604 (Heen, J. concurring).

that restrict a family court's discretion in violation of section 580-47(a).[63]

In direct response to Justice Heen's concurring opinion, the I.C.A. again defended the use of USPs in *Gardner v. Gardner*.[64] The majority asserted that "as an appellate court we have the power to require all family court judges to start their equitable distribution analysis from uniform starting points."[65] The I.C.A. majority argued that without uniformity, "categorization and the uniform decisional process are exercises without any useful or meaningful purpose."[66]

The courts' continuing debate over the USP process has apparently ended, at least for the moment, with the Hawaii Supreme Court's expressed prohibition of USPs in *Gussin*. The next section will explore the reasons which the Hawaii Supreme Court gave for the prohibition of USPs.

III. Analysis

In *Gussin*, the Hawaii Supreme Court invalidated the USP process. The court concluded that the development of such guidelines by the I.C.A. was beyond the scope of appellate review and an intrusion into the "wide discretion" conferred upon family court judges by section 580-47(a).

A. Uniform Starting Points

1. The role of the appellate courts

The Hawaii Supreme Court rejected the I.C.A.'s contention that the appellate courts have the authority to develop uniform guidelines and mandate their use by family court judges in divorce property distribution proceedings. The Hawaii Supreme Court emphasized the fact that section 580-47(a) gives family court judges "wide discretion" to divide and distribute marital assets according to what is just and equitable under the particular circumstances of the case.[67] The family

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[63] *Id.* at 428-29, 807 P.2d at 604 (Heen, J. concurring).

[64] 8 Haw. App. 461, 810 P.2d 239 (1991).

[65] *Id.* at 471, 810 P.2d at 244.

[66] *Id.*

[67] *Gussin*, 73 Haw. 470, 479, 836 P.2d 484, 488-89.

court's division and distribution will not be disturbed unless there exists an abuse of that discretion.[68] In order for the appellate court to find an abuse of discretion, "it must appear 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."[69]

The I.C.A. interpreted section 580-47(a) and concluded that the statute:

> does not in any way restrict or preclude the Hawaii appellate courts, in the exercise of their supervisory and review functions, from narrowing the discretion available to the various family courts by establishing and mandating adherence to uniform categories, USPs, uniform limits on the range of choice, and uniform procedures.[70]

According to the I.C.A., the role of the appellate courts in reviewing a family court judge's property distribution was as follows:

> The reviewing court thereby develops the uniformly applicable principles, policies, and rules of equitable distribution, and range of choice, and exposes, rejects, and discards the invalid reasons for deviation or for refusing to deviate from the USP that some of the many family court judges are using.[71]

In *Gussin*, the Hawaii Supreme Court disagreed with the I.C.A.'s construction of section 580-47(a) and concluded instead that a strict interpretation of the statute does not give the appellate courts the power to narrow the discretion available to the family courts.[72] The supreme

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[68] Au-Hoy v. Au-Hoy, 60 Haw. 354, 357, 590 P.2d 80, 82 (1979).

[69] State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961).

[70] Bennett v. Bennett, 8 Haw. App. 415, 422, 807 P.2d 597, 601-02 (1991). See also Malek v. Malek, 7 Haw. App. 377, 380-81, 768 P.2d 243, 246-47 (1989) where the I.C.A. explained, "[i]n a progression of divorce cases . . . this court has developed . . . various standards and rules defining the family court's authorized range of discretionary equitable choice."

[71] Hatayama v. Hatayama, 9 Haw. App. 1, 10-11, 818 P.2d 277, 282 (1991).

[72] *Gussin*, 73 Haw. at 478, 836 P.2d at 489 (1992). Chief Justice Lum, in his dissenting opinion, argued that "[t]he judicial authority to create a scheme by which trial courts exercise discretion is certainly within the power of our appellate courts." *Id.* at 497, 836 P.2d at 497 (Lum, C.J., dissenting). In fact, he declared that it was the appellate court's "obligation and responsibility to articulate generalizable rules of law." *Id.* at 495, 836 P.2d at 496 (Lum, C.J., dissenting). To defend this position, Justice Lum cited the rule announced by the Hawaii Supreme Court in *Cassiday* that "the trial court may award up to half of this [during-marriage] appreciation [of separately owned property] to the non-owning spouse if, under the totality of the

court concluded that the plain meaning of the statute gave the family courts "wide discretion."[73]

The Hawaii Supreme Court went on to discuss what portion of the family court's decision is subject to review. The court declared, "[c]learly, it is the court's *ending* point, and not its starting point, which bears on whether the court has abused its discretion."[74] The court was responding to what it opined was the I.C.A.'s unauthorized emphasis on the family court's starting points.[75]

In *Hatayama v. Hatayama*,[76] the I.C.A. had expressed concern over uniformity in appellate review and explained that every judge in a divorce case has a starting point from which he or she decides how to equitably divide and distribute the parties' estate. The problem was, however, that without USPs each family court judge had the discretion to start at a different point in each case. The court concluded that "[o]n appeal, only the family court judge's ending point will be reviewed and it will be reviewed only under the abuse of discretion standard of review."[77]

In a concurring opinion in *Hatayama*, Justice Heen did not reject the possible importance or need for USPs, but stated nonetheless that, in light of section 580-47(a), it was "not [the appellate court's] function to determine if the [family] court started from a point which is not mandated by the statute."[78] Rather, in Justice Heen's view, the appellate court's function was to evaluate the family court's ending point.[79]

2. *Rebuttable presumptions*

In *Gussin*, the Hawaii Supreme Court expressly adopted Justice Heen's statements from *Hatayama* and concluded that the uniform

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circumstances, it is just and equitable to do so . . . ." *Id.* at 497, 836 P.2d at 497-98 (Lum, C.J., dissenting). According to Justice Lum's interpretation, this in essence was a rule that confined the family court's discretion to award the non-owning spouse more than half. *Id.*

[73] *Id.* at 479, 836 P.2d at 489.

[74] *Id.* at 484, 836 P.2d at 491.

[75] *Id.*

[76] 9 Haw. App. 1, 9-10 n.2, 818 P.2d 277, 281-82 (1991).

[77] *Id.*

[78] *Id.* at 14, 818 P.2d at 284 (Heen, J., concurring).

[79] *Id.*

decisional process mandated by the I.C.A. resulted in an unauthorized emphasis by the appellate courts on the family court judge's starting point.[80] The court held that the USP process mandated by the I.C.A. was violative of section 580-47 because it limited the family court's discretion in the equitable division and distribution of the parties' marital assets.[81] The court went on to define what such discretion entails:

> [A grant of discretion] means that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law. In other words, "[d]iscretion" denotes the absence of a hard and fast rule. [Citation omitted.] When involved as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.[82]

The court reasoned that the USPs created rebuttable presumptions that "undeniably restrict the exercise of the family court's wide discretion" because the family court must start at the USPs and if an appeal is taken, the family court must explain its reasons for deviating or not deviating from the USPs.[83] In addition, the burden of justification is on the party who wants the family court to deviate from the USPs.[84] The court emphasized that it had previously overruled "general rules" in *Cassiday* and in *Meyers* because these rules create rebuttable presumptions that bind family court judges to "a predetermined division of marital property."[85] The Hawaii Supreme Court concluded that such rebuttable presumptions were "repugnant" to section 580-47(a) because they restrict the family court's discretion.[86] In addition, the

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[80] *Gussin*, 73 Haw. 470, 485, 836 P.2d 484, 492.

[81] *Id.* at 486, 836 P.2d at 492.

[82] *Id.* at 479, 836 P.2d at 489 (citations omitted).

[83] *Id.* at 482, 836 P.2d at 490.

[84] *Id.*

[85] *Id.* at 481, 836 P.2d at 490. See *supra* notes 39 and 53, and accompanying text for discussion of these decisions.

[86] *Gussin*, 73 Haw. at 480, 836 P.2d at 489. According to Chief Justice Lum, in his dissent, the USP process was not unduly burdensome on the family courts and did not limit the grant of discretion conferred upon them by the legislature. Justice Lum reasoned that "the trial court is free to exercise its statutorily conferred discretion, only limited by its willingness to provide findings of fact to permit meaningful judicial

court declared that regardless of whether these guidelines are called "general rules" or USPs, their limiting effect on the family court's statutorily-mandated exercise of discretion was the same.[87]

3. Partnership model as necessary guidance

Although the supreme court commended the I.C.A.'s intentions in developing the USP process, it concluded that USPs were violative of section 580-47 and added that the aims of the I.C.A. for developing USPs were "unrealistic."[88] The court apparently believed that it was the I.C.A.'s goal to achieve consistent outcomes, rather than a consistent process, and concluded that diverse outcomes were inevitable because of the unique facts and circumstances of each case.[89] The court also proclaimed that, in light of the grant of discretion conferred on the family courts by the legislature, whatever "uniformity, stability, clarity or predictability" that can be obtained must be done so with "reason and conscience" being the guide.[90] The court concluded that the "partnership model of marriage" would "[provide] the necessary guidance to the family courts in exercising their discretion and to facilitate appellate review."[91]

The "partnership model of marriage" was first embraced by the Hawaii Supreme Court in *Cassiday*,[92] where the court accepted "the time honored proposition that marriage is a partnership to which both parties bring their financial resources as well as their individual energies and efforts."[93] The court also cited the partnership model in *Myers*,[94] where it overturned a Category NMV and USP relating to the increase in the value of assets between the separation and divorce, in part because they were inconsistent with "the rule that a final division of marital property can be decreed only when the partnership is dis-

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review." *Id.* at 494, 836 P.2d at 496 (Lum, C.J., dissenting). Justice Lum reasoned that there was no advantage to family court judges to favor USPs as ending points because the appellate court "will review them freshly, and without presumption either way." *Id.* at 497, 836 P.2d at 497 (Lum, C.J., dissenting).

[87] *Id.* at 481, 836 P.2d at 490.

[88] *Id.* at 485, 836 P.2d at 492.

[89] *Id.* at 485-86, 836 P.2d at 492.

[90] *Id.* at 486, 836 P.2d at 492.

[91] *Id.*

[92] 68 Haw. 383, 716 P.2d 1133 (1986).

[93] *Id.* at 387, 716 P.2d at 1136.

[94] 70 Haw. 143, 764 P.2d 1237 (1988).

solved."[95] Finally, in *Gussin* the Hawaii Supreme Court stated that "[t]he ICA has also acknowledged that, in divorce proceedings regarding division and distribution of the parties' estate, 'partnership principles guide and limit the range of the family court's choices.'"[96]

Although the Hawaii Supreme Court had "in the past declined to adopt fixed rules for determining the amount of property to be awarded to each spouse in a divorce action, other than as set forth in HRS § 580-47,"[97] the decision can be read as condoning the use of general rules of partnership which limit the range of the family court's choices.

B. The Court's Reasoning Applied

1. The transmutation theory

In *Gussin*, the Hawaii Supreme Court agreed with the I.C.A.'s rejection of the wife's transmutation theory, however, on other grounds. The court held that the "doctrine of transmutation" was also a fixed rule that created a rebuttable presumption; therefore, like USPs, the doctrine was violative of Hawaii's equitable distribution statute.[98]

On the other hand, the supreme court disagreed with the I.C.A.'s holding that there was insufficient evidence to prove that the husband had legally gifted any Category 1 assets to the wife during the marriage.[99] Instead the court held that the I.C.A. erred in not remanding the issue because, in its view, the family court had "failed to make any findings as to donative intent or any element bearing on whether a legal gift had been made."[100]

2. During-marriage appreciation

The Hawaii Supreme Court also vacated and remanded that part of the divorce decree relating to the Gussins' Category 2 assets.[101] The

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[95] *Id.* at 154, 764 P.2d at 1244.

[96] *Gussin*, 73 Haw. at 483, 836 P.2d at 491. The supreme court cited the I.C.A.'s opinion in *Bennett*, where the I.C.A. noted that: "[the Hawaii Supreme Court] defined 'marriage' as a 'partnership,' thereby deciding that partnership principles guide and limit the range of the family court's choices." 8 Haw. App. 415, 423, 807 P.2d 597, 602 (1991).

[97] *Cassiday*, 68 Haw. 383, 388, 716 P.2d 1133, 1137 (1986).

[98] *Gussin*, 73 Haw. at 488, 836 P.2d at 493.

[99] *Id.*

[100] *Id.* at 488, 836 P.2d at 494.

[101] *Id.* at 490-91, 836 P.2d at 494.

family court had incorrectly applied the 25% USP as a limit on the nonowner's potential award rather than as a starting point and restricted itself to a range of 0% to 25% in distributing and dividing the parties' Category 2 assets.[102] The court did not agree with the I.C.A. that this was harmless error because the family court could have awarded up to 50% to the wife if that was just and equitable under the circumstances to do so.[103] The Court held that the family court, on remand, must redistribute the assets at issue without the guidance of the USPs.[104]

IV. Impact

A. A Step Back to Pre-USP Process

Prior to *Gussin*, proponents of the USP process predicted its eventual demise and supported legislation that would expressly give the appellate courts the authority to require the family courts to utilize a uniform decisional process in the equitable distribution of property in divorce actions.[105] In their pleas to the legislature, proponents warned of the disadvantages of returning to a pre-USP system.

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[102] *Id.* at 490, 836 P.2d at 494.

[103] *Id.*

[104] *Id.* at 491, 836 P.2d at 495.

[105] *See* House Bill 2470, 16th Leg., Reg. Sess. (1992). House Bill 2470 proposed to amend section 580-47 of the Hawaii Revised Statutes by adding the following language:

> (f) Subject to all applicable statutory requirements and limitations, the Hawaii appellate courts are authorized to: (1) Require the family courts, when deciding property division and distribution issues in divorce actions, to: (A) Utilize a judicially created uniform decisional process involving uniform categories of net market values and uniform starting points for the distribution of the property; and (B) Specify the factual considerations that caused the family court to deviate or refuse to deviate from the uniform starting points; and (2) Decide: (A) Whether, as a matter of law, the specified factual considerations authorized any deviation from the uniform starting points; and (B) If so, whether the refusal to deviate or the extent of the deviation was an abuse of the family court's discretion.

Id.

The bill passed the House and subsequently died in the Senate Judiciary Committee without comment.

I.C.A. Chief Judge James S. Burns,[106] a former family law practitioner and family law judge, testified as an individual citizen and explained what divorce proceedings were like prior to the development of the uniform decisional system:

> Each family court judge was allowed the discretion to use his or her own system, and to use different systems in different cases. I can tell you from personal experience that there was very little predictability or accountability.[107]

The Chair of the Family Law Section of the Hawaii State Bar Association, Charles T. Kleintop, also testified in favor of the proposed legislation and confirmed Chief Judge Burns' observations:

> Prior to these appellate changes, the broad "just and equitable" family court authority of § 580-47, *Hawaii Revised Statutes*, resulted in widely disparate decisions which were dependent solely upon what an individual judge viewed as "just and equitable."[108]

Commentators explain that such unpredictability directly affects the parties involved and their decisions in proceeding with divorce actions.[109] One commentator reasoned:

> Under this scheme, the outcome of any individual dispute is difficult to predict, and informal settlement negotiations must proceed against a

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[106] Chief Judge Burns has been labeled as the "family law expert" within the appellate courts. Jon C. Yoshimura, Comment, *Administering Justice or Just Administration: The Hawaii Supreme Court and the Intermediate Court of Appeals*, 14 U. HAW. L. REV. 294-97 (1992).

[107] *Relating to Divorce Actions: Hearings on H.B. 2470 Before the Senate Committee on Judiciary*, 16th Leg., Reg. Sess. (1992) (testimony of James S. Burns, Chief Judge of the I.C.A.) [hereinafter Burns].

[108] *Relating to Divorce Actions: Hearings on H.B. 2470 Before the Senate Committee on Judiciary*, 16th Leg., Reg. Sess. (1992) (testimony of Charles T. Kleintop, Chair, Family Law Section, Hawaii State Bar Association). In an interview on Oct. 22, 1992, Mr. Kleintop, a family law practitioner and attorney for respondent-appellee in *Gussin*, added that the USP process "really brought some certainty to our clients, in what is a very uncertain time of their lives." Interview with Charles T. Kleintop, Chair, Family Law Section, in Honolulu, Haw. (Oct. 22, 1992) [hereinafter Kleintop interview].

[109] In addition to affecting the parties' procedural decisions, one commentator has discussed a greater effect that the distribution process may have on the parties. *See* Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279 (1989). Fineman argues that "[t]he distribution may psychologically represent to the spouses the final accounting of their contributions to the marriage—a concrete measure of their relative net worth." *Id.* at 283.

> "backdrop of uncertainty." Many litigants may be reluctant to settle in the hopes of larger court ordered awards.[110]

The probability of increased litigation due to such unpredictability was also recognized by the family court itself. Senior Family Court Judge Frances Q.F. Wong warned of the burden that would be placed on the judiciary's scarce resources because of a predicted increase in contested trials that would result from the prohibition of USPs.[111] In addition, although the family court took no position on the bill, Judge Wong outlined the "positive impact" that the USP process has had on divorce law in Hawaii. Judge Wong noted that:

> [The USP process] has provided a rational basis enabling more divorcing spouses to fairly settle division of their marital estate without repetitive and acrimonious contested trials which often impair their future ability to work together as parents after the divorce is over.[112]

A major area of concern which led to the development of the uniform decisional process was the inherent difficulty of appellate review in equitable distribution divorce actions. Chief Judge Burns explained to the legislature that under an abuse of discretion standard, the family court judges were allowed "to make any decision that did not clearly exceed the bounds of reason."[113] Section 580-47(a), as it stands, does not expressly require family court judges to articulate what factors they relied upon for determination of the property division.[114] Therefore, in the absence of a uniform decisional process, the appellate courts may be left with inadequate information from which to determine whether the family court judges had in fact "exceeded the bounds of reason." Family court judges may not be held accountable for their decisions.

Encompassing all these concerns is a desire for an appearance of fairness. In his dissenting opinion in *Gussin*, Chief Justice Lum cautioned that "broad unguided discretion exercised at the trial level, where each court may impose its unfettered will upon litigants, risks promoting an unnecessary amount of discontent with and disdain for the judicial process."[115] Justice Lum explained that USPs "demystify

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[110] Kastely, *supra* note 34, at 385 (footnote omitted).

[111] *Relating to Divorce Actions: Hearings on H.B. 2470 Before the Senate Committee on Judiciary*, 16th Leg., Reg. Sess. (1992) (testimony of Frances Q.F. Wong, Senior Family Court Judge).

[112] *Id.*

[113] Burns, *supra* note 107.

[114] See *supra* note 3 for text of statute.

[115] 73 Haw. at 494, 836 P.2d at 496 (Lum, C.J., dissenting).

the method a court uses to achieve . . . statutory goals."[116] Similarly, Chief Judge Burns reasoned that a uniform decisional process "brings openness, uniformity, and equitability to the process of dividing property in divorce cases."[117]

In summary, proponents of the uniform decisional process have predicted that in absence of such a process, unpredictability, increased litigation, lack of accountability, and a community sense of unfairness will pervade in this area of divorce law.

B. Unanswered Questions

Gussin leaves many questions unanswered. What guides family court judges in making just and equitable distribution decisions? As noted earlier, the Hawaii Supreme Court concluded that the "partnership model" of marriage would provide adequate guidance to the family courts but the court did not elaborate.[118] Although the court purports to eschew general rules, it accepted the proposition that "partnership principles guide and limit the range of the family court's choices."[119] Practitioners argue that "by holding that to some as yet unspecified extent partnership principles under *commercial* law apply in the division of the marital estate incident to divorce, *Gussin* greatly confuses the current state of divorce law in Hawaii."[120]

Practitioners contend that commercial partnership rules are incompatible with marriage principles. Charles T. Kleintop explained:

> There's no mistake that a marriage is a partnership. But a marriage partnership and a business partnership are completely different if for no other reason than the relationship of the partners is a completely different relationship. In no way can it be said that a marital partnership is an arms length partnership. In no way can it be said that the parties are on equal footing when they enter into a marital partnership as opposed to a business partnership.[121]

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[116] *Id.* at 495, 836 P.2d at 496 (Lum, C.J., dissenting).

[117] Burns, *supra* note 107.

[118] *See supra* notes 91-97 and accompanying text.

[119] *Id.*

[120] *Special Edition*, *supra* note 1, at 1.

[121] Kleintop interview, *supra* note 108.

Although many agree with the proposition that marriage is a partnership, they feel that this analogy should only be considered a first step:

The place where its useful is in explaining why it is equitable to consider all of

The Uniform Partnership Act was adopted in Hawaii in 1972 and is presently outlined in chapter 425, Hawaii Revised Statutes.[122] Section 425-118 provides:

> *Rules determining rights and duties of partners.*
>
> The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> (a) Each partner shall be repaid the partner's contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses whether of capital or otherwise, sustained by the partnership according to the partner's share in the profits.[123]

This rule is almost identical to the initial general rules articulated by the I.C.A. in that "[u]pon dissolution, each partner is repaid his contribution (the date-of-contribution value of the property he put into the partnership originally) but the remaining property is equally divided."[124] However, under the USP process which had evolved, exceptions to these rules could be pursued by either party and granted by the judge.[125] On appeal the family court judge was required to specify the factual considerations which led to a deviation or nondeviation from the USPs.[126] Practitioners argue that strict adherence to commercial partnership rules would create stronger presumptions of ownership, would impose a greater burden on parties seeking deviation from the "general partnership principles," and would impose greater limits on a family court judge's discretion than did the USP process.[127]

> the assets of the individuals and not to look at material contribution, but to assume that both parties are making both effort and material contributions . . . . What I think is missing from the partnership model is attention to needs and fairness. That should be part of the family law.

Interview with Amy H. Kastely, Professor of Law, Wm. S. Richardson School of Law, in Honolulu, Haw. (Nov. 16, 1992).

[122] Act 17, 1972 Haw. Sess. Laws 174.

[123] HAW. REV. STAT. § 425-118 (1985).

[124] Kastely, *supra* note 34 at 393. See *supra* note 36 and accompanying text for summary of initial general rules articulated by the I.C.A.

[125] *See supra* notes 58-59 and accompanying text.

[126] *See supra* notes 58-59 and accompanying text.

[127] *Gussin* specifically does *not* indicate how it can be that commercial partnership principles, which by their very nature do *not* involve a range of choice, "guide and limit" the range of choice of the Family Court in dividing the marital estate. *Special Edition*, *supra* note 1, at 2.

Another unanswered question is the validity of the Categories of NMVs. The Hawaii Supreme Court expressly invalidated USPs.[128] However, it remains questionable as to whether the Categories of NMVs have been included in the supreme court's prohibition. The categorization process involved the preparation of charts detailing the parties' assets and liabilities.[129] Following *Gussin*, there is a concern that such necessary information will no longer be prepared. One commentator explained:

> [T]here is a very serious concern that many Family Court practitioners will no longer take the time, and divorcing clients will no longer want to expend the resources required, to adequately organize and present the financial aspects of their cases, the result being that many cases will now be negotiated and tried without sufficiently comprehensive information regarding the nature and extent of the marital estate.[130]

Finally, how are the appellate courts to hold family court judges accountable for their decisions in the absence of a uniform decisional process and in the absence of consensus over "partnership model" guidelines? One commentator noted that without requiring family courts to state their reasons for a certain distributional scheme, appellate courts are often left without an adequate record to determine the propriety of the award and "[i]t is inequitable for an appellate decision to be based on an incomplete record."[131]

V. Conclusion

In *Gussin*, the Hawaii Supreme Court held that under current Hawaii law, the appellate courts are powerless to require the family courts to engage in a uniform decisional process when dividing and distributing divorcing parties' assets. Regardless of the apparent inequities of a nonuniform system and the apparent support for and success of the I.C.A.'s Uniform Starting Points, the supreme court concluded that the legislature had not authorized appellate courts to mandate such a process.

Although proponents of the USP process have expressed concern over the potential adverse impact of *Gussin* on the future of divorce

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[128] *Gussin*, 73 Haw. 470, 482, 836 P.2d 484, 490 (1992).

[129] *Muraoka*, 7 Haw. App. at 438, 776 P.2d at 422.

[130] *Special Edition*, *supra* note 1, at 1.

[131] Mary Jane Connell, Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 Fordham L. Rev. 415, 441-43 (1981).

law in Hawaii,[132] others are able to view the decision in a positive light. Amy H. Kastely, Professor of Law at the William S. Richardson School of Law, views *Gussin* as an opportunity to improve the family law in Hawaii.[133] According to Professor Kastely, the debate over the equitable distribution of property in divorce that has been going on for the past decade has brought about "very real improvements in our law."[134] These improvements include the "vision of marriage as an institution structured on principles of sharing" and the benefits of predictability in allowing settlement and negotiation.[135] However, problems in this area of family law continue. Professor Kastely explains that "divorce continues to be a major factor in the impoverishment of women and children."[136] In addition, the USPs do not adequately treat certain types of cases where the post-divorce income of a spouse is inadequate to maintain the spouse and/or the children.[137] Professor Kastely emphasizes the supreme court's "insistence that the focus of analysis must shift from starting points to results."[138] This shift in focus, according to Professor Kastely, will provide new ways to address the continuing inequities in divorce law.

> We have gained much from the years of contested argument focused by the doctrine of Uniform Starting Points and by the "partnership model" as it has been elaborated in our appellate courts . . . . *Gussin* challenges us to move beyond these insights and to look directly at the results of divorce on the financial condition of the parties and their children.[139]

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[132] *See supra* text accompanying notes 106-17.

[133] Professor Amy H. Kastely, Address at the Annual Meeting of the Hawaii State Bar Association (Nov. 25, 1992). See *infra* Appendix for transcription of Professor Kastely's speech.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Professor Kastely described two kinds of cases:

> *First*, divorces involving relatively long-term relationships (perhaps 8 or 10 years or more, but sometimes less . . .) in which one of the spouses, most often the woman, has put priority in children and family, by restricting paid employment, by foregoing education, promotion, advancement opportunities of various kinds. *Second*, and this category frequently overlaps with the first, divorces involving children where the post-divorce income of the custodial parent, most often the woman, is not adequate, even supplemented with child support payments, to maintain stability in the children's lives.

Id.

[138] *Id.*

[139] *Id.*

At the very least, *Gussin* has drawn much attention to this area of family law. Hopefully, the discussions and debates fueled by this decision will ensure that Hawaii divorce law progresses closer towards "justice and equity" rather than reverting to unpredictability and disparity.

Lori L. Yamauchi

APPENDIX[140]

As an introduction to discussion of *Gussin*, I would like to speak of the achievements of the last ten years or so, then to talk of some of the problems not adequately addressed by the uniform starting points doctrine and finally to make some suggestions for development of the law under *Gussin*, . . .

I. First, on past achievements:

Debate within our legal community over the law governing the economic consequences of divorce has been intense and productive, and there is much in which you who having been working in the family law area should feel pride.

Attention has focused, in this on-going debate, on a number of issues that needed examination, and you who have been negotiating, presenting, and deciding cases in the family court have brought depth and complexity to the issues and have worked to discover areas of consensus and shared notions of justice:

— We now have a much stronger, a much more concrete vision of marriage as an institution structured on principles of sharing.
— We now have a clearer sense that married people contribute to their on-going marriages in a diversity of ways, both material and intangible, and that it is both respectful and wise for the law to resist trying to weigh or to place determinant values on these multitude of contributions.
— We now have a fairly complex notion of the significance of separate (premarital, gifted, or inherited) assets, a notion that includes the idea that some circumstances do warrant the treatment of this property as available for distribution upon divorce.
— We within the legal community also know that predictability is a genuine value and thus we know the importance of judges stating their reasons for particular decisions. We have all seen the benefit to people in our ability to predict the outcome of cases with enough assurance to allow us to negotiate settlements that we believe are fair and thereby to save individual litigants the harsh pain and cost of contested trials.

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[140] Professor Amy H. Kastely, Address to the Annual Meeting of the Hawaii State Bar Association (Nov. 25, 1992).

These are very real improvements in our law.

II. Yet there are problems not adequately addressed by the uniform starting points and supporting doctrine.

And *Gussin* presents an opportunity to address these in new ways:

1) *Most importantly, divorce continues to be a major factor in the impoverishment of women and children.*

In 1985, Lenore Weitzman reported the results of her study of the economic effects of divorce under California's 50-50 property division system, which is in many ways similar to the uniform starting points:

— In the many cases Lenore Weitzman studied, men experienced, on the average, a 42% increase in standard of living while women and children experienced an average 73% decrease in standard of living following divorce.

Following Weitzman, other studies have confirmed that divorce most frequently results in a significant decrease in the standard of living of women and children and in an increase in the standard of living of men. The precise percentage of increase and decrease may vary, depending on how the researcher measures standard of living and the like, but the results consistently reveal what we know from experience . . . That the economic losses from divorce fall most frequently on women and children.

— We do not have comparable studies for Hawaii, but my guess is that this pattern corresponds with most of our experiences, and we know from the 1990 census that women and children are disproportionately impoverished in our community.

— *There are two important reasons for this effect:*

One is that most divorcing couples' assets are of fairly low value — cars, some equity in a house . . . — For most people, nowadays (unlike times past) a job is by far the most significant asset . . .

The second is that women continue to bear and to be expected to bear the primary responsibility for childcare and housework and as a result continue to forego employment opportunities, education and advancement opportunities, and continue to be awarded custody following divorce . . . without corresponding resources to assume these responsibilities . . .

2) *Many practitioners in our community have observed that the uniform starting points do not adequately treat two kinds of cases.*

> *First*, divorces involving relatively long-term relationships (perhaps 8 or 10 years or more, but sometimes less . . .) in which one of the spouses, most often the woman, has put priority in children and family, by restricting paid employment, by foregoing education, promotion, advancement opportunities of various kinds.
> *Second*, and this category frequently overlaps with the first, divorces involving children where the post-divorce income of the custodial parent, most often the woman, is not adequate, even supplemented with child support payments, to maintain stability in the children's lives.

Gussin presents the opportunity for the law to address the economic consequences of divorce, and to treat cases of this sort in a more just fashion.

III. And I would like to make some suggestions for interpretation of Gussin, and some remarks on the use of partnership as a conceptual model . . .

In *Gussin*, the court disapproved the use of uniform starting points as a doctrinal organization for analysis of disputes over division of property. The court instead focused on *results* as the appropriate focus for a determination of justice in these cases.

I urge you to take the court very seriously in its insistence that the focus of analysis must shift from starting points to results. It is right, I think, that decisions under 580-47 must seek a just result for the parties and their children. This is an important shift in the focus of analysis and one that we are now well-prepared to make and that has the potential to improve the law in significant ways.

We are at a point in our family law where we can talk directly about the results of divorce for children, for women, for men.

We can talk directly about results, and our law will be more just as a consequence.

A second element in the *Gussin* decision is the court's suggestion that the "partnership" model "provides the necessary guidance to family courts." On this, I think the court will find that this dicta is too limited, that they do not really mean that the partnership model is enough . . .

It is important to begin, to acknowledge, that the "partnership model" talked about in *Myers*, in *Cassiday*, in *Gussin*, in my 1984 article has very little to do with the business partnership defined in business partnership law:

Here's a frequently quoted phrase:

"Marriage is a partnership to which both partners bring their financial resources as well as their individual energies and efforts."

Reading this now, I have to smile. In truth the sentence says something like:

"An elephant is a cat that has a trunk and a very big body."

I suppose that the comment would be helpful in some contexts — in order to explain the difference between an elephant and a butterfly, perhaps, but it clearly is not justification to feed catfood to an elephant . . .

Just as the very big cat with a trunk is fictional, no business partnership exists in which the partners contribute literally all of their time (24 hours a day, 7 days a week) and 100% — all — of their resources. So really, the "partnership model" of marriage is very different from a business partnership.

Within family law nationally, the "partnership model" simply means that marriage entails sharing, and that differences in the contributions of each person are not relevant to their claims upon dissolution.

This is a useful conceptual model, because it gives us a way to talk and think about the efforts and resources of each member of the partnership as contributing to the marital entity.

But like any analogy, like any model, business partnership is inadequate to describe the whole of marriage. In particular, the partnership model fails to account for the complexity of relationships, responsibilities, claims among members of a marriage, and it fails to account for a variety of intangible goods and purposes that are significant to the institution of marriage among us:

One could say, then, that marriage is also a trust, with assets held for the benefit of children and each spouse; it is also a non-profit organization, existing to provide shelter and support for its members; an educational institution committed to the intellectual and ethical growth of all its member; a health care organization, formed to provide medical and nutritional care; a support group, providing advice and aid . . .

At the same time, for many women, marriage is the site of extreme physical and psychological violence.

Although it is very difficult to get accurate information, for the telling reason that women are at risk in reporting violence, studies in other states indicate that 25 to 40 percent of women initiating divorce report current abuse by their husbands.

And one thing we do know for sure is that when women attempt to leave abusive marriages, their husbands' violence escalates.

— At least half of women who leave their abusers are followed and harassed or further attacked.[1] One study of interspousal homicide indicates that in more than half of the instances in which men killed their spouses, they did so when the two were separated.[2]
The most dangerous time for a women is when she separates from her husband.
Marriage is, then all of these things, or some of these things, both more and less than these things. In order to carry out the mandate of 580-47 and *Gussin*, to achieve a just result upon the dissolution of marriage, courts must resist the urge to believe that a single analogy, useful for some purposes, is the whole truth.
Conceptual models are useful inasmuch as they help us to discover and communicate arguments towards justice in particular situations. The partnership model strengthens our ability to see and talk about contributions, but we must not let it blind us to the variety of other aspects of marriage as a legal institution.
We have gained much from the years of contested argument focused by the doctrine of uniform starting points and by the "partnership model" as it has been elaborated in our appellate courts . . .
Gussin challenges us to move beyond these insights and to look directly at the results of divorce on the financial condition of the parties and their children.
In doing this, I believe that the courts will soon find that the general sharing principles of a partnership model need to be augmented by attention to the income producing capacities of each spouse following divorce, to the child care responsibilities of each, with particular sensitivity to the multitude of ways in which the primary care provider has had to forego employment opportunities and advancement in the past and will continue to have to do this in the future.
I believe that women are going to be increasingly hurt by the refusal of our business and political leaders to recognize the hard and important work of raising children. In this recent presidential campaign, the focus on workfare must be seen as a direct attack on women who must put most of their efforts and resources into caring for children. Similarly, the moves by American business to lower wages and raise productivity

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[1] Angela Browne, WHEN BATTERED WOMEN KILL, 110 (1987).

[2] George Bernard et al., *Til Death Do Us Part: A Study of Spouse Murder*, 10 BULLETIN of AMERICAN ACADEMY of PSYCHIATRY AND LAW 224 (1982) (In contrast only 10 percent of the few women who killed did so when they were separated).

has the direct effect of putting women with child care responsibilities at a greater disadvantage in the workplace. There are many reasons to believe that the economic well-being of women and children will become worse in the future.

In emphasizing *Gussin*'s focus on just results, I am not advocating a case by case inquiry into the particular history of each marriage. I believe it is appropriate for the law to make rebuttable presumptions that will relieve the need for extensive fact-finding and will facilitate negotiated settlements in most cases.

Some of the assumptions that are warranted:

1) That child care is hard and valuable work.
2) That the person with primary child care responsibilities has had to forego employment and advancement opportunities in order to carry the variety of material and emotional burdens of child care.
3) That an unemployed or underemployed spouse has done much to enhance the earning capacity of a higher-paid spouse.
4) That it is important to maintain stability in children's lives.
5) That it is just to give priority to children in decisions about the economic consequences of divorce, and that it is just as a secondary goal to equalize standards of living of the divorcing couples.

For all of these reasons, the partnership model will not be the only helpful conceptual analogy. The challenge of *Gussin* is the persistent, the permanent challenge of the common law — to develop open and flexible ways to articulate and respond to the genuine claims of justice made by individuals. Our job as lawyers is to learn to hear these claims, and to aid in making them as powerful and persuasive as possible, and to find ways for the legal system to act within the complexity that life always presents.

It is important that we continue to work on developing legal doctrine that is informed by and responsive to the complex and diverse claims of justice made by those whose lives are effected by marriage and divorce.

I admire the abilities of Hawaii's family law practitioners: lawyers, judges, social service providers, involved workers throughout the community. I think that the *Gussin* case provides an important opportunity and I am confident that your work will further our shared aspiration for justice.

Sexual Harassment in the Workplace: Remedies Available to Victims in Hawai'i*

I. Introduction

Sexual harassment has been a continual problem for working women in Hawai'i, and across the nation, since they have entered the work force.[1] Federal and state courts have only given significant attention to the issue within the past two decades. In Hawai'i, legislative and judicial response has traditionally been slow and insufficient to provide sexual harassment victims with appropriate relief.[2] Recently, however, sexual harassment is receiving more legislative attention, as lawmakers take steps to amend existing statutes to improve the remedies available to victims and increase the liability of employers.

The purpose of this Article is to discuss the recent changes in remedies available to victims of sexual harassment in Hawai'i under

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* The authors acknowledge the following individuals for providing commentary or background materials: Mazie Hirono, Hawai'i State Representative; Amy H. Kastely, Esq., Professor of Law, William S. Richardson School of Law; Earl Kim, Public Information Officer, Hawaii Civil Rights Commission; Nalani Markell; Richard S. Miller, Esq., Professor of Law, William S. Richardson School of Law; Janice Weir, Esq., Hawaii Commission on the Status of Women; Michael D. Wilson, Esq., Pavey & Wilson, Honolulu, Hawai'i.

1. Ilene Aleshire, *Sex Harassment Not Rare Here*, Honolulu Sunday Star-Bulletin & Advertiser, October 20, 1991, at D4 [hereinafter Aleshire]. Sexual harassment is an increasingly widespread problem across the United States. In Hawai'i, it is "a lot more prevalent than people might want to believe." *Id.* In a recent survey conducted by Working Woman Magazine, over 60% of respondents said they had experienced sexual harassment at work, and over a third knew a co-worker who had been harassed. *See* Ronni Sandroff, *Sexual Harassment: The Inside Story*, Working Woman Mag., June 1992, at 47, 48.

2. Prior to 1992, no provision of the Hawaii Revised Statutes even included the term "sexual harassment." The term only appeared in a case note to § 378-4 of the Hawaii Revised Statutes Annotated, Haw. Rev. Stat. Ann. § 378-4 Case Notes (1988) (citing Lui v. Intercontinental Hotels Corp., 634 F.Supp. 684 (D.Haw. 1986)).

both state and federal laws.[3] The major changes in state law occurred with the passage of Act 275 in 1992.[4] Act 275 is a composite measure that amended certain provisions of the state's Fair Employment Practices (FEP) statute[5] and workers' compensation law[6] by allowing sexual harassment victims to sue their employers under certain common law torts independent of the administrative restrictions existing under the previous statutes. Prior to Act 275, victims were barred from bringing private civil actions against employers because of the exclusivity of the FEP and workers' compensation statutes granted by the Hawai'i courts and legislature. On the federal level, the Civil Rights Act of 1991[7] amended Title VII of the Civil Rights Act of 1964 (Title VII)[8] by allowing sexual harassment victims to seek compensatory and punitive damages in addition to those damages already allowed under Title VII. With these changes, a victim of workplace sexual harassment can now seek recovery under four areas of law:[9] 1) Title VII and the 1991 Civil Rights Act; 2) the Hawai'i FEP statute; 3) the Hawai'i workers' compensation statute; and 4) certain common law torts under Act 275.

First, this Article provides background information on the evolution of sexual harassment law and the prevalence of sexual harassment, identifying unique issues that must be considered when creating, or analyzing, a remedial provision. Part III begins the discussion on remedies available under Title VII, then describes the impact of the 1991 Civil Rights Act. Part IV, which discusses the state remedies currently available to sexual harassment victims, contains four sections.

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3. This Article mainly addresses statutory developments in sexual harassment under state employment law and federal law under Title VII; it does not discuss possibilities for relief under common law tort and contract theory or other federal employment anti-discrimination statutes. The remedies and causes of action discussed in this Article are by no means exhaustive.

4. Act of June 19, 1992, §§ 378-3, 386-5, 1992 Haw. Sess. Laws 275 [hereinafter Act 275].

5. HAW. REV. STAT. ch. 378 (1985 & Supp. 1992).

6. HAW. REV. STAT. ch. 386 (1985 & Supp. 1992).

7. P.L. 102-166, 105 Stat. 1071 (1991).

8. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

9. No statute precludes all four claims from being brought by a plaintiff in one action. *See* Lui v. Intercontinental Hotels Corp., 634 F.Supp. 684, 686 (1986) ("[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.").

The first two sections examine the Hawai'i FEP statute,[10] which is the state version of the Civil Rights Act of 1964, and its administrative body, the Hawaii Civil Rights Commission (Commission).[11] The third section discusses sexual harassment in relation to Hawai'i's workers' compensation law.[12] The last section highlights the changes introduced by Act 275[13] to the FEP and workers' compensation laws. Finally, Part V discusses the impact these statutory changes may have on future sexual harassment litigation.

II. BACKGROUND

Prior to 1976, the only remedies available to victims of sexual harassment in the workplace were those existing under traditional tort law.[14] An individual who felt she[15] was a victim of sexual harassment in the workplace could bring a court action, but only if she could prove that the circumstances of the harassment amounted to a cognizable tort, such as battery or assault.[16] As a result, many sexual harassment claims went unresolved because of the difficulty plaintiffs encountered in "pigeonholing" their claims into tort theories. In addition, plaintiffs could seek redress from only the perpetrator, such as a co-worker or supervisor; courts generally did not recognize the

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10. HAW. REV. STAT. ch. 378 (1985 & Supp. 1992).

11. The Hawaii Civil Rights Act, HAW. REV. STAT. ch. 368 (Supp. 1992), is basically an administrative provision which governs four Hawai'i anti-discrimination statutes, one of which is the FEP statute, HAW. REV. STAT. ch. 378 (1985 & Supp. 1992). Hawaii Revised Statutes § 378-3 was amended in 1992 by Act 275 as follows:

> Nothing in this part shall be deemed to:
>
> (10) *Preclude any employee from bringing a civil action for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto; provided that notwithstanding section 368-12, the commission shall issue a right to sue on a complaint filed with the commission if it determines that a civil action alleging similar facts has been filed in circuit court.*

(new portion emphasized) HAW. REV. STAT. § 378-3 (Supp. 1992).

12. HAW. REV. STAT. ch. 386 (1985 & Supp. 1992).

13. Act 275, *supra* note 4.

14. *See* Terry M. Dworkin et al., *Theories of Recovery for Sexual Harassment. Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125 (1988).

15. Plaintiffs/victims in this article are referred to as "she" because the majority of victims are female. The authors do recognize, however, that the problem is increasingly a concern for males as well.

16. *See* Dworkin et al., *supra* note 14, at 125-26.

liability of the victim's employer even though the harassment occurred in the workplace.[17]

In 1976, a federal district court in *Williams v. Saxbe* [18] first recognized sexual harassment as a form of sex discrimination prohibited under Title VII. Traditionally, courts have taken the view that sexual harassment was not sex discrimination under the meaning of Title VII.[19] *Williams* involved a female employee who claimed she was fired after refusing her male supervisor's sexual advances. The court held that the employer was subject to Title VII action because the supervisor's behavior "created an artificial barrier to employment which was placed before one gender and not the other."[20]

A decade later, the United States Supreme Court examined sexual harassment in the context of Title VII for the first time in *Meritor Savings Bank v. Vinson* (*Vinson*).[21] *Vinson* involved a bank teller, Mechelle Vinson, who claimed that during her course of employment at the Capitol City Federal Savings and Loan Association,[22] from 1974 to 1978, she was subjected to sexual harassment by her branch manager, Sidney Taylor, the man who hired her.[23] Vinson claimed that she was required to perform sexual favors for Taylor, including sexual intercourse, in order to keep her job at the bank.[24] She also said Taylor fondled her in front of other employees, exposed himself to her in the restroom, and even raped her on several occasions.[25] She was eventually

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17. *See id.* at 126.

18. 413 F.Supp. 654 (D.D.C. 1976, *rev'd on other grounds sub nom).* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

19. *See* Barnes v. Train, 13 Fair Empl.Prac.Cas. (BNA) 123, 124 (D.D.C. 1974) (male supervisor's sexual advances toward employee did not constitute Title VII discrimination because, although his behavior was "inexcusable," such behavior did not "evidence an arbitrary barrier to continued employment based on plaintiff's sex"); Corne v. Bausch and Lomb, Inc., 390 F.Supp. 161, 163 (D. Ariz. 1975) (male supervisor's sexual advances toward female employee resulted from "personal proclivity, peculiarity or mannerism" rather than sex discrimination). *See also* Dworkin et al., *supra* note 14, at 125-126 ("One early argument against recognition of sexual harassment by males against females was that harassment could not be title VII gender discrimination because a woman could also harass a man, and homosexuals could harass members of the same sex.").

20. *Williams*, 413 F.Supp. at 657.

21. 477 U.S. 57 (1986). To date, *Vinson* is the only sexual harassment case heard by the U.S. Supreme Court.

22. The name of the bank has since changed to Meritor Savings Bank.

23. *Vinson*, 477 U.S. at 59-60.

24. *Id.* at 60.

25. *Id.*

terminated, the bank alleged, because of a significant number of absences from work.[26] *Vinson* presented the court with several important issues, including whether an employer is strictly liable for the behavior of supervisors who subject other employees to harassment and whether an employee could bring a Title VII action against her employer for a hostile or abusive work environment.[27] As to the first issue, the Court did not articulate a definitive rule regarding standards for measuring employer liability[28] but nevertheless held that an employer is not subject to strict liability in sexual harassment cases.[29] But as to the second issue, the Court expressly recognized two types of sexual harassment actionable under Title VII. One type is *quid pro quo* harassment, in which the subordinate employee is directly victimized by a person in a superior position, such as a supervisor or manager.[30] An example is when an employer demands sexual favors from an employee, promising job-related rewards in return, then denying the rewards or firing the employee if the employee declines.[31] The second type of harassment is the hostile work environment,[32] in which the victim's claims are based on the harassing environment created by her supervisors and/or other employees.[33] In light of this recognition, *Vinson* was hailed as a victory for working women because the Court "clearly established that employees have the right to a work environment free from sexual harassment."[34]

Since *Vinson*, many federal courts have upheld actions for sexual harassment under Title VII.[35] State legislatures have also taken action

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26. *Id.*

27. *Id.* at 72. *See also* David Holtzman & Eric Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 ST. LOUIS U. L.J. 239, 255 (1987).

28. *Vinson*, 477 U.S. at 72.

29. *Id* at 73. This issue involved much more, but the authors decline from in-depth sis for purposes of this article.

30. *Id.* at 65. Victimization may take the form of denying the employee a specific benefit, such as a promotion, raise, or job position. It is the exchange of the benefit for some type of sexual favor which is characteristic of *quid pro quo* sexual harassment. *Id.*

31. *See* Jill W. Henken, *Hostile Environment Claims of Sexual Harassment: The Continuing Expansion of Sexual Harassment Law*, 34 VILL. L REV. 1243, 1245 (1989).

32. The Court in *Vinson* also used the term "abusive" in describing a victim's work environment.

33. *Vinson*, 477 U.S. at 65.

34. *See* Holtzman & Trelz, *supra* note 27, at 255.

35. *See, e.g.*, EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) ("[E]mployers

by incorporating the prohibition of employee harassment into their state employment and civil rights laws.[36] In Hawai'i, employment discrimination and workers' compensation statutes provide some protection for victims of sexual harassment in the workplace.

The effectiveness of such statutes, however, may be reduced if the unique physical and psychological aspects of workplace sexual harassment are not considered. One problem area involves the large number of incidents that go unreported and the reasons why victims choose not to report them. During the first eight months of its operation, the Hawaii Civil Rights Commission[37] received thirty-two complaints involving sexual harassment[38] — ten percent of all complaints received.[39] These figures are similar to those received through national studies, which indicate that while approximately one out of every two women experience sexual harassment,[40] only five to ten percent actually file a formal complaint or request an investigation.[41]

In agonizing over whether to file a complaint, the victim of sexual harassment is often concerned about the potential consequences.[42] Fear of being blamed for the harassment, fear of retaliation, and lack of

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are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.").

36. *See, e.g.*, California (CAL. GOV'T CODE § 12940(i) (West 1992)); Michigan (MICH. COMP. LAWS ANN. §§ 37.2102, 37.2103(h), 37.2202 (West 1985)); Wisconsin (WIS. STAT. ANN. §§ 111.32(13), 111.36(1)(b) (West 1988)).

37. The Commission was created in 1989 and began operating on January 1, 1991.

38. Interview with Earl Kim, Public Information Officer, Hawaii Civil Rights Commission, in Honolulu, Hawai'i (November 17, 1992) [hereinafter Kim].

39. *See* Aleshire, *supra* note 1, at D4.

40. NATIONAL COUNCIL FOR RESEARCH ON WOMEN, SEXUAL HARASSMENT: RESEARCH AND RESOURCES 9 (Report-in-Progress 1991) [hereinafter NATIONAL COUNCIL REPORT]. This report lists the following statistics: (1) One out of two women will experience sexual harassment during academic or work life; (2) Forty-two percent of the women in the federal work force reported experiencing sexual harassment during a two-year study period (citing a 1987 U.S. Merit Systems Protection Board survey); (3) Two out of three women in the military claim to have experienced sexual harassment (citing Women's Legal Defense Fund 1991). *Id.*

41. *Id.* at 6. A 1987 U.S. Merit Systems Protection Board survey of federal employees indicated that only five percent of those who have been sexually harassed actually filed a formal complaint or requested investigations. Generally, 90% of sexual harassment victims are unwilling to come forward. *See* NATIONAL COUNCIL REPORT, *supra* note 40, at 10.

42. *Id.* at 10-13.

confidence in the complaint process are some common reasons why victims fail to report incidents.[43]

Given these concerns, the victim may exhibit internalized or externalized reactions[44] which may ultimately be diagnosed as "Sexual Harassment Trauma Syndrome."[45] The syndrome may take the form of one or a combination of symptoms generally described as (1) emotional reactions;[46] (2) physical reactions;[47] (3) changes in self-perception;[48] or (4) social, interpersonal relatedness and sexual effects.[49]

The combination of physical and psychological effects on the victim often results in a traumatic experience that is frequently repressed.[50] As a consequence, considerable time may elapse before the individual

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43. *Id.* at 11-12. Other related issues include the disparate power of harasser over victim, wherein the perpetrator has a higher position at work than the victim. Additional consequences considered by the sexual harassment victim are that the harasser may have been someone that the victim liked and respected, or the victim may feel uncomfortable and is concerned that she is being over-sensitive or over-reacting. The victim may also contemplate effects on her career — having her reputation harmed and/or creating enemies in the workplace or industry. *Id. See also* Aleshire, *supra* note 1, at D4.

44. *See* NATIONAL COUNCIL REPORT, *supra* note 40, at 11. Internalized reactions may include: 1) detachment, e.g., minimizing the situation; 2) denial, e.g., ignoring the problem in hope that it will go away; 3) relabelling or rationalizing the incident; 4) attributing harassment to one's behavior or attire; or 5) suffering in silence. Externally, the reactions may include: 1) avoidance; 2) confronting the harasser; 3) seeking institutional help, i.e., reporting the harassment; 4) seeking social support; or 5) attempting to appease or placate the harasser. *Id.*

45. M. A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL 27-29 (State University of New York Press 1991).

46. *Id.* These include anxiety, shock, denial, anger, frustration, fear, insecurity, betrayal, embarrassment, confusion, self-consciousness, shame, powerlessness, guilt, and isolation. *Id*

47. *Id.* These may surface as headaches, sleep disturbances, lethargy, gastrointestinal distress, hypervigilance, dermatological reactions, weight fluctuations, nightmares, phobias, panic reactions, genitourinary distress, respiratory problems, and substance abuse. *Id*

48. *Id.* Changes in self-perception may be evidenced by negative self-concept or self-esteem, lack of competency, lack of control, isolation, hopelessness, or powerlessness *Id*

49. *Id.* Social, interpersonal relatedness and sexual effects may be seen as withdrawal, fear of new people or situations, lack of trust, lack of focus, self-preoccupation, changes in social network patterns, negative behavior in sexual relationships, sexual disorders, or changes in dress or physical appearance. *Id.*

50. *See* NATIONAL COUNCIL REPORT, *supra* note 40, at 14.

even realizes that she is a victim of the harasser's illegal behavior.[51]

All of these aspects of sexual harassment must be considered in analyzing the effectiveness of any statute seeking to deter and provide a remedy for this social problem.

III. Federal Remedies

A. *Title VII*

Under federal law, a victim of sexual harassment in the workplace may seek remedies under Title VII of the Civil Rights Act of 1964 (Title VII).[52] Title VII, administered and enforced by the Equal Employment Opportunities Commission (EEOC), prohibits employment practices that discriminate against an individual on the basis of race, color, religion, sex, or national origin.[53] Title VII applies to private employers who have fifteen or more employees for each working day during twenty or more weeks in a current or preceding calendar year.[54] It also applies to state and local governments, educational institutions, employment agencies, labor unions that have memberships of fifteen or more, and the federal government.[55]

The federal courts are still grappling with the issue of how sexual harassment fits into the Title VII definition of sex discrimination.[56] Federal district and appellate courts have held employers accused of Title VII sex discrimination violations to varying degrees of liability. The inconsistency results from the absence of standards by which to measure employer liability[57] as well as the lack of a legislatively established definition of "sexual harassment."[58]

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51. *Id.*

52. 42 U.S.C. §§ 2000e to 2000e-17 (1988).

53. 42 U.S.C. § 2000e-2(a)(1) (1988). In pertinent part, Title VII states that it is illegal for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

54. *See* 42 U.S.C. § 2000e(b) (1988).

55. *See* 42 U.S.C. § 2000e(a)-(e) (1988); *see also* Leslie A. Hayashi, *Title VII of the Civil Rights Act of 1964 and Hawaii Fair Employment Practices Law*, *in* Our Rights, Our Lives 9 (Elizabeth J. Fujiwara et al. eds., 2d ed. 1991).

56. *See* Holtzman & Trelz, *supra* note 27, at 263.

57. *See* 42 U.S.C. § 2000e (1988); *see also* Holtzman & Trelz, *supra* note 27, at 264.

58. There is altogether a lack of legislative history regarding the decision to include

B. EEOC Guidelines on Sexual Harassment

In an attempt to clarify its intent to include sexual harassment within the meaning of sex discrimination under Title VII, and to provide uniformity in interpreting Title VII, the EEOC, in 1980, published its Guidelines on Discrimination Because of Sex in the Code of Federal Regulations.[59] This was the first time a government agency explicitly defined sexual harassment as a form of unlawful sex-based discrimination.[60] Although they do not have the force and effect of law, the guidelines have played an important role in key federal court decisions.[61] According to the guidelines, behavior amounting to "[u]nwelcome 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.[62]

The EEOC looks at the totality of the circumstances in determining whether the alleged conduct constitutes sexual harassment.[63]

The EEOC guidelines gained notoriety when the United States Supreme Court cited the guidelines in creating a legal definition of sexual harassment in *Meritor Savings Bank v. Vinson*.[64] The Court held

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sex discrimination in Title VII. *See* Barnes v. Costle, 561 F.2d 983, 986-87 (D.C. Cir. 1977) (legislative history provides no assistance in attempts to define the scope of prohibition against sex discrimination); Miller v. Bank of America, 418 F.Supp. 233, 235 (N.D. Cal. 1976) (legislative history of Title VII fails to reveal any specific discussions as to the intended scope or impact of the prohibition against sex discrimination), *rev'd* 600 F.2d 211 (9th Cir. 1979); Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991) ("Congress added the word 'sex' to Title VII of the Civil Rights Act of 1964 at the last minute on the floor of the House of Representatives.").

59. 29 C.F.R. § 1604.11 (1992).

60. *See* NATIONAL COUNCIL REPORT, *supra* note 40, at 3. Prior to the EEOC guidelines, sexual harassment was viewed as disparate impact or intentional discrimination. *Id.*

61. *See Vinson*, 477 U.S. at 65-67; *see also* Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991).

62. 29 C.F.R. § 1604.11(a) (1992).

63. 29 C.F.R. § 1604.11(b) (1992).

64. 477 U.S. at 65-67.

that (1) in every sexual harassment claim the alleged sexual advances must be unwelcome; (2) to be actionable the harassment must be sufficiently severe or pervasive; (3) the voluntariness of a woman's participation in any sexual relations is irrelevant; and (4) evidence of a woman's dress and speech is relevant to determine whether the sexual advances are unwelcome.[65] With this decision, the Court expressly supported the use of the EEOC guidelines by federal courts for interpretative guidance.[66] To date, however, the Court has not provided its own clear-cut definition of sexual harassment.[67]

C. Additional Remedies: The Civil Rights Act of 1991

Although employer liability for sexual harassment of employees under Title VII evolved significantly in the federal courts, the damages available under Title VII, until 1991, remained limited to the plaintiff's actual tangible losses, such as lost wages, reinstatement and lost employment benefits.[68] A plaintiff could not seek compensatory or punitive damages under Title VII;[69] her only other alternatives were to seek additional remedies available under state law.[70] Congress addressed this obstacle by passing an accompanying statute, the Civil Rights Act of 1991 ("1991 Act"), which explicitly allows for recovery of compensatory and punitive damages for victims of "unlawful harassment and intentional discrimination in the workplace."[71]

The 1991 Act is an amendment to the Civil Rights Act of 1964. The overall purpose of the 1991 Act is to "strengthen and improve

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65. Holtzman & Trelz, *supra* note 27, at 256-57 (citing *Vinson*, 477 U.S. at 63-71).

66. *See Vinson*, 477 U.S. at 65-67; *see also Ellison*, 924 F.2d at 876.

67. On March 1, 1993, the United States Supreme Court granted certiorari to clarify the definition of illegal sexual harassment in the workplace. The main issue on appeal is whether sexual harassment, in order to be actionable, need only be behavior that offends a victim or whether the victim must be psychologically damaged as well. *See* Harris v. Forklift Systems, Inc., 976 F.2d 733 (6th Cir. 1992) (unpublished), *cert. granted*, 113 S.Ct. 1382 (1993).

68. *See* 42 U.S.C. § 2000e-5(g) (1988).

69. *Id.*

70. *See* Dworkin et al., *supra* note 14, at 126. Because of Title VII's complex procedural requirements and relatively inadequate remedies, plaintiffs have explored tort, contract, and statutory causes of action instead of or in addition to their Title VII claims.

71. P.L. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a (1992 Supp.)).

Federal civil rights laws" and to "provide for damages in cases of intentional employment discrimination."[72] Under the 1991 Act, a plaintiff who brings a Title VII action against her employer for intentional discrimination in the workplace, including sexual harassment, may seek compensatory and punitive damages in addition to the remedies already afforded by Title VII.[73] Prior to the enactment of the 1991 Act, a plaintiff could only seek equitable relief, such as back pay, lost wages and reinstatement of employment.[74] Because of this, Title VII was often criticized for inadequately compensating sexual harassment victims.[75]

But Congress included certain restrictions with the new allowances of damages. First, the 1991 Act caps awards for compensatory and punitive damages based on the size of the employer:

> (3) Limitations. The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party —
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . $100,000;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . $200,000; and
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> (D) in the case of a respondent who has more than 500 employees . . . $300,000.[76]

These provisions were included as part of the political compromise "forged to ensure passage of the bill in Congress and gain White

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72. *See* Pub. L. No. 102-166.

73. *See* 42 U.S.C. § 1981a(a)(1) (Supp. 1992). Such damages are recoverable against a business that has engaged in intentional discrimination that is unlawful for reasons other than disparate impact. *Id. See also* WARREN, GORHAM & LAMONT, ANALYSIS OF THE CIVIL RIGHTS ACT OF 1991 ¶ 504 (1991) [hereinafter ANALYSIS OF 1991 ACT].

74. *See* 42 U.S.C. § 2000e-5(g) (1988).

75. *See* Dworkin et al., *supra* note 14, at 126 (noting Title VII's "relatively meager remedies," essentially limited to tangible losses, such as reinstatement, back pay, lost employment benefits, and attorney's fees); *see also* James C. Gross & Eric S. Waxman, Note, *Sexual Harassment*, 14 U.C. DAVIS L. REV. 711, 725 (1981) (state remedies may provide more protection than Title VII).

76. 42 U.S.C. § 1981a(b)(3) (Supp. 1992).

House approval."[77] Victims' rights advocates have been critical of the provisions because the result is that damages are based not upon the severity of the harm to the victim, but rather, solely on the employer's ability to pay.[78]

Second, the 1991 Act states in regard to punitive damages that:

> A complaining party may recover punitive damages . . . against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.[79]

Thus, in addition to the overall cap on damages, liability for punitive damages is limited to those other than government entities, government agencies, and political subdivisions.

Finally, other problems remain that might prevent or discourage a victim from seeking federal remedies under Title VII and the 1991 Civil Rights Act. Among them are the time and expense to the plaintiff to file claims under Title VII.[80] In addition, generally few attorneys are willing to take sexual harassment cases, due to the limitations on available damages.[81] Another significant barrier is that actions under Title VII and the 1991 Act can be brought only against employers who have fifteen or more employees.[82] Consequentially, small business employers who have fewer than fifteen employees are immune from Title VII actions.

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77. NATIONAL COUNCIL REPORT, *supra* note 40, at 4. *See also* ANALYSIS OF 1991 ACT, *supra* note 73, ¶ 101. ("The final version of the CRA of 1991 is the result of a compromise that was not accompanied by Senate or House committee reports.").

78. Interview with Janice Weir, Esq., Hawaii Commission on the Status of Women, in Honolulu, Hawai'i (November 17, 1992) [hereinafter Weir].

79. 42 U.S.C. § 1981a(b)(1) (Supp. 1992).

80. Interview with Michael Wilson, Esq., in Honolulu, Hawai'i (November 25, 1992) [hereinafter Wilson]. Wilson noted the complex procedures and length of time involved in filing a Title VII claim. Also, the majority of victims do not have the monetary resources to pursue every available cause of action. Wilson anticipates that most victims will fare better in state court. *Id.*

81. *Id.*

82. 42 U.S.C. § 2000e(b) (1988). Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ." *Id.* The 1991 Civil Rights Act, Title VII's accompanying statute, adopts the same definition.

IV. Recovery Under State Law

Recovery for sexual harassment under state employment laws has generally been an area of much controversy, often stemming from varying interpretations of the laws.[83] Further, controversy has arisen over whether state workers' compensation laws provide an exclusive remedy for injuries resulting from sexual harassment that occurs in the workplace;[84] court rulings are split on this issue.[85]

Part IV examines each of the relevant Hawai'i statutes in turn and discusses how they are interrelated, both substantively and administratively. The final section of Part IV highlights the changes brought about in 1992 by Act 275. Act 275 attempts to clarify a plaintiff's right to recovery, as well as to bring interpretative consistency in Hawai'i courts by amending several important provisions of the statutes mentioned above.

A. Hawai'i's Fair Employment Practices Statute

1. Chapter 378

Hawai'i's Fair Employment Practices statute is found in Part I of Hawaii Revised Statutes Chapter 378.[86] The statute, originally enacted in 1981, makes unlawful the practice of sex discrimination by an

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83. In Hawai'i, the controversial statutes are Hawai'i's Fair Employment Practices statute, Haw. Rev. Stat. ch. 378 (1985 & Supp. 1992), and the Hawaii Civil Rights Act, Haw. Rev. Stat. ch. 368 (Supp. 1992).

84. The state workers' compensation exclusivity provision generally bars an employee, who collects workers' compensation from an employer, from bringing further legal action against that employer. Haw. Rev. Stat. § 386-5 (Supp. 1992).

85. Some courts have ruled that when an employee's emotional distress results from conduct within the normal scope of the employment relationship, common law emotional distress claims are barred by state workers' compensation laws. *See* Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743 (Ca. 1987); Meerbrey v. Marshall Field and Co., Inc., 564 N.E.2d 1222 (Ill. 1990); Wangler v. Hawaiian Elec. Co., Inc., 742 F.Supp. 559 (D.Haw. 1990). *But see* Phillips v. City of Seattle, 766 P.2d 1099 (Wash. 1989), Arnold v. Kimberly Quality Care Nursing Service, 762 F.Supp. 1182 (N.D.Pa. 1991) (employee's state tort claims arising from sexual harassment not barred by exclusive remedy provision of workers' compensation), *cited in* Brown, 20th Annual Institute on Employment Law, *Wrongful Termination and Emerging Torts*, September-October 1991.

86. Haw. Rev. Stat. ch. 378 (Supp. 1992).

employer in its hiring and termination of individuals.[87] In regard to sexual harassment, employers are also prohibited from discriminating against employees with respect to compensation or in the "terms, conditions, or privileges of employment."[88]

Prior to 1991, Chapter 378 conferred jurisdiction to the Department of Labor and Industrial Relations (D.L.I.R.) over matters regarding discriminatory practices by employers.[89] Chapter 378 required that an individual file a written complaint with the D.L.I.R. within ninety days of the date that the alleged violation occurred.[90] The D.L.I.R. could then issue a Notice of Right to Sue upon which the complainant had ninety days in which to bring a civil action against the employer.[91]

The statute was unclear as to whether this course of recovery, as required by the D.L.I.R. under Chapter 378, was the exclusive remedy for a victim of sexual harassment in the workplace.[92] D.L.I.R.'s jurisdiction over this section was not explicitly "exclusive" in the language of the statute, but the statute failed to address whether a complainant had a right to bring a civil action against her employer independent of the D.L.I.R.

In 1986, the United States District Court, District of Hawai'i, addressed this issue in *Lui v. Intercontinental Hotels Corp.* (*Lui*).[93] In *Lui*, the plaintiff, a former employee of the Hotel Inter-Continental Maui, alleged that the hotel's general manager, who was also her supervisor, subjected her to multiple incidents of sexual assault and battery and sexual harassment during working hours.[94] She stated that, as a result,

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87. HAW. REV. STAT. § 378-2(1)(A) (Supp. 1992). Other factors by which employees cannot be discriminated against include race, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record.

88. *Id.*

89. HAW. REV. STAT. § 378-4(a) (1985) (amended in 1991) ("The department shall have jurisdiction over the subject of discriminatory practices made unlawful by this part. Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice may file with the department a verified complaint in writing . . . ."). Note, however, that jurisdiction was transferred to the Hawaii Civil Rights Commission in January 1991. *See* discussion *infra* part IV.A.2.

90. HAW. REV. STAT. § 378-4(c) (1985) (amended in 1991). This 90-day period was increased to 180 days by the Hawaii Civil Rights Act, HAW. REV. STAT. § 368-11(c) (Supp. 1992).

91. HAW. REV. STAT. § 378-5(e)(1), (2) (1985) (amended in 1991).

92. HAW. REV. STAT. ch. 378 (1985) (amended in 1991).

93. 634 F.Supp. 686, 688 (Haw. 1986).

94. *Id.* at 685.

she was "forced" to resign.[95] She failed to file a discrimination complaint with the D.L.I.R. within the specified ninety-day time period, and instead filed a complaint in state court against the hotel for sexual assault and battery, emotional distress, negligent hiring, and constructive discharge.[96] The defendant argued that the plaintiff's failure to file a complaint with D.L.I.R. in accordance with Chapter 378 barred her from recovery on all causes of action because Chapter 378 provided the exclusive remedy for sexual harassment.[97]

The case was removed to the United States District Court, District of Hawai'i, which dismissed the plaintiff's constructive discharge claim because it held that the remedy under Chapter 378 was exclusive.[98] The court noted that Hawai'i "recognizes a 'public policy' exception" to the doctrine of employment at will.[99] Here, the specific policy against employment at will advanced by the plaintiff was anti-discrimination in employment, and the court held that "[w]here the policy is one created by statute, the statutory remedy is exclusive."[100]

Although the court dismissed the plaintiff's constructive discharge claim, it held that Chapter 378 did not provide the exclusive remedy for sexual harassment in general.[101] The court stated that other common law claims were still available to victims of discrimination because Chapter 378 only granted the D.L.I.R. jurisdiction over statutory employment discrimination claims.[102]

A state Circuit Court, however, adopted a contrary opinion. In 1988, Judge Robert Klein of the First Circuit Court in Honolulu ruled in *Shutt v. Rykoff-Sexton, Inc.* (*Shutt*)[103] that the remedies provided in

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 688.
99. *Id.*
100. *Id.*
101. *Id.* at 685.
102. *Id.* at 686. The court noted that "[chapter] 378 was intended to provide remedies for employment discrimination beyond those that already existed, not at the expense of those that already existed." Although the court's interpretation of Chapter 378 allowed a plaintiff to independently sue employers under additional causes of action, it created a "Catch-22" situation by also holding that the plaintiff's common law tort claims against her employer were barred by the exclusivity provision of the state workers' compensation law. *Id.*
103. *See* Order Granting Defendants' Joint Motion to Dismiss First, Second, Third, Fourth, and Fifth Causes of Action, Shutt v. Rykoff-Sexton, Civil No. 88-0766-03 (1st Cir. Sept. 22, 1988)

Chapter 378 "may be exclusive" in regard to a victim of sexual harassment.[104] The Court dismissed the plaintiff's claims against her employer for intentional infliction of emotional distress, negligent infliction of emotional distress, and wrongful discharge, and limited the relief available to lost wages and attorney's fees.[105] As a result, the plaintiff was precluded from seeking compensatory and punitive damages against her employer.[106]

The Circuit Court's ruling in *Shutt* sparked much controversy.[107] Shortly after this decision, the need for clarification of state policy concerning sexual harassment under Chapter 378 prompted legislative response. In early 1990, Hawai'i State Representative Mazie Hirono introduced a bill which contained a measure that clarified Chapter 378 such that an individual would not be precluded from bringing a separate cause of action against her employer under common law tort.[108] However, before the legislature made any substantive changes, it first devised administrative and procedural changes regarding the enforcement and jurisdiction of Chapter 378.

2. Chapter 368: Hawaii Civil Rights Commission

While the substance of Hawai'i's employment discrimination laws remains in Chapter 378, jurisdiction and enforcement authority of the laws were transferred to the Hawaii Civil Rights Commission (Commission) on January 1, 1991.[109]

The Commission was created in 1988 under the Hawaii Civil Rights Act.[110] The Hawaii Civil Rights Act, codified in Hawaii Revised Statutes Chapter 368, supports public policy against discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability.[111] In doing so, Chapter 368 creates a system that provides for consistent enforcement of the rights established under the anti-discrimination statutes[112] for employ-

104. *Id. at* 2.
105. *Id.*
106. Wilson, *supra* note 80.
107. *Id.*
108. House Bill 2740 (1990).
109. Kim, *supra* note 37.
110. HAW. REV. STAT. ch. 368 (Supp. 1992).
111. *Id* § 368-1.
112. *Id.*

ment,[113] public accommodations,[114] real property,[115] and access to state-funded services.[116] While the Commission oversees four areas of discrimination, the scope of this Article is limited to employment discrimination that takes the form of sexual harassment.

Under the Hawaii Civil Rights Act, the complainant has 180 days to file a complaint with the Commission.[117] The Commission then conducts an investigation to determine if a valid claim exists, and what liability to impose on an employer.[118] While the investigation is ongoing, the complainant may file a written request with the Commission to obtain a Notice of Right to Sue.[119] The complainant will then have ninety days from the issuance of the Notice to file a civil action.[120] The Complainant will also obtain a Notice if the complaint is dismissed.[121]

Whether a proceeding occurs in front of the Commission or a court, it was the Hawai'i legislature's express intent in enacting the Hawaii Civil Rights Act "to preserve all existing rights and remedies" of the various state anti-discrimination laws.[122]

Generally, if discrimination is found, Hawaii Revised Statutes Chapter 378 and the Hawaii Civil Rights Act allow the Commission, or the court, to provide the complainant with "appropriate" relief.[123] Appropriate relief may take the form of compensatory and punitive damages to provide legal and equitable relief,[124] e.g. hiring, reinstatement, or

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113. HAW. REV. STAT. ch. 378 (1985 & Supp. 1992). This is the Fair Employment Practices statute discussed *supra*, part IV.A.1.

114. HAW. REV. STAT. ch. 489 (Supp. 1992) (Discrimination in Public Accommodations).

115. HAW. REV. STAT. ch. 515 (1985 & Supp. 1992) (Discrimination in Real Property Transactions).

116. HAW. REV. STAT. § 368-1.5 (Supp. 1992).

117. HAW. REV. STAT. § 368-11(c) (Supp. 1992) ("No complaint shall be filed after the expiration of one hundred eighty days after the date: (1) Upon which the alleged unlawful discriminatory practice occurred; or (2) Of the last occurrence in a pattern of ongoing discriminatory practice.").

118. HAW. REV. STAT. § 368-13 (Supp. 1992).

119. HAW. REV. STAT. § 368-12 (Supp. 1992).

120. *Id.*

121. HAW. REV. STAT. § 368-13(c) (Supp. 1992).

122. HAW. REV. STAT. § 368-1 (Supp. 1992).

123. HAW. REV. STAT. § 378-5 (Supp. 1992); *see also* HAW. REV. STAT. § 368-3(3),(5) (1985 & Supp. 1992).

124. HAW. REV. STAT. § 368-17(a) (Supp. 1992).

upgrading the positions of employees, with or without back pay;[125] money damages for injury or loss caused by the discrimination;[126] money damages for all or a portion of the costs of maintaining the action before the Commission, including reasonable attorney's fees and expert witness fees;[127] admission or restoration of membership to labor organizations;[128] admission to or participation in guidance, apprenticeship, on-the-job training, or other job training or retraining programs which use objective criteria in admitting individuals;[129] and/or requiring the posting of notices in a conspicuous place which explains the requirements for complying with the civil rights law.[130] This list is not exhaustive and the Commission or the court may award other relief as is deemed necessary.[131]

Since the Commission is a relatively new entity, questions arise as to whether its procedures will be implemented smoothly and efficiently, and whether it will effectively support its position against discrimination. On January 25, 1993, the Commission made its first ruling in *Santos v. Niimi (Santos)*,[132] upholding a claim for sexual harassment in the workplace.[133] In doing so, the Commission established several guidelines that will be used in judging sexual harassment claims.[134]

In *Santos*, Dolores Santos, the complainant, maintained that during her two-year employment with Hawaiian Flower Exports, Inc. (HFE),[135] she was subjected to continuous "offensive and unwelcome sexual conduct" by Masami Niimi, a supervisor at HFE.[136] Santos asserts

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125. HAW. REV. STAT. § 368-17(a)(1) (Supp. 1992).
126. HAW. REV. STAT. § 368-17(a)(8) (Supp. 1992).
127. HAW. REV. STAT. § 368-17(a)(9) (Supp. 1992).
128. HAW. REV. STAT. § 368-17(a)(2) (Supp. 1992).
129. *Id.*
130. HAW. REV. STAT. § 368-17(a)(7) (Supp. 1992).
131. HAW. REV. STAT. § 368-17(a)(10) (Supp. 1992).
132. Docket No. 92-001 E-SH (Haw. Civil Rights Comm'n 1993).
133. Andy Yamaguchi, *Isle Rights Panel Upholds Sex Harassment Complaint*, THE HONOLULU ADVERTISER, Jan. 27, 1993, at A13.
134. *Santos v. Niimi*, Docket No. 92-001 E-SH (Hearing Examiner's Findings of Fact, Conclusions of Law and Recommended Order) [hereinafter *Santos Findings of Fact*]. The Commission adopted the Hearing Examiner's conclusions of law located in the Findings of Fact. *Santos*, Docket No. 92-001 E-SH (Final Decision) [hereinafter *Santos Final Decision*].
135. *Santos Findings of Fact*, *supra* note 134, at 4. Santos' employment with HFE was from Dec. 23, 1988 to Nov. 12, 1990. *Id.*
136. *Id.* at 7. Niimi was the former owner of 75% of HFE, a family-run business.

that Niimi's behavior created a hostile work environment.[137] Niimi's offensive behavior toward Santos was both verbal and physical.[138] Santos claimed that Niimi repeatedly asked her personal questions with sexual overtones, made sexual comments to her about other female co-workers, propositioned her, told other employees about his wanting to have sex with her, made several attempts to kiss her, and did grab her buttocks, breasts, and crotch area.[139] Niimi's behavior ultimately forced Santos to quit.[140]

On July 1, 1991, Santos filed a workers' compensation claim for emotional injuries due to workplace sexual harassment.[141] The D.L.I.R. determined that Santos was temporarily and totally disabled due to sexual harassment at HFE.[142] HFE was ordered to pay for all of Santos' medical expenses, and $153.34 per week in wage losses beginning July 4, 1991.[143]

Santos also filed a claim for sexual harassment with the Hawaii Civil Rights Commission.[144] When Santos and HFE were unable to reconcile the claim, this matter was docketed for an administrative hearing.[145] Ultimately, the Commission issued its decision on January 25, 1993 finding for Santos.[146] The decision ordered compensation for Santos as follows: (1) HFE must render to Santos back pay for the period of November 13, 1990 to September 30, 1992, *less any amount received by*

The remaining 25% was owned by Niimi's son, Robert. Upon retirement from HFE, Niimi transferred ownership to his two sons and their wives. However, despite his retirement, Niimi remained active in HFE's business with the company's approval. Niimi's continued activities on behalf of HFE included: picking up and delivering flowers one to three times a week "to customers in the Hilo area and to the airport for shipping to customers on the outer islands and in Japan"; supervising field operations one to three days per week; and supervising operations in the packing plant. Generally, Niimi worked when he felt like it and did not keep set hours. *Id.* at 2-4. *See infra* notes 153-56 and accompanying text (the Commission found that Niimi was acting as a supervisor at HFE and was an agent for the company).

137. *Id.* at 2.

138. *Id.* at 7-12.

139. *Id.* Santos also asserted that Niimi's behavior was offensive toward other female employees. *Id.* at 10-11.

140. *Id.* at 12.

141. *Id.* at 15.

142. *Id.* at 15-16. The decision was issued on February 19, 1992. *Id.* at 15.

143. *Id.*

144. *Id.* at Appendix A.

145. *Id.*

146. *Santos Final Decision*, *supra* note 134, at 2-4.

her from workers' compensation for wage loss during that period;[147] (2) HFE and Niimi, jointly and severally, shall pay Santos $80,000 in compensatory damages covering pain, suffering, embarrassment, humiliation or emotional distress;[148] and (3) Niimi shall pay Santos $10,000 in punitive damages.[149] Santos' request for deposition costs and interest were denied, and the Commission stated that future medical expenses would be covered by workers' compensation.[150]

In reaching its conclusion, the Commission addressed the following issues: (1) How are the doctrines of agency and vicarious liability defined and applied?; (2) What is hostile environment sexual harassment?; and (3) What is required to prove constructive discharge? In regard to the first issue, Santos sought to hold HFE liable for Niimi's actions based on agency principals.[151] The Commission noted at the outset that "agency" was not defined by Hawai'i's hostile work environment sexual harassment statute, Chapter 378, and was inadequately defined by Hawai'i courts.[152] Thus, the Commission looked to federal case law.[153]

The federal cases construe "agent" liberally in order to meet the objectives of Title VII.[154] Accordingly, federal courts have held that a person who acts as a supervisor and has significant control over the claimant's hiring, firing or conditions of employment is an agent.[155] Furthermore, a person acting informally as supervisor may be deemed an agent if they are acting in that capacity with the employer's express or implied consent.[156] In applying these principals to *Santos*, the Commission found that Niimi was acting as HFE's agent.[157]

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147. *Id.* at 3-4.

148. *Id.* at 4.

149. *Id.*

150. *Id.*

151. *Id.* at 19.

152. *Id.* at 21-22. Haw. Admin. Rule 12-46-109(c) provides that the Commission will determine if an agency relationship exists by examining "the circumstances of the particular employment relationship and the job functions performed by the individual." *Id.* at 22.

153. *Id.* at 22.

154. *Id.* at 23. *See supra* Part III.

155. *Id.*

156. *Id.*

157. *Id.* at 25-26. The Commission concluded that an "employer is responsible for its acts and those of its agents and supervisory employees regardless of whether the acts were authorized or even forbidden, and regardless of whether the employer knew or should have known of their occurrence." *Id.* at 39.

The second significant issue addressed by the Commission involved defining "hostile work environment sexual harassment."[158] Hostile work environment sexual harassment is defined by Hawaii Administrative Rule (H.A.R.) 12-46-109 as:

> [U]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or visual forms of harassment of a sexual nature . . . when . . . that conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.[159]

In addition, since Hawai'i's statutes on hostile work environment sexual harassment[160] are very similar to the provisions in Title VII and the EEOC regulations,[161] the Commission decided that Ninth Circuit federal case law was instructive in determining the elements of this type of harassment.[162] Generally, the plaintiff must prove the following elements: (1) "the complainant was subjected to sexual advances, requests for sexual favors or other visual, verbal or physical conduct of a sexual nature";[163] (2) the "conduct was unwelcome";[164] and (3) the conduct must be "sufficiently severe or pervasive" such that employment conditions are altered.[165] In analyzing severity and pervasiveness, the Commission adopted the *reasonable woman standard* instead of the usual reasonable man standard.[166] Furthermore, to establish a

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158. *Id.* at 26.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 27 (citing Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988)).

164. *Id.* (citing Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Jordon v. Clark, 847 F.2d 1368 (9th Cir. 1988)). The Commission further defined "unwelcome" to mean that "the complainant did not solicit or incite [the conduct]" *and* that the behavior was "undesirable or offensive." *Id.* (citing Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)).

165. *Id.* (citing Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988)). This element was further defined as "having the purpose or effect of unreasonably interfering with an individual's work performance or be creating an intimidating, hostile or offensive working environment." *Id.* Furthermore, the severity of the conduct may be analyzed inversely with the pervasiveness of the actions so that a single sufficiently severe act might be enough to establish a hostile work environment sexual harassment. *Id.*

166. *Id.* at 28 (citing Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991)). Based upon the logic presented by the Commission, it is inferred that the "reasonable woman standard" would be applied to female complainants and a "reasonable man standard" would be applied to male complainants.

prima facie case of hostile work environment sexual harassment, direct evidence showing an intent to discriminate is required.[167]

The third major issue discussed by the Commission concerned constructive discharge. As with hostile work environment sexual harassment, the Commission deemed that Ninth Circuit federal case law was instructive in determining the elements of constructive discharge.[168] To prove constructive discharge, the complainant must establish, using an objective test, that "a *reasonable person* in the employee's position would have felt that she was forced to quit because of intolerable and discriminatory working conditions."[169] Unlike the hostile work environment sexual harassment test, the claimant does not have to prove that her employer intended to force her to quit.[170]

Santos implies that the Hawaii Civil Rights Commission will look to federal case law in developing its standards and rules used to adjudicate sexual harassment claims. But, until the Commission formally adopts the federal holdings as their own and rules on more cases, several issues remain unanswered.

As seen in *Santos*, access to remedies under Chapters 378 and 368 is easier because, unlike Title VII, an employer is not required to employ more than one employee in order to be held liable under these statutes.[171] But, the Hawaii Civil Rights Act continues to provide only a short 180-day period to file a claim. Additionally, since the Commission is not a court of law and can be composed of laypersons,[172] the outcome may not be comparable to results reached in the Hawai'i courts. Therefore, how tight a rein will the Commission keep on which

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167. *Id.*

168. *Id.* at 38.

169. *Id.* (citing Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987); Howard v. Daiichiya-Loves Bakery, Inc., 714 F. Supp. 1108, 1112) (D. Haw. 1989). The Commission added that one instance of discrimination was not enough to prove constructive discharge and that "aggravating factors, such as a continuous pattern of discriminatory treatment" must be shown. *Id.*

170. *Id.*

171. HAW. REV. STAT. § 368 (Supp. 1992) and HAW. REV. STAT. § 378 (1985 & Supp. 1992). One sub-issue in *Santos* involved whether an agent, like an employer, must employ one or more persons to be held liable under Chapters 378 and 368. The Commission defined an "employer" as "any person having one or more persons in his employment, and includes any person acting as an agent of an employer, directly or indirectly" and held that agents, such as Niimi, are *not* required to employ one or more persons to be held liable. *Santos Findings of Fact, supra* note 134, at 21-22.

172. HAW. REV. STAT. § 368-2 (Supp. 1992).

parties qualify for punitive damages?[173] Similarly, if punitive damages are awarded, how much?[174] Also, what effect will Chapter 378, and ultimately Chapter 368, have on the filing of workers' compensation claims under Chapter 386 for sexual harassment?[175]

B. Chapter 386: Workers' Compensation

In 1956, the Hawaii Supreme Court in *Kamanu v. E. E. Black, Ltd.*[176] stated that the purpose of Hawai'i's workers' compensation law was to create a type of no-fault system whereby an employee who is accidentally injured in the workplace is assured "definite compensation . . . which is prompt, certain and inexpensive."[177] In return, the employer is relieved of vexatious and potentially lengthy litigation that could result in an excessive award.[178] The result is that the injured employee is barred from bringing further action, including those at common law, against the employer,[179] the rationale being that workers' compensation

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173. Aleshire, *supra* note 1, at D4. Lynette Jee, Deputy Executive Director of the Hawaii Civil Rights Commission stated "punitive damages [will be awarded] if the employer has allowed malicious and intentional harassment". *Id.*

174. In *Santos*, the Commission followed closely the Hawaii Supreme Court case of Masaki v. General Motors Corp., 71 Haw. 1, 780 P.2d 566 (1989). *Id.* The "clear and convincing" standard of proof was substituted for the usual "preponderance of the evidence" standard in determining whether punitive damages were appropriate. *Id.* Appropriateness was further dependant on whether HFE's and/or Niimi's wrongdoing was "intentional and deliberate, and has the character of outrage frequently associated with crime." *Id.* The Commission found that HFE did not meet this prerequisite, but Niimi did. *Id.* In determining the amount of punitive damages, the Commission considered three factors: "(1) the degree of malice and reprehensibility of [Niimi's] conduct; (2) [Niimi's] financial situation; and (3) the amount of punitive damages which will have a deterrent effect on [Niimi] in light of his financial situation. *Id.* While *Santos* appears to clearly answer the inquiry of how punitive damages will be meted out by the Commission, there remains a question of what consistency will be achieved in applying this doctrine to the claims. Therefore, the question of how punitive damages will be determined remains open.

175. HAW. REV. STAT. ch. 386 (1985 & Supp. 1992), discussed *infra*, part IV.B. *See also Santos Final Decision*, *supra* note 134, at 3-4.

176. 41 Haw. 442 (1956).

177. *Id.* at 458.

178. *Id.*

179. *Id.* at 459 ("The history of the Act shows that the purpose is to substitute a definite compensation for accidental injury occurring with or without fault to the employee instead of the uncertainty of litigation; likewise, to give the employer a certain definite liability regardless of his negligence or lack of negligence, and not

provides adequate protection to employees and their dependents.[180] This idea is codified in what is known as the "exclusivity provision" of Hawai'i's workers' compensation statute.[181]

The United States District Court, District of Hawai'i, has repeatedly held that the exclusivity provision of the workers' compensation statute bars independent actions against an employer for emotional distress.[182] In 1986, the district court in *Lui v. Intercontinental Hotels Corp.*[183] addressed the issue of whether the exclusivity provision also applied to injuries caused by sexual harassment in the workplace. The court held that the employee's emotional distress claim, arising out of assault and battery claims asserted in a sexual harassment action, were work-related and thus barred by the workers' compensation statute.[184] In *Wangler v. Hawaiian Electric Co., Inc.*,[185] the court similarly held that

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subject either party to the risk of lawsuits."); *See also* Kamali v. Hawaiian Elec. Co., 54 Haw. 153, 157-58, 504 P.2d 861, 864 (1972) ("The purpose of such legislation is to achieve certainty—certainty that an employee will be compensated for all work injuries regardless of his negligence or fault; and certainty with regard to the amount for which the employer shall be liable. The effect is a compromise where the chance that an employee may not recover at all and the chance that an employer will be charged with an excessive judgment are eliminated.").

180. HAW. REV. STAT. ch. 386 (1985 & Supp. 1992). In general, the workers' compensation statute allows a claimant to receive benefits for medical expenses and lost wages. Punitive damages and compensation for pain and suffering are not allowed. *Id.*

181. HAW. REV. STAT. § 386-5 (Supp. 1992). Prior to its 1992 amendment, the provision read:

> *Exclusiveness of right to compensation.* The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury.

HAW. REV. STAT. § 386-5 (1985) (amended in 1992).

182. Morishige v. Spencecliff Corp., 720 F.Supp. 829 (D.Haw. 1989) (emotional distress claims arising out of wrongful discharge are barred by workers' compensation statute); Howard v. Daiichiya-Love's Bakery, Inc., 714 F.Supp. 1108 (D.Haw. 1989) (emotional distress claims arising from a constructive discharge based on alleged age discrimination are barred by workers' compensation statute), *cited in* Wangler v. Hawaiian Electric Co., Inc., 742 F.Supp. 1465, 1466 (D. Haw. 1990).

183. 634 F.Supp. 686 (1986).

184. *Id.* at 688 (noting, "The employer is held strictly liable for misconduct in the work place and the employee has an efficient, economical remedy."). *Id* at 688. *See also Wangler*, 742 F.Supp. at 1467.

185. 742 F.Supp. 1465, 1468 (D. Haw. 1990).

the plaintiff's injuries[186] were work-related "within the meaning of Haw. Rev. Stat. § 386-3"[187] and thus barred by the workers' compensation statute.[188]

In late 1990, acting Circuit Judge Marcia Waldorf ruled in *Goo v. MJR Corp.*[189] that Hawai'i's workers' compensation law was the "exclusive remedy" for two women who were sexually assaulted by a company executive.[190] The plaintiffs in that case were two women who claimed they were raped and sexually harassed on separate occasions at company offices.[191] They were eventually forced to resign and subsequently sued the company for negligent and intentional infliction of severe emotional distress.[192] The court held that "all of Plaintiffs' tort claims involve workplace injuries under Hawai'i's workers' compensation law" which "preempts and provides the exclusive remedy for all of Plaintiffs' tort claims against [the defendant]."[193] The court dismissed all of the plaintiffs' common law tort claims.

The court's decision in this case again raised the question of whether the remedies provided to sexual harassment victims under state employment laws were appropriate or sufficient.[194] Women's rights advocates viewed this opinion as a great injustice to working women because it severely limited the victim's recovery and did little to provide a deterrent against sexual harassment in general.[195]

C. *Act 275: Amendments to the Hawai'i FEP and Workers' Compensation Laws*

In early 1990, Hawai'i State Representative Mazie Hirono introduced House Bill 2740 (H.B. 2740).[196] The bill contained a measure

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186. *Id* at 1465. Plaintiff sued employer for, among other things, assault, battery, and intentional and negligent infliction of emotional distress.

187. *Id.* at 1468, citing Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeal Bd., 53 Haw. 32, 38, 487 P.2d 278, 282 (1971).

188. *Id.* at 1467. The court explained: "Sex discrimination or harassment is no more a normal or reasonably anticipated incident of employment than is race or age discrimination. . . . The court finds no reason which would justify carving out an exception to the previous holdings of this district under Hawaii law." *Id*

189. Civil No. 89-2587-08 (1st Cir. Haw. Nov. 29, 1990).

190. Findings of Fact, Conclusions of Law, and Order Granting Defendant MJR Corporation's Motion for Partial Summary Judgment as to Plaintiffs' Tort Claims, Goo v. MJF Corp., Civil No. 89-2587-08 (1st Cir. Haw. June 26, 1990).

191. *Goo*, Civil No. 89-2587-08, at 5.

192. *Id.* at 2.

193. *Id.*

194. Wilson, *supra* note 80.

195. Weir, *supra* note 78.

196. *Id*

that would clarify Hawaii Revised Statutes Chapter 378 such that an individual would not be precluded "from maintaining a cause of action for intentional infliction of emotional distress, invasion of privacy, wrongful discharge, and negligence."[197] H.B. 2740 also proposed to amend Hawaii Revised Statutes section 386-5 by providing an exception to the exclusivity of workers' compensation as a remedy for intentional infliction of emotional distress or intentional invasion of privacy.[198]

The bill died in the House in late 1990,[199] but was revived in 1992 as Senate Bill 3133,[200] which survived only for a short period. House Bill 2131, the final version of the measure, became Act 275 on June 19, 1992.[201]

Act 275 made two major changes to the Fair Employment Practices statute and workers' compensation law.[202] First, it added a provision to Chapter 378 which explicitly states that under that chapter, an individual employee is not precluded:

> from bringing a civil action for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto; provided that notwithstanding section 386-12, the commission shall issue a right to sue on a complaint filed with the commission if it determines that a civil action alleging similar facts has been filed in circuit court.[203]

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197. Amendments were codified in HAW. REV. STAT. § 378-3 (Supp. 1992).

198. *See* H.B. 2740.

199. Wilson, *supra* note 80.

200. S.B. 3133 would have amended HAW. REV. STAT. § 386-5 Section 1 to read:

> Exclusiveness of right to compensation. The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee. . .; *provided that an employee's allegation of sexual harassment or sexual assault shall be exclusively covered by this chapter; and provided further that a civil action for alleged sexual harassment or sexual assault may also be brought.*

Id.

201. Act 275 was signed into law by Gov. John Waihee on June 18, 1992.

202. Act 275 also amends HAW. REV. STAT. § 386-8.5:

> "Safety [or health] provision" includes, but is not limited to, safety [or health] inspections and advisory services [.]; *"health provision" includes, but is not limited to, health inspections and advisory services; "personal conduct provision" includes, but is not limited to, contractual language covering sexual harassment or assault and related infliction of emotional distress or invasion of privacy.*"

Id. Although this is an important addition to workers' compensation in regards to third party liability in collective bargaining agreements or negotiations, it is not discussed in detail for purposes of this Article.

203. HAW. REV. STAT. ANNO. § 378-1 (1992).

Second, the Act amended the exclusivity provision of the workers' compensation statute in Chapter 386 (amended portion emphasized):

> Exclusiveness of right to compensation[.]; *exception.* The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury[.], *except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought.*[204]

These additions "amend Chapters 378 and 386 of the Hawaii Revised Statutes to enable employees to file civil actions [against their employers] premised on sexual harassment or sexual assault arising out of and in the course of employment."[205] As a result, an employee who is subjected to unlawful sexual harassment in the workplace can seek relief under Chapter 378 via the Civil Rights Commission, Chapter 386 workers' compensation,[206] and by independent court action for sexual assault, infliction of emotional distress, or invasion of privacy.[207] An important side effect of Act 275 is that plaintiffs can now take advantage of the two-year statute of limitations allowed under tort law. Prior to the Act, plaintiffs were confined to the limitations prescribed by Chapters 378 and 368.[208]

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204. HAW. REV. STAT. § 386-5 (Supp. 1992).

205. H.R. CONF. COMM. REP. No. 21, 16th Legislature (1992).

206. Workers' compensation law under Chapter 386 provides compensation when an employee "suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting for the nature of the employment[.]" HAW. REV. STAT. § 386-3 (Supp. 1992).

Part II of Chapter 386 allows compensation for medical care, services, and supplies and, if applicable, certain amounts due to lost wages. HAW. REV. STAT. ch. 386 (1985 & Supp. 1992).

207. Act 275 delineates these specific common law torts. This does not necessarily preclude a plaintiff from seeking relief under claims of negligent hiring, constructive discharge, or breach of contract.

208. HAW. REV. STAT. § 368-11(c) (Supp. 1992) ("No complaint shall be filed after the expiration of one hundred eighty days after the date: (1) Upon which the alleged unlawful discriminatory practice occurred; or (2) Of the last occurrence in a pattern of ongoing discriminatory practice."). This provision amended Chapter 378 by increasing the time to file an employment discrimination suit from 90 days to 180 days.

V. Conclusion

Steps taken by Congress and by the Hawai'i legislature to provide appropriate remedies and compensation for victims of workplace sexual harassment are encouraging. A victim can now seek relief under four areas of law: 1) Title VII and the 1991 Civil Rights Act; 2) the Hawai'i FEP statute; 3) the Hawai'i workers' compensation statute; and 4) state tort law.

With the recent changes on both the federal and state levels, many of the previous barriers to filing a sexual harassment suit against an employer have been eliminated. Under Title VII, the availability of compensatory and punitive damages has been added via the Civil Rights Act of 1991. Plaintiffs who decide to pursue relief for sexual harassment under Title VII and the 1991 Act must keep in mind the potential restrictions that do not exist under state law, for example, the caps on damages afforded under Title VII and the 1991 Act.

In Hawai'i, Act 275 makes available to the plaintiff the opportunity to file suit in tort and obtain compensatory and punitive damages from her employer. The focus now shifts to how Hawai'i courts will adjudicate these claims. This raises a number of issues: What vocabulary will be adopted for sexual harassment claims, i.e., how will "sexual harassment" be defined by the state courts since Act 275 and the Hawaii Revised Statutes do not provide a definition?[209] How difficult will it be for a victim to meet all the elements of a tort? Should sexual harassment be its own tort? How difficult will it be for a victim to impute liability to the employer for the conduct of an employee, and what is the test going to be?

Act 275 and the 1991 Civil Rights Act create a deterrent effect against sexual harassment by subjecting the employer to greater liability by expanding the victims' remedies. However, when considering the special nature of sexual harassment and its psychological, physical, and financial consequences, the effectiveness of these statutes as deterrence mechanisms becomes questionable. Statutes such as Act 275 and articles such as this can educate the public further about sexual harassment and the remedies available, but it is still up to the victim to come

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209. Will the state courts follow the lead of federal courts in Title VII cases, as did the Commission in *Santos*, to determine whether an act of sexual harassment is sufficiently severe or pervasive to warrant a claim? By what standard will the victim be judged—a subjective standard, reasonable person standard, or a reasonable woman standard?

forward and make a claim. Immense psychological trauma and fear of retribution resulting from harassment may prevent a victim from ever coming forward, despite recent measures to liberalize the administrative procedures and available remedies. Courts and legislatures need to accommodate for these factors and address such issues as retribution or harm to victims' reputations that may result from airing their grievances.

Despite these observations, a rise in the number of workplace sexual harassment claims can be expected simply due to the longer statute of limitations and the availability of a more cost-effective method for fighting this problem.

Jill A. Fukunaga
Carolyn M. Oshiro

Privacy v. Secrecy: The Open Adoption Records Movement and Its Impact on Hawai'i

I. Introduction

> All of us need to know our past, not only for a sense of lineage and heritage, but for a fundamental and crucial sense of our very selves: our identity is incomplete and our sense of self retarded without a real personal historical connection.
>
> Is there any reasonable justification for us to prevent, in perpetuity, the geneological [sic] self-discovery of those among us who were adopted?[1]

Many adults who were adopted as children ask this question. Experts estimate there are about six million Americans who are adoptees.[2] In Hawai'i, approximately 20,000 people, or 2% of the population, are adopted.[3] These figures, however, understate the magnitude of adoption's reach because an adoption involves a number of parties. These parties include the adoptive parents, birthparents,[4] siblings (both birth and adoptive), grandparents (both birth and adoptive), and other members of the extended family. If we assume at least six million adoptees, twelve million birthparents, and twelve

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[1] *In re* Maples, 563 S.W.2d 760, 767 (Mo. 1978) (Seiler, J., concurring).

[2] Linda Hosek, *Adoptees Sealed Off From Roots*, Honolulu Star-Bullentin, Jan. 5, 1990, at A8.

[3] *Id.*

[4] I will refer to the genetic parents as "birthparents." Researchers and observers say that this is preferred over "natural parents" or "biological parents." "Natural parents" implies that the adoptive parents are the "unnatural" parents, understandingly resented by adoptive parents. "Biological parent" is a mechanical term, devoid of feeling. The term "birthparent" is accepted because it portrays with accuracy and sensitivity the birthparent's place in the adoptee's existence. Arthur D. Sorosky, M.D. Et Al., The Adoption Triangle 50 (1978); Judith S. Gediman & Linda P. Brown, Birthbond xix-xx (1989).

million adoptive parents, adoption touches one in eight Americans.[5]

In America, and in other western societies, confidentiality plays a key role in adoption practices.[6] In other societies, however, confidentiality has no role at all in adoption practices.[7] For example, the Hawaiians, Eskimos, and Thais employ the concept of retaining one's birthright even though one is adopted.[8] In contrast, by 1950, most state adoption laws, including those of Hawai'i, denied a child's birthright.[9] The adoption laws did this by sealing the child's original birth certificate and other records in the adoption file.[10]

Despite the sealed records, a small number of adult adoptees all over the country have overcome the obstacles and have been able to search for and reunite with birthparents.[11] As adult adoptees began to question the practice of sealing records, they formed activist groups to provide mutual support for the search for birthparents.[12] These groups brought civil rights cases into courts to test the constitutionality of provisions requiring the lifetime sealing of adoption records.[13] Additionally, these groups introduced legislation that changed the adoption laws of various states.[14] Such a change occurred in Hawai'i with the passage of Hawai'i's new law that provides access to adoption records.[15] The new law took effect on January 1, 1991.[16]

This commentary explains the controversy surrounding the open adoption records movement and provides an overview of Hawai'i's new law and its impact. Part I gives a brief background of adoption records law in America. Part II describes the background of adoption records law in Hawai'i before the 1991 change. Part III discusses the reasons why Hawai'i's old law was changed. Part IV provides an overview of the options that were available to Hawai'i in changing

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[5] Hosek, *supra* note 2, at A8.

[6] PAUL SACHDEV, UNLOCKING THE ADOPTION FILES 7 (1989).

[7] GEDIMAN & BROWN, *supra* note 4, at 249.

[8] *Id.*

[9] RUTH G. MCROY ET AL., OPENNESS IN ADOPTION 3 (1988); *see infra* notes 67-68 and accompanying text.

[10] *Id.*

[11] SOROSKY et al., *supra* note 4, at 38.

[12] *Id.* at 39.

[13] *Id.*

[14] *Id.*

[15] Act 338, 1990 Haw. Sess. Laws 1036 (codified as amended at HAW. REV. STAT. § 578-15 (Supp. 1991)).

[16] *Id.*

the law. Part V furnishes the provisions of the new law. Part VI explores the impact of the new law on adoption in Hawai'i. Lastly, part VII provides the author's conclusions.

II. Background of Adoption Records Law in America

The Puritans brought the apprenticeship system from England to America.[17] That system became the model for early adoption practices.[18] Traditionally, relatives cared for orphans in accordance with the will of the deceased.[19] However, when there were no relatives, other people took in orphans to serve as their apprentices.[20] The shortage of labor and economic needs at that time superseded any concern for children's welfare.[21]

As the nineteenth century approached, conditions in America changed.[22] With the influx of immigrants into the country, the task of finding workers was no longer difficult.[23] In fact, hiring an immigrant, who would work for very little, was easier than taking in an orphan who would require many years of care.[24] At the same time, the number of homeless children increased because poor and uneducated immigrants could not support all of their children.[25] Society was thus faced with the problem of how to care for these children in a manner that insured they would grow up to be respectable and useful members of society.[26] The answer was the orphanage.[27]

By the 1850s, thousands of homeless children lived in orphanages.[28] Orphanages required strict order and delivered harsh punishment to

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[17] Sorosky et al., *supra* note 4, at 30. Apprenticeship was a form of unofficial adoption that provided training for a child so that he or she gained a vocation and a role in society. The apprenticeship system was also useful for dealing with orphaned children. *Id.* at 29-30.

[18] *Id.* at 30.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Jeanne Duprau, Adoption 18 (1983).

[23] *Id.*

[24] *Id.*

[25] *Id.* Some immigrants could not speak English and had to take whatever work they could find even if it paid almost nothing. *Id.*

[26] *Id.* at 19.

[27] *Id.*

[28] *Id.*

those who resisted.[29] As time went on, however, people realized that orphanages resembled prisons or army camps and that this resemblance was not desirable.[30] After this realization, orphanages placed more children in homes.[31] However, the status of these children was vague.[32] They were not servants, yet they were not family members.[33] They were free to leave if they wanted, or the families could discharge them.[34] In this atmosphere, gradually, states became aware of the need to pass laws that safeguarded children's welfare.[35] In 1851, Massachusetts became the first state to pass a law permitting legal adoptions.[36] The other states followed.[37]

Then, as now, adoptions were carried out through licensed private adoption agencies, state agencies, and independent placements.[38] During the 1950s and 1960s there were many adoptable babies available through agencies, and independent adoptions declined.[39] During the 1970s, however, there was a shortage of adoptable babies because of the increased use of contraception, the liberalization of abortion, and society's acceptance of women raising children out of wedlock.[40] As a result of this shortage, independent adoptions as well as illegal black market adoptions increased.[41] Subsequently, because of the risks in-

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[29] *Id.* at 19-21.

[30] *Id.* at 21-22.

[31] *Id.* at 22.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Carol S. Silverman, *Regulating Independent Adoptions*, 22 COLUM. J.L. & SOC. PROBS. 323, 326 (1989).

In independent adoptions, the birthparent retains legal rights to the child until court action takes place even after placement has been made to an adoptive family. In agency adoptions, the birthparent relinquishes the child to the agency and surrenders all legal rights to the child before placement to an adoptive family is made. SOROSKY et al., *supra* note 4, at 34.

[39] SOROSKY et al., *supra* note 4, at 35.

[40] *Id.*; *see also* Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 180-81 (1983).

[41] SOROSKY et al., *supra* note 4, at 35.

In black market adoptions, the priorities present in a normal adoption are reversed. The welfare of the child and the birthmother and the fitness of the adoptive parents are subordinated to the profit motive of the black marketeer. The consent of the

curred in independent adoptions,[42] some states enacted standards and procedures to protect children in independent adoptions.[43]

Additionally, to insure that adopted children were given status and treatment equal to that given to natural children, most states enacted laws requiring the "rebirth" of the adopted child as the child of the adoptive family with a new identification in the form of an amended birth certificate.[44] The rationale for these laws was that a person should not bear the stigma of illegitimacy or suffer rejection because of the "adopted" label.[45] The original birth certificate was sealed to protect the adoptee and adoptive parents from disruption, harassment, or blackmail by the birthparents or others and to allow the birthparents to make new lives for themselves.[46] This was the beginning of the sealed records controversy.

Adoption agencies advised parents who were adopting nonrelated children to treat them as if they were their natural born.[47] Adoption

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birthmother may not be truly voluntary. Adoptive parents need not show fitness for parenthood but rather that they can afford the fee. This promotes a system where the rich can adopt and the poor cannot. Note, *Black-Market Adoptions*, 22 CATH. LAW. 48, 50-51 (1976).

[42] These risks include: the absence of preplacement home studies, the sale of children for high fees, the possibility of a custody fight between the birthparents and adoptive parents before the adoption proceeding is completed, the chance that the birthmother may change her mind after the placement but before her rights have been terminated, and the possibility that the adoptive parents may not receive information on the child's background that might affect the child's health or development or the adoptive parents' willingness to rear the child. WILLIAM MEEZAN ET AL., ADOPTIONS WITHOUT AGENCIES 26-32 (1978).

Another risk in independent adoptions is the risk that formal legal adoption might never be completed. In the highly publicized Joel Steinberg case, a six year old girl was beaten to death in 1987. The birthmother had given New York attorney Joel Steinberg $500 to arrange an independent adoption. Steinberg did not arrange the adoption but kept the baby in his home. Richard Lacayo, *A Question of Responsibility*, TIME, Feb. 13, 1989, at 68.

[43] Howe, *supra* note 40, at 192. For example, a state could restrict fees, require reporting of fees, or limit the types of persons who could participate in independent adoptions. *Id.*

Some states have prohibited independent adoptions altogether. *See, e.g.*, Florida, FLA. STAT. ANN. § 63.212 (West Supp. 1992).

[44] SOROSKY et al., *supra* note 4, at 38.

[45] *Id.* at 37; *see also* DUPRAU, *supra* note 22, at 101.

[46] SOROSKY et al., *supra* note 4, at 38; *see also* DUPRAU, *supra* note 22, at 101.

[47] SOROSKY et al., *supra* note 4, at 34. Adoptive parents often told the adoptee that the birthparents had died. *Id.* at 35.

agency policies regarding the amount and kinds of information that should be given to the adoptive parents and the adoptee about the child's background varied from agency to agency.[48]

Gradually adoption agencies realized that background information was important to the adoptee.[49] Thus, beginning in the 1960s, agencies kept carefully recorded histories of background data.[50] Agencies provided adoptive parents with nonidentifying data on the birthparents such as "nationality, education, health factors, physical characteristics, occupations, talents, and abilities."[51] Controversy existed, however, concerning whether to reveal negative information "such as mental illness, criminal behavior, alcoholism, and illegitimacy."[52]

In 1980, a proposed Model State Adoption Act, developed by an independent expert panel under President Carter's administration, was published in the *Federal Register*.[53] The Department of Health, Education, and Welfare asked for public comments on the proposed act before it prepared the final version.[54] The proposed act raised and disposed of all the objections to open records.[55] Section 502(d) of the proposed act stated that the adult adoptee, by right, may obtain information identifying his birthparents.[56] Efforts to finalize the act were thwarted under the Reagan administration.[57]

III. Background of Adoption Records Law in Hawai'i

A. Traditional Hawaiian Practices

In traditional Hawaiian culture, there were two basic forms of adoption: *ho'okama* and *hanai*.[58] In *ho'okama* adoption, the adoptive

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[48] *Id.* at 35-36.

[49] *Id.* at 36.

[50] *Id.*

[51] *Id.*

[52] *Id.* For a discussion on what adoptive parents are telling the adopted child today, see Duprau, *supra* note 22, at 64-67.

[53] Notice of Report for Public Comment, 45 Fed. Reg. 33 (1980). The Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 mandated the creation of the panel to recommend model legislation relating to adoption. 42 U.S.C. § 5111 (1988).

[54] Notice of Report for Public Comment 45 Fed. Reg. 33.

[55] *Id.*

[56] *Id.*

[57] *Relating to Adoption: Hearings on H.B. 2089 Before the Senate Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of Neil F. Hulbert, Esq.).

[58] Josephine Horn, *Adoption Customs in Old Hawaii*, Paradise of The Pacific, Holiday Ed. 1948, at 23.

parents took as their own an unrelated child or an adult, but they did not necessarily assume full responsibility over the adoptee.[59] In *hanai* adoption, the adoptive parents took a child into their household and assumed full responsibility and authority over the child.[60] *Hanai* children were almost always taken from within the family group and only after careful consideration of the background and true parentage of the child.[61]

In Hawaiian culture, the ties between the adopted child and the birthparents were not severed.[62] Because family clan or *ohana* was a vitally important concept to Hawaiians, the adopted child knew his or her birthparents.[63] The child belonged to two families openly and proudly.[64]

The term *hanai* is still used today, but with varying definitions.[65] Most people use the term *adoption* to mean the legal assumption of parental rights and obligations and the term *hanai* to mean the informal, non-legal assumption of parental rights and obligations.[66] In any event, as the next section shows, the tradition of ensuring that the adopted child knew about his or her parentage was lost when Hawai'i's original adoption laws were enacted.

B. Adoption Records Law in Hawai'i Before the 1991 Change

In 1945, Hawai'i enacted a law mandating the issuance of a new birth certificate in the name of the adoptive family at the time the adoption decree was finalized.[67] The law also required the court to seal

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] E.S. CRAIGHILL HANDY & MARY K. PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA-'U, HAWAI'I 72 (1972).

[63] SOROSKY et al., *supra* note 4, at 208.

[64] *Id.* at 209.

[65] Alan Howard, et al., *Traditional and Modern Adoption Patterns in Hawaii*, *in* CONTEMPORARY RESEARCH IN SOCIAL PSYCHOLOGY; A BOOK OF READINGS 21, 31 (Henry C. Lindgren ed., 1968).

[66] *Id.* at 32.

[67] Act of April 25, 1945, No. 40, § 2, 1945 Haw. Sess. Laws 301, 302 (codified as amended at HAW. REV. STAT. § 578-14 (Supp. 1991)). The Act stated that:

> A certified copy of the decree of adoption shall be sent to the bureau of vital statistics of the board of health. Such bureau shall cause to be made a new record of the birth in the new name of the child with the names of the adoptive

the records of the adoption proceeding.[68]

The original adoption records law was amended through the years, but the basic requirement that records must be permanently sealed has remained. Prior to its 1990 revision, Hawaii Revised Statutes section 578-15 stated that after the adoption petition was filed and before the adoption decree was entered, the records of the adoption proceedings were open to inspection only by the parties or their attorneys, the state social services agency, or upon a showing of good cause and order of the court.[69] The petition for adoption could not contain the name of the adoptee or the name of either of the birthparents except in the case of an individual being adopted by a stepparent.[70] The hearing of the petition was not open to the public.[71] Upon the entry of the decree, the clerk of the court sealed the records unless the petitioner waived this requirement.[72] The seal could not be broken and records could not be inspected by any person, including the parties, except upon order of the family court.[73]

When adult adoptees sought information about their birthparents or their heritage, a family court judge would answer each inquiry individually.[74] Volunteers would research the court records and set out the information that could be released to the adoptee for the judge's approval.[75] To the extent available in the records, the judge supplied information relating to the birthparents' ethnicity or nationality, age, education, occupation, marital status, physical and personality traits,

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parents, and shall then cause to be sealed and filed the original birth certificate of the child with the decree of the judge, and such sealed package shall be opened only by order of court.

Id.

[68] *Id.* The Act of April 25, 1945 further provided that:

The records in adoption proceedings, after the petition is filed and prior to the entry of the decree, shall be open to inspection only by the parties or their attorneys, the director of the department of public welfare or his agent, or by any proper person on a showing of good cause therefor, upon order of court.

Id.

[69] HAW. REV. STAT. § 578-15 (1985).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Relating to Adoption: Hearings on S.B. 2292 Before the House Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of former family court judge, Betty Vitousek). This procedure was in place from at least the early 1970s. *Id*

[75] *Id.*

and medical history.[76] The judge did not provide the names of birthparents.[77]

Family court later set up an internal procedure that allowed birthparents and adoptees to register with the court their desire to exchange identifying information.[78] When both parties consented, they were referred for counseling and reunification through an adoption agency.[79]

Unfortunately, the public was not well-informed about these family court procedures.[80] Adult adoptees walked into family court offices expecting to get their records.[81] Not surprisingly, adoptees were angered because clerks had access to their files and they did not.[82]

IV. Why The Old Law Had To Be Changed

For many years, the states and adoption agencies have been under pressure to revise traditional policies on sharing information and on facilitating reunions between adoptees and birthparents.[83] To fully comprehend the controversy over open adoption records and all of the issues that were addressed and hotly debated in the period before Hawai'i's adoption records law was changed, each party's perspective must be examined.

A. The Different Perspectives

1. The adoptee

> A woman who brings a child into the world has a responsibility to that child. Only she can give him his story and explain why the adoption took place. Only she can deliver to the child his biological and historical

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[76] *Id.*

[77] *Id.*

[78] Hawaii Institute For Continuing Legal Education, Hawaii Adoption Manual I-6 (1984).

[79] *Id*

[80] *See, e.g.*, Linda Hosek, *Search for Parents is Hard*, Honolulu Star-Bulletin, Jan. 5, 1990, at A8. In the incident described in the article, the adoptee, Jacqueline, "just expected to go in and ask for her records." *Id*

[81] *Id.*

[82] Linda Hosek, *Mothers Ask Open Records on Adoption*, Honolulu Star-Bulletin, Feb. 2, 1990, at A3.

[83] Sachdev, *supra* note 6, at 1.

> identity. She can always refuse the petitioner . . . but society should not guard her with the protective cover of anonymity. If someone has to be favored . . . let it be the innocent party, the adopted adult, who maintains that his rights are being denied and his best interests not being served by yesterday's arrangements. . . . If adoptees need to be reconnected to their origins, why should separation be judged the higher good?[84]

Adopted people have only recently begun to talk about their lives as adoptees.[85] Previously, because adoptive families were supposed to be just like other families, adoptees usually tried to suppress any feelings about being different.[86] Today, the more they talk, write, and study, the more they realize that being adopted makes them different.[87] Researchers say being different is not necessarily a bad thing.[88] However, adoptees need to be aware of the difference and come to terms with it.[89]

To be adopted is to have an incomplete identity, an incomplete sense of who you are.[90] Your identity is important because it connects you to other people and gives you a sense of belonging.[91] To some adoptees, having an incomplete identity is not troubling.[92] To others, it is vitally important to complete their identities by finding out their family histories.[93] For those adoptees who do not feel the need to complete their identities, an illness or turning point in life, such as a marriage

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[84] GEDIMAN & BROWN, *supra* note 4, at 250-51. This excerpt represents the views of the open records advocates.

[85] DUPRAU, *supra* note 22, at 68.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 72.

[89] *Id.* For example, one adoptee explained:

> [I]n second grade I knew that the family tree I had drawn as a homework assignment was a fraud. When I received my first physical exam in order to compete in junior high school sports, I knew there was no family medical history to be recorded. And in high school, when I was asked to determine the genetic probability of inheriting my parents' eye color, I knew that I didn't have the correct information to fit into the formula. . . . These may seem trivial incidents, but they add up over a lifetime.

Relating to Adoption: Hearings on H.B. No. 2089 Before the Senate Committee on Judiciary, 15th Leg., Reg. Sess. (1990) (written testimony of Laurel, an adoptee)

[90] DUPRAU, *supra* note 22, at 73-74.

[91] *Id.*

[92] *Id.* at 75.

[93] *Id.*

or having children, may influence them to search for information on their family histories.[94]

Adoptees contend that they are co-owners of information about themselves, and, thus, it is unfair to deny this information to them.[95] The adoptees themselves have never consented to the sealing of information.[96] Most adoptees do not question confidentiality during their childhoods but believe that the conditions justifying such protection are no longer needed when they reach adulthood.[97]

Of course, not every adoptee feels the need to search for birthparents.[98] Those who do feel the need find that even making the decision to search is not easy.[99] In the past, an adoptee who wanted to search was treated as abnormal.[100] Moreover, adoptive parents who do not understand the adoptee's need for information may make the adoptee feel guilty for "betraying" them, for not being grateful and loyal.[101]

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[94] *Id.* at 86; *see also* GEDIMAN & BROWN, *supra* note 4, at 49.

It is important to note that the adoptee who has no known blood relatives does not know anyone who looks like him or her. The options available to an adoptee who wants to know someone who looks like himself or herself are to search for birth relatives or to have a baby. One researcher says that "[a]dopted youngsters, both male and female, may demonstrate a compulsive urge to procreate, thus providing them with their first contact with a blood relative." SOROSKY et al., *supra* note 4, at 113

[95] SACHDEV, *supra* note 6, at 69.

[96] *See, e.g.*, Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 649 (N.J. Super. Ct. Ch. Div. 1977). In *Mills*, the court noted that "[t]he child, who is the third and ultimately most important party to the adoption, has no voice in the proceedings. He or she is not represented as an individual by legal counsel. The child's only protection at the proceedings is the thoroughness of the report of the Division of Youth and Family Services and the perceptiveness of the presiding judge." *Id.*

[97] SACHDEV, *supra* note 6, at 12.

One expert discourages the adolescent adoptee from searching for birthparents because the adoptee is still too immature to put the entire experience into healthy perspective. SOROSKY et al., *supra* note 4, at 117.

Another expert, Betty Jean Lifton, thinks adopted children ought to know all facts about themselves by the time they are thirteen. They should not necessarily meet their birthparents at that time, but she feels they might avoid a lot of the turmoil that adopted teenagers often suffer through if they have a better idea of who they are and where they come from. DUPRAU, *supra* note 22, at 107-108.

[98] DUPRAU, *supra* note 22, at 83.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 84.

Some adoptees may be afraid of what the search may reveal.[102] But, even an adoptee who discovers a disturbing history usually says he or she is glad to know the truth.[103] The known, however terrible, is often easier to live with than the unknown because the questions are finally put to rest.[104]

2. The birthparents

> I am always looking for my daughter. . . . Her birth is the single most important event of my life; since that day, her existence has shaped who I am. . . .
> I know, I know, I gave her away, I can hear you thinking; I knew what I was doing and so why am I making a fuss now?
> A signature cannot abrogate my feelings.[105]

Today, the notion that the birthmother[106] will forget about the child she gave up for adoption is considered a myth.[107] Studies show that

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Many adoptees are curious about their birthparents during their childhoods, but they learn to suppress it, sensing the disapproval or hurt and anger of their adoptive parents. Some adoptees do not raise the subject fearing it might be interpreted as dissatisfaction with the adoptive home. SACHDEV, *supra* note 6, at 82-83.

While all other questions are viewed as positive indications of intelligence, questions about birthparents are viewed sometimes as a comment on the adoptive parents' inadequacy as parents. SOROSKY et al., *supra* note 4, at 91.

[102] DUPRAU, *supra* note 22, at 84.

[103] *Id.* at 97.

[104] *Id.* "Every reunion is good in the sense that it is useful, enabling adoptees to replace fantasy with reality, grieve if necessary, and then move on." GEDIMAN & BROWN, *supra* note 4, at 60.

The author of this commentary is an adoptee who, fortunately, did not have to go through the turmoil of searching for her birthmother. Upon reaching adulthood, the author began a relationship with her birthmother, and that relationship has answered many questions and changed the author's life in a positive way.

[105] LORRAINE DUSKY, BIRTHMARK 10-11 (1979).

[106] This commentary focuses on birthmothers because historically it was the birthmother who made the decision to relinquish the child and whose consent was solicited. Furthermore, adoption records contain more information on the birthmother than the birthfather. More importantly, the literature shows that adoptees first search for their birthmothers before birthfathers. SACHDEV, *supra* note 6, at 26.

See GEDIMAN & BROWN, *supra* note 4, at 165-83 for an insightful discussion on birthfathers. The rights of a putative father were largely ignored in the past, but the courts have begun to strengthen the prerogatives of the father to ensure the legality and finality of an adoption. For a good overview of recent cases on this topic, see NATIONAL COMMITTEE FOR ADOPTION, 1989 ADOPTION FACTBOOK 150-51 (1989) [hereinafter ADOPTION FACTBOOK].

[107] GEDIMAN & BROWN, *supra* note 4, at 33.

birthmothers never really forget and, for some, the relinquishment results in deep emotional problems.[108] Many birthmothers say they were not aware of the contractual arrangement regarding confidentiality and that they were not given an option because it was silently assumed they wanted to be anonymous.[109] Birthmothers realize they have no legal claims to the adoptees, but they want to tell their stories and, in turn, hear the adoptees' stories.[110] In a study regarding attitudes toward the release of identifying information to adoptees, close to ninety percent of all birthmothers surveyed said they supported the release of the information.[111]

Birthmothers do not often search, however, because they fear being intrusive or misunderstood by the adoptee and adoptive parents.[112] In one expert's study, eighty-two percent of the birthmothers surveyed said that they were interested in reunions with the adult adoptees; however, only five percent of the birthmothers were themselves actively searching for the adoptees.[113]

Of course, there are those birthparents who want to remain unknown and who do not want contact with the adoptee because of the foreseeable disruptions that will occur in the birthparents' lives.[114] Moreover, some experts believe the confidentiality guarantee can be the deciding factor

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[108] *Id.* at 35-36. The effects of relinquishment are long-lasting. In the mid 1970s the first studies were published suggesting that birthmothers were not all proceeding satisfactorily with their lives. For example, in a study of over 200 birthmothers in Australia, over half of the women reported an increasing sense of loss over periods of up to thirty years. *Id.*

[109] SACHDEV, *supra* note 6, at 10.

[110] SOROSKY et al., *supra* note 4, at 69.

[111] SACHDEV, *supra* note 6, at 55-56.

[112] SOROSKY et al., *supra* note 4, at 53.

[113] *Id.* at 53.

[114] *See Relating to Adoption: Hearings on S.B. No. 2292 Before the House Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of Laurie Loomis, Esq., a private placement adoption attorney). As this attorney explained:

> A significant number of birth parents have in good faith relied on our law's guarantee of privacy. . . . Based on our experiences and on the experiences of our colleagues involved in both private and agency adoptions, there is no question that a good many are still relying on that guarantee of anonymity. While raising significant legal questions, the unfettered abridgment of that substantial privacy interest can be traumatic and, in some cases, cruelly disruptive of a birth parent's, or adoptee's, "new" life.

Id

in a woman's decision regarding abortion[115] or adoption.[116] One birthmother sued her physician for helping the now adult adoptee whom she had placed with an adoptive family learn her identity.[117] The Oregon court held that breaching the confidence of the birthparent was an actionable offense.[118] A Missouri court has stated: "There must be finality for the natural parents and a new beginning; if there is a right of privacy not to be lightly infringed, it would seem to be theirs."[119]

3. The adoptive parents

> If they want to know about their parents nobody should be allowed to keep that information from them. It's a natural desire and a part of growing up.[120]
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> It would be upsetting to us; but how can you say you can't look for your parents? He would do it anyway when he gets [to] a certain age with or without our consent. It certainly would deteriorate our relationship if we went against him. However, if he does like his parents and wants to maintain a relationship, I hope by that time our love will be so strong that it won't make a difference between us.[121]
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> • • •
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> If we had known that there was a possibility of the records being opened, we never would have adopted. We did not adopt our children to be caretakers or babysitters for the natural mothers who gave them up for adoption. We adopted because we were guaranteed total anonymity, and we feel that promise must be honored.[122]

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[115] ADOPTION FACTBOOK, *supra* note 106, at 108. "Regardless of people's religious or ethical convictions about abortion, if the only choice given women is between a *confidential abortion* or a *non-confidential adoption*, women will too often be compelled to choose confidential abortion. Confidential records give pregnant women greater freedom to choose adoption." *Id.*

[116] SACHDEV, *supra* note 6, at 11. But, birthmothers challenge this prediction that disclosure of identities could inhibit the decision of a large number of mothers to give up their children for adoption. Finland, Scotland, and Israel do not have confidentiality statutes, and adoption is practiced just as effectively. *Id.*

[117] Humphers v. First Interstate Bank, 696 P.2d 527 (Or. 1985).

[118] *Id.* at 533-36.

[119] *In re* Maples, 563 S.W.2d 760, 763 (Mo. 1978).

[120] SACHDEV, *supra* note 6, at 56. This is an adoptive mother's statement.

[121] *Id.* at 58. This is an adoptive mother's statement.

[122] SOROSKY et al., *supra* note 4, at 83. This is an adoptive parent's statement.

Understanding the adoptive parent's viewpoint requires an awareness of the reasons for adopting a child.[123] In most cases, it is because of infertility.[124] Infertility can affect every aspect of an adoptive couple's lives.[125] Infertile couples receive little help in understanding their feelings of shame and guilt.[126] Their psychological reactions to infertility are often similar to those of grief in adjusting to a death.[127] One expert explains:

> The process of grief, in essence, is for their loss of reproductive function and for the loss of the biological children they had expected, but never could have. When they have resolved their own feelings of loss, they are in a better position to help the adopted child to deal with the loss in his/her own background.[128]

Today, researchers find that the majority of adoptive parents feel secure about their relationships with their adoptive children and do not think information should be withheld from them after adulthood.[129] This finding is supported by a study that showed that close to seventy percent of adoptive parents surveyed supported the release of identifying information to adoptees.[130]

There are those adoptive parents, however, who feel, at the very least, that the adoptee should obtain their permission before trying to obtain identifying information on birthparents.[131] Some of these adop-

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[123] *Id.* at 73.

[124] DEPRAU, *supra* note 22, at 53.

[125] SOROSKY et al., *supra* note 4, at 84.

[126] *Id.* at 74

[127] *Id*

[128] *Id* at 74-75.

[129] Heidi A. Schneider, *Adoption Contracts and the Adult Adoptee's Right to Identity*, 6 LAW & INEQ. J. 185, 221 (1988); *see also* SOROSKY et al., *supra* note 4, at 85-86.

As one adoptive mother said:

> [A]dopted children, no matter how sturdy the family, will, simply as a function of being adopted, confront deep feelings of rejection, abandonment and unconnectedness that can derail healthy development *unless* parents are given the information they need to give honest answers about heritage and history, *unless* the system supports ease of contact with birth parents when children are ready.

Relating to Adoption. Hearings on H.B. No. 2089 Before the Senate Committee on Judiciary, 15th Leg., Reg. Sess. (1990) (written testimony of Jean, an adoptive parent).

[130] SACHDEV, *supra* note 6, at 55-56.

[131] One study found that 36.8% of the adoptive parents surveyed supported their prior consent as a condition for releasing identifying information to the adult adoptee. *Id.* at 60-61

tive parents feel they were given a pledge of confidentiality.[132] They feel that if the department or agency decides unilaterally to change the ground rules, it has the moral and legal obligation to grant them a say in the decision on disclosure of information.[133]

4. The state

> The primary interest of the public is to preserve the integrity of the adoptive process. That is, the continued existence of adoption as a humane solution to the serious social problem of children who are or may become unwanted, abused or neglected. In order to maintain it, the public has an interest in assuring that changes in law, policy or practice will not be made which negatively affect the supply of capable adoptive parents [] to make decisions which are best for them and their children. We should not increase the risk of neglect to any child, nor should we force parents to resort to the black market in order to surrender children they can't care for.[134]

The state wants to honor the promises of anonymity given to the parties at the time of the adoption.[135] The state also wants to maintain the viability of the adoption system so that people will continue to use the system.[136] The concern is that the absence of confidentiality will make birthparents less likely to relinquish their child for adoption and make potential adoptive parents less likely to adopt a child.[137]

From a state's viewpoint, confidentiality helps to protect birthparents' privacy rights.[138] It gives the adoptive parents the opportunity to create a secure family relationship free from intrusion.[139] It helps the adoptee

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[132] *Id.* at 63.

[133] *Id.* In 1976, the Child Welfare League of America recommended that agencies alert adopting parents and birthparents that secrecy could not be permanently guaranteed to them. *Id.* at 5; *see also* SOROSKY et al., *supra* note 4, at 44.

[134] Klibanoff, *Genealogical Information in Adoption: The Adoptees Quest and the Law*, 11 FAM L.Q. 196-97 (1977), *quoted in In re* Maples, 563 S.W.2d 760, 763 (Mo. 1978).

[135] Susan E. Simanek, Comment, *Adoption Records Reform: Impact on Adoptees*, 67 MARQ. L. REV. 110, 124-25 (1983).

[136] *Id.* at 124.

[137] SACHDEV, *supra* note 6, at 8; Schneider, *supra* note 129, at 224. However, the number of adoptions has not dramatically dropped in places like Great Britain, Finland, and Israel that have enacted open records laws. SOROSKY et al., *supra* note 4, at 224.

[138] Simanek, *supra* note 135, at 124.

[139] *Id.*

develop a stable relationship with the adoptive parents and safeguards the adoptee against psychological distress from stigmatizing disclosures about his or her birth.[140] Confidentiality also encourages people to be honest so that all facts needed to make the best placement for the child will be revealed.[141]

B. The Inability to Meet the "Good Cause" Requirement

The movement to change Hawai'i's sealed adoption records law arose because of the different parties' views as expressed above and also because of the inability to open sealed adoption records through the courts. To protect the integrity of the adoption process and the privacy of the people involved, most states, like Hawai'i, had guaranteed confidentiality by mandating that adoption records would remain sealed unless the petitioner showed there was "good cause" to open the records.[142] The courts, however, did not have a standard for good cause and were reluctant to open records.[143] Consequently, adoptees had a heavy burden of persuasion.[144]

"Good cause," it is admitted, has no universal, black-letter definition.[145] The courts must decide whether good cause exists and the extent of disclosure that is appropriate on the facts of each case.[146] Courts have generally held that the mere desire of an adoptee to learn of his or her ancestry cannot, in itself, constitute good cause when balanced against the interests of other parties to the adoption process.[147]

If an adoptee's mere desire to learn of his or her ancestry is not deemed good cause, what about the adoptee's need for medical information? In Hawai'i, the release of medical information has been

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[140] *Id.*

[141] *Id.*

[142] GEDIMAN & BROWN, *supra* note 4, at 25-26.

[143] Debra D. Poulin, *The Open Adoption Records Movement: Constitutional Cases and Legislative Compromise*, 26 J. FAM. L. 395, 396 (Winter 1987).

[144] *Id.*

[145] Linda F.M. v. Dep't of Health of New York, 418 N.E.2d 1302, 1304 (N.Y. 1981), *appeal dismissed*, Mason v. Abrams, 454 U.S. 806 (1981).

[146] *Id.*

[147] *Id.*; *see also In re* Roger B., 418 N.E.2d 751, 757 (Ill. 1981), *appeal dismissed*, Barth v. Finley, 454 U.S. 806 (1981); *In re* Assalone, 512 A.2d 1383, 1388-89 (R.I. 1986); Bradey v. Children's Bureau of South Carolina, 274 S.E.2d 418, 422 (S.C. 1981).

allowed as long as identifying data is not released.[148] In other states, however, the adoptee has to petition the courts to obtain medical information with or without identifying information.[149] These petitions have met with varying levels of success.[150]

The adoptee has also argued, with mixed responses from courts, to unseal adoption records because of inheritance rights,[151] religious reasons,[152] and a desire to find siblings.[153] Adding to an adoptee's frustration are paternalistic courts who refuse to unseal records even when a birthparent has consented.[154] Judges often treat the adoptee as an

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[148] *See* discussion *supra* part II.B. In many cases, however, needed medical information will not be found in the records. An adoptee in Hawai'i claims that if he had gained access to his birth records when he was 18 and been able to meet his birthmother, he would have found out that he was a likely candidate for diabetes and been able to fight his diabetes much sooner and more effectively. *Relating to Adoption Hearings on H.B. 2089 Before the Senate Committee on Judiciary*, 15th Leg., Reg. Sess (1990) (written testimony of Dan, an adoptee).

[149] *See, e.g.*, Chattman v. Bennett, 393 N.Y.S.2d 768, 768-69 (N.Y. App. Div. 1977). In *Chattman*, the adult adoptee wanted to have children and was concerned about problematic genetic factors in her background. The New York court held that she had good cause to gain access to her medical information but not to the names of her birthparents. *Id.*

[150] For example, an adoptee in need of bone marrow transplant was denied the names of his birthparents. A court administrator, however, was instructed to make confidential inquiries of the birthparents as to their willingness to determine the critical medical facts concerning suitability for donation of bone marrow. *In re* George, 625 S.W.2d 151, 159-61 (Mo. Ct. App. 1981).

In another case, an adoptee, a commercial pilot, was laid off until he could find medical history from his birthparents to explain his heart disease and heart attack. The court denied access, rationalizing that "[a] rule which automatically gave full disclosure to any adopted person confronted with a medical problem with some genetic implications would swallow New York's strong policy against disclosure as soon as adopted people approached middle age." Golan v. Louise Wise Services, 507 N.E.2d 275, 279 (N.Y. 1987).

[151] *E.g.*, Massey v. Parker, 369 So. 2d 1310, 1314 (La. 1979) (finding no compelling necessity for plaintiff to see the sealed records, but a compelling reason for the court to examine the records to determine whether plaintiff had inheritance rights).

[152] *E.g.*, *In re* Gilbert, 563 S.W.2d 768, 770 (Mo. 1978) (holding adoptee who alleged that fundamental belief of his Mormon religion inspired him to inspect the records should be given the opportunity to present evidence on that issue).

[153] *E.g.*, *In re* Lay, 382 So. 2d 814, 815 (Fla. Dist. Ct. App. 1980) (holding Florida law did not prohibit the release of information on siblings from adoption records but left it up to judicial discretion whether good cause was shown to open up the records).

[154] *See, e.g.*, *In re* Estate of McQuesten, 578 A.2d 335, 339 (N.H. 1990) ("If all of the parties to the adoption give their consent to unsealing the adoption records . . .

eternal child who should be grateful and loyal to his or her adoptive parents and who must be shielded from the truth.[155]

Given the failure of the courts to articulate a good cause standard and their harsh attitudes toward opening sealed adoption records, adoptees looked for another approach to the problem. That approach took the form of a constitutional attack on sealed records laws.

C. The Inability to Attack Sealed Records on Constitutional Grounds

1. Privacy rights

In 1979, the United States Court of Appeals for the Second Circuit heard constitutional arguments attacking sealed adoption records laws and their "good cause" requirements for the first time in *ALMA Society, Inc. v. Mellon*.[156] *ALMA* adoptees asserted that learning the identity of their parents is a fundamental privacy right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[157]

In analyzing sealed records laws and the right to privacy, the court focused upon the sensitive nature of the potentially conflicting interests

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the State still has an interest in continued confidentiality."); Golan v. Louise Wise Services, 507 N.E.2d 275, 278 (N.Y. 1987) ("Even in the face of consent by all parties, the court must independently satisfy itself that 'good cause' for disclosure has been shown and possible limitations on the use of the information have been explored before allowing access.").

[155] *See, e.g.*, *In re* Maples, 563 S.W.2d 760, 764 (Mo. 1978).

In *Maples*, the court stated:

> [T]he adoptee has prospered socially, intellectually and financially as the child of her adopting parents and has recently married. . . . In addition, it should be stated that *adoptive parents need and deserve the child's loyalty* as they grow older and particularly in their later years. The statute promotes a posture from which *the child's attention and emotional attachments are directed toward the relationship with the new parents and so it should be.*

Id. (emphasis added).

[156] 601 F.2d 1225 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979).

[157] *Id.* at 1230. The court characterized this asserted right as the right to "personhood." *Id.* at 1231. The relevant section of the Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

and family privacy in general.[158] The court concluded that the statute, providing for release of information on a showing of good cause, permissibly balanced the interests of all parties (the adoptee's need and the birthparents' and adoptive parents' privacy expectations) and did not "unconstitutionally infringe upon or arbitrarily remove appellants' rights of identity, privacy, or personhood."[159]

2. Equal Protection rights

In their second argument, *ALMA* adoptees alleged that sealed records laws violate the Equal Protection Clause of the Fourteenth Amendment.[160] The adoptees argued that adoptees are a vulnerable or "suspect" class accorded strict scrutiny under equal protection analysis.[161] The United States Supreme Court has held that classification based on race, alienage, and national origin trigger strict scrutiny.[162] Additionally, a "quasi-suspect" class exists for those classifications based on sex or illegitimacy, and unequal treatment of quasi-suspect classes must serve important government objectives and be substantially related to accomplishment of those objectives.[163] *ALMA* adoptees argued they were entitled to at least the same level of judicial scrutiny afforded illegitimates and that the good cause requirement could not withstand this heightened level of scrutiny.[164]

The *ALMA* court found no logic in comparing adult adoptees who must show good cause to access birth records with illegitimate persons who have unrestricted access to birth records.[165] Furthermore, the court

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[158] 601 F.2d at 1231.

[159] *Id.* at 1233.

[160] *Id.* at 1230. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[161] 601 F.2d at 1233-34. For an analysis of this constitutional challenge, see Marilee C. Unruh, Comment, *Adoptees Equal Protection Rights*, 28 UCLA L. REV. 1314, 1332 (1981).

[162] Unruh, *supra* note 161, at 1332 (citing Loving v. Virginia, 388 U.S. 1 (1967); *In re* Griffiths, 413 U.S. 717 (1973); Korematsu v. United States, 323 U.S. 214 (1944)).

[163] *Id.* at 1332-33 (citing Craig v. Boren, 429 U.S. 190 (1976)).

[164] 601 F.2d at 1233.

[165] *Id.* at 1234. The court said that discrimination against illegitimates is scrutinized because of the "injustice of stigmatizing a child in order to express disapproval of the parents' liaisons." *Id.* This is less applicable to discrimination against adoptees. *Id.* Moreover, adoptees "are not generally subject to extensive legal disabilities and thus have less of a claim to judicial protection than illegitimates." *Id.*

concluded that even if adopted status was deemed a quasi-suspect class, the sealed records laws would survive intermediate scrutiny because they are "substantially related to an important state interest."[166]

3. Abolishment of slavery

In their third argument, *ALMA* adoptees proposed that sealed records laws impose on them a "badge or incident" of slavery that had been abolished by the Thirteenth Amendment.[167] The adoptees compared their status under sealed records laws to that of slave children who were sold before they were old enough to remember their parents.[168] They argued that because adoptees, like slave children, are unable to communicate with their birthparents, they are forced to wear a "badge or incident" of slavery.[169]

The *ALMA* court rejected this novel Thirteenth Amendment argument saying it did not conform to the United States Supreme Court's interpretation of the Thirteenth Amendment.[170] The *ALMA* court pointed out that the Supreme Court has never held that the Thirteenth Amendment addresses the badges and incidents of slavery as well as the actual condition of slavery.[171] Moreover, the Supreme Court has been very reluctant to expand the list of traits subject to strict scrutiny.[172] Additionally, the *ALMA* court pointed out that a broad construction of slavery would enable the Thirteenth Amendment to engulf many of the rights of the Fourteenth Amendment and, thus, make the two redundant.[173]

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[166] *Id.* See Unruh, *supra* note 161, at 1334-61, for arguments concluding that adoptees are a quasi-suspect class and that the good cause requirements are not constitutional.

[167] 601 F.2d at 1230. The Thirteenth Amendment to the United States Constitution provides:

> Section 1. Neither slavery nor involuntary servitude . . . shall exist within the United States . . . .
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

[168] 601 F.2d at 1237.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* at 1237.

[173] *Id.* at 1238. See Poulin, *supra* note 143, at 407-409 for an analysis disagreeing with the *ALMA* court's conclusions regarding the Thirteenth Amendment.

4. First Amendment rights

The Supreme Court of Missouri heard a First Amendment challenge to sealed records laws in *In re Maples*.[174] Maples, an adoptee, alleged that the sealed records laws violate the right to receive information, a penumbral First Amendment right.[175] Maples cited cases where the principle behind the decisions was the constitutional prohibition against restricting the free flow of ideas from one person to another.[176] However, the *Maples* court did not find this principle applicable to adoption records.[177] The court held that the state was exercising a "valid state interest, balancing conflicting rights of privacy and protecting the integrity of the adoption process" and was not infringing on Maples's First Amendment rights.[178]

V. The Options That Were Available To Hawai'i

Given the failure of the attempts to attack the sealed records laws in the courts, open adoption records support groups turned to lobbying for adoption law reform.[179] The states have pursued different options and methods in facilitating information sharing and reunions between adoptees and birthparents. Ultimately, the State of Hawaii Legislature chose the search and consent option.[180]

A. Original Birth Certificate Laws

Alaska and Kansas enacted laws that allow adoptees, upon reaching the age of majority, to obtain copies of their original birth certificates.[181] These laws give adoptees the absolute right to identifying information without consents, waivers, or court orders as hurdles.[182] The disadvan-

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[174] *In re* Maples, 563 S.W.2d 760 (Mo. 1978).

[175] *Id.* at 760-61.

[176] *Id.* at 762.

[177] *Id.*

[178] *Id.*

[179] Poulin, *supra* note 143, at 410.

[180] See *infra* part IV.C. for a description of this option.

[181] Alaska Stat. § 18.50.500 (Supp. 1991); Kan. Stat. Ann. § 65-2423 (Supp. 1991). Alabama had the same open records law but repealed it in 1990 and now has a search and consent law. Ala. Code § 26-10A-31 (Supp. 1992)

[182] Poulin, *supra* note 143, at 412.

tage of these laws is that a birth certificate provides sparse information[183] that sometimes is not enough to enable adoptees to locate their birthparents.[184] Complete adoption records would give adoptees more information on which to base their searches.[185]

B. Voluntary Mutual Consent Adoption Registries

Voluntary registry statutes allow the adult adoptee and birthparents to register their consents to the release of identifying information.[186] If a match is made between the birthparents and the adoptee, they are notified, and identifying information is released or a meeting is facilitated.[187] The registry is operated by the state or by designated adoption agencies.[188] Registry statutes do not allow the authorities to solicit or request a person's registration.[189] Twenty-six states have enacted registry statutes.[190] Six of those states have enacted both registry statutes

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[183] Upon perusal of a Hawaii birth certificate, one can find the following information: (1) child's name; (2) hospital or facility name; (3) date of birth; (4) city, town or location of birth; (5) time of birth; (6) sex of child; (7) attendant's name; (8) mother's name; (9) mother's age at this birth; (10) mother's state of birth; (11) whether mother was active in the U.S. military; (12) mother's residence; (13) mother's mailing address; (14) father's name; (15) father's age at this birth; (16) father's state of birth; (17) whether father was active in the U.S. military; (18) race of mother and father. Included in the birth certificate form are the items required by the Public Health Service, National Center for Health Statistics, subject to modification by the State's Department of Health. HAW. REV. STAT. § 338-11 (1985).

[184] Poulin, *supra* note 143, at 412.

[185] *Id.*

[186] *Id.* Some registry statutes allow adoptive parents and siblings of the adoptee to register. *Id.* at 413.

[187] ADOPTION FACTBOOK, *supra* note 106, at 44.

[188] Poulin, *supra* note 143, at 413.

[189] *Id.* at 414.

[190] Arkansas, ARK. CODE ANN. §§ 9-9-501-508 (Michie 1991); California, CAL. CIV. CODE § 229.40 (West Supp. 1992); Colorado, COLO. REV. STAT. § 25-2-113.5 (Supp. 1992); *see also* COLO. REV. STAT. § 19-5-304 (Supp. 1992) (search and consent statute); Connecticut, CONN. GEN. STAT. § 45a-755 (1991); *see also* CONN. GEN. STAT. 45a-751 (1991) (search and consent statute); Florida, FLA. STAT. ANN. § 382.027 (West Supp. 1992); Georgia, GA. CODE ANN. § 19-8-23 (Michie 1991) (also provides for search and consent procedures); Idaho, IDAHO CODE § 39-259A (Supp. 1992); Illinois, ILL. ANN. STAT. ch. 40, ¶ 1522.1 (Smith-Hurd Supp. 1992); *see also* ILL. ANN. STAT. ch. 40, ¶ 1522.3a (Smith-Hurd Supp. 1992) (search and consent statute); Indiana, IND. CODE ANN. § 31-3-4-28 (Burns Supp. 1992); Louisiana, LA. CHILDREN'S CODE ANN. art. 1270 (West 1992); Maine, ME. REV. STAT. ANN. tit. 22, § 2706-A (West 1992);

and search and consent statutes.[191]

In 1982, the National Committee for Adoption ("NCFA") published model state legislation for states to use in establishing a mutual consent adoption registry.[192] NCFA believes that the registry is the most "professionally sound, humane, sensitive, and practical" method for maintaining confidentiality while sharing useful information.[193]

Opponents say that relatively few matches are accomplished this way because: (1) People do not know about the registries because they are not widely advertised; (2) Some registries charge a fee which not everyone can afford; and (3) Some registries require counseling, often considered demeaning to birthmothers and adult adoptees, before any meeting takes place.[194] In a passive registry, both parties need to register before a match can be made.[195] In an active registry, an intermediary is supposed to notify the second party after the first party

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Maryland, MD. FAM. LAW CODE ANN. § 5-4A-01-07 (Supp. 1991); Massachusetts, MASS. ANN. LAWS ch. 210, § 5D (Law. Co-op 1992); Michigan, MICH. COMP. LAWS ANN. § 710.27 (West Supp. 1992); Missouri, MO. ANN. STAT. § 453.121 (Vernon Supp. 1992) (also provides for search and consent procedures); Nebraska, NEB. REV. STAT. §§ 43-119 to -146.13 (Supp. 1990) (also provides for search and consent procedures); Nevada, NEV. REV. STAT. § 127.007 (1991); New Hampshire, N.H. REV. STAT. ANN. § 170-B:19 (1990 and Supp. 1991); New York, N.Y. PUB. HEALTH LAW §§ 4138b-4138d (McKinney 1985 & Supp. 1992); Ohio, OHIO REV. CODE ANN. § 3107.41 (Anderson Supp. 1991); Oregon, OR. REV. STAT. § 109.425-.500 (1991); South Carolina, S.C. CODE ANN. § 20-7-1780 (Law. Co-op. Supp. 1991); South Dakota, S.D. CODIFIED LAWS ANN. § 25-6-15 (Supp. 1992); Texas, TEX. HUM. RES. CODE ANN., § 49.001-.023 (West 1990); Utah, UTAH CODE ANN. § 78-30-18 (Supp. 1992); West Virginia, W. VA. CODE § 48-4A-1-8 (1992).

[191] Colorado, COLO. REV. STAT. § 19-5-304 (Supp. 1992); Connecticut, CONN. GEN. STAT. § 45a-751 (1991); Georgia, GA. CODE ANN. § 19-8-23 (Michie 1991); Illinois, ILL. ANN. STAT. ch. 40 ¶ 1522.3a (Smith-Hurd Supp. 1992); Missouri, MO. ANN. STAT. § 453.121 (Vernon Supp. 1992); Nebraska, NEB. REV. STAT. §§ 43-119 to -146.13 (Supp. 1990).

See *infra* part IV.C. for a description of search and consent statutes.

[192] ADOPTION FACTBOOK, *supra* note 106, at 44

[193] *Id.*

[194] GEDIMAN & BROWN, *supra* note 4, at 251. *See, e.g.*, Arkansas' counseling requirement:

> Upon registering, the registrant shall participate in not less than one (1) hour of counseling with a social worker employed by the entity that operates the registry; if a birth parent or adult adoptee is domiciled outside the state, he shall obtain counseling from a social worker employed by a licensed agency in that other state selected by the entity that operates the registry.

ARK. CODE ANN. § 9-9-504(b)(1) (Michie 1991).

[195] GEDIMAN & BROWN, *supra* note 4, at 251.

registers.[196] Critics say that a passive registry is too passive to be any good, and an active registry is ineffective because no one can expect a disinterested worker to be diligent in conducting a search on a stranger's behalf.[197] Some state registry statutes require adoptive parents' consent[198] or require another round of birthparent and adoptee consent forms even after previous consent forms are "matched" up.[199] Some statutes require registrants to attend face-to-face conferences with representatives of the registry before identifying information can be given to them.[200]

C. Search and Consent Laws

Search and consent laws allow access to records only if the consents of the other parties are obtained.[201] Under these laws, although an adult adoptee does not have an absolute right to his or her adoption records, the state has an affirmative duty to search for the birthparents and request their consents to the release of the records.[202] To cover the search cost, an adoptee is required to pay a fee.[203] The search is time-limited, and contact with birthparents should be personal and confidential.[204] If both birthparents refuse consent, the adoptee has no recourse other than to ask the court to open the records.[205] Seventeen states have enacted search and consent laws.[206] Six of these states have also enacted registry laws.[207]

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[196] *Id.*

[197] *Id.*

[198] *See, e.g.*, IND. CODE ANN. § 31-3-4-28 (Burns Supp. 1992).

[199] *See, e.g.*, TEX. HUM. RES. CODE ANN. § 49.016 (West 1990).

[200] *Id.* § 49.017.

[201] Poulin, *supra* note 143, at 415.

[202] *Id.*

[203] *Id.*

[204] *Id.* The requirement of personal and confidential contact is included to make sure that the birthparent's privacy is respected. Some states do not even allow contact by mail. *See, e.g.*, MINN. STAT. ANN. § 259.49 (West Supp. 1992).

[205] Poulin, *supra* note 143, at 415.

[206] Alabama, ALA. CODE § 26-10A-31 (Supp. 1992); Arizona, ARIZ. REV. STAT. ANN. § 8-134 (Supp. 1992); Colorado, COLO. REV. STAT. § 19-5-304 (Supp. 1992); *see also* COLO. REV. STAT. § 25-2-113.5 (Supp. 1992) (registry statute); Connecticut, CONN. GEN. STAT. § 45a-751 (1991); *see also* CONN. GEN. STAT. § 45a-755 (1991) (registry statute); Georgia, GA. CODE ANN. § 19-8-23 (Michie 1991) (also provides for registry procedures); Hawaii, HAW. REV. STAT. § 578-15 (Supp. 1991); Illinois, ILL. ANN. STAT. ch. 40, ¶ 1522.3a (Smith-Hurd Supp. 1992); *see also* ILL. ANN. STAT. ch.

Although the search and consent statutes allow access to adoption records, there are disadvantages. For example, in some states, the state still has the prerogative of refusing release even when all the consents are given.[208] Varying provisions are made for birthparents who cannot be located and for birthparents who are deceased. Some of these provisions give the courts the ultimate decision. These provisions are obstacles to adoption records access because vague standards are used in allowing the courts to decide. For example, the Minnesota statute says that if the state is unable to notify the birthparent, the adoptee may petition the court for disclosure, and the court shall grant the petition if "the court determines that disclosure of the information would be of greater benefit than nondisclosure."[209] In Washington, if the birthparent is deceased, the court "may" order disclosure of his or her identity.[210] Some states put up other obstacles to records access by requiring the adoptive parents' consent.[211]

40, ¶ 1522.1 (Smith-Hurd Supp. 1992) (registry statute); Kentucky, KY. REV. STAT ANN. § 199.572 (Baldwin 1992); Minnesota, MINN. STAT. ANN. § 259.49 (West Supp. 1992); Missouri, MO. ANN. STAT. § 453.121 (Vernon Supp. 1992) (also provides for registry procedures); Nebraska, NEB. REV. STAT. § 43-119 to -146.13 (Supp. 1990) (also provides for registry procedures); North Dakota, N.D. CENT. CODE § 14-15-16 (1991); Pennsylvania, 23 PA. CONS. STAT. ANN. § 2905 (1991); Tennessee, TENN. CODE ANN. § 36-1-141 (1991); Washington, WASH. REV. CODE ANN. § 26.33.343 (West Supp. 1992); Wisconsin, WIS. STAT. ANN. § 48.433 (West 1987 and Supp. 1991); Wyoming, WYO. STAT. §§ 1-22-201 to -203 (Supp. 1991).

[207] Colorado, COLO. REV. STAT. § 19-5-304 (Supp. 1992); Connecticut, CONN. GEN. STAT. § 45a-751 (1991); Georgia, GA. CODE ANN. § 19-8-23 (Michie 1991); Illinois, ILL. ANN. STAT. ch. 40, ¶ 1522.3a (Smith-Hurd Supp. 1992); Missouri, MO. ANN. STAT. § 453.121 (Vernon Supp. 1992); Nebraska, NEB. REV. STAT. §§ 43-119 to -146.13 (Supp. 1990).

[208] *See, e.g.*, CONN. GEN. STAT. § 45a-751 (1991).

> [T]he agency or department . . . shall furnish the information [] unless the consents required . . . are not given or unless the agency or department . . . determines at any time that the release of the requested information would be seriously disruptive to or endanger the physical or emotional health of the adult adopted or adoptable person or the person whose identity is being requested.

Id.

[209] MINN. STAT. ANN. § 259.49 (West Supp. 1992).

[210] WASH. REV. CODE ANN. § 26.33.343 (West Supp. 1992).

[211] For example, the Missouri statute says that for adoptions completed before August 13, 1986, the adoptive parents shall be notified if a request for identifying information is received from the adoptee. If the adoptive parents do not give their consent, the agency makes a "written report to the court stating that they were unable to notify the biological parent." MO. ANN. STAT. § 453.121 (Vernon Supp. 1992).

VI. HAWAI'I'S NEW LAW

The open adoption records reform movement in Hawai'i was spearheaded by members of the Adoption Circle of Hawaii, Inc. ("ACH"), a non-profit organization of adoptees, adoptive parents, and birthparents.[212] In 1990, ACH, arguing that denying access to the records violated human rights, lobbied the legislature to open adoption records to adoptees, birthparents, and adoptive parents when the adoptee reaches the age of eighteen.[213] In lengthy, emotion-laden hearings, numerous adoptees, birthparents, adoptive parents, attorneys, and social workers testified in favor of open records.[214] The legislators who held the hearings also received testimony in favor of open records from various organizations.[215]

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[212] Sue L. Villani, *A Search for Roots*, MIDWEEK, Feb. 19, 1992, at A6.

[213] The then president of ACH testified:

> Simultaneous with the closing of adoption records in Hawaii, governments of the world—spearheaded by Eleanor Roosevelt—adopted the Universal Declaration of Human Rights. This declaration has been the basis for the development of human rights groups worldwide. Article 25, in part, states "all children, whether born in or out of wedlock, shall enjoy the same social protection." Within the system, adopted individuals are denied the social protection of access to birth heritage.

Relating to Adoption: Hearings on H.B. 2089 Before the Senate Committee on Judiciary, 15th Leg., Reg. Sess. (1990) (written testimony of Dan Fargo, President, Adoption Circle of Hawaii)

[214] Hosek, *supra* note 82, at A3; Linda Hosek, *Adoptees Plead for Open Records*, HONOLULU STAR-BULLETIN, Feb. 14, 1990, at A6. The testimonies presented basically the same arguments given in part III.A of this commentary in discussing perspectives of the parties.

[215] *See Relating to Adoption: Hearings on S.B. 2292 Before the House Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of Kate Burke, President, American Adoption Congress); *Relating to Adoption: Hearings on S.B. 2292 Before the House Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of Sara L. Smith, Hawaii Women Lawyers); *Relating to Adoption: Hearings on S.B. 2292 Before the House Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of the National Association of Social Workers, Inc., Hawaii Chapter); *Relating to Adoption: Hearings on S.B. 2292 Before the House Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of Livia Wang, Native Hawaiian Legal Corporation); *Relating to Adoption: Hearings on H.B. 2089 Before the Senate Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of the Office of Hawaiian Affairs); *Relating to Adoption: Hearings on H.B. 2089 Before the Senate Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of Terri Needels, Ph.D., Hawaii Psychological Association); and *Relating to Adoption: Hearings on H.B. 2089 Before the Senate Committee on Judiciary*, 15th Leg., Reg.

The National Committee for Adoption,[216] adoption attorneys,[217] birthparents, adoptive parents, and others opposed ACH's efforts.[218] The Department of Human Services recommended only slight modifications to the law.[219] Representative Mike O'Kieffe stressed that those who were most strongly opposed to the bill would be those persons least likely to testify against it, such as birthparents who want to remain anonymous and who thought the State would honor its promise of confidentiality.[220] Even the media got involved, with both of Honolulu's major newspapers opposing open records.[221]

Because of the intense opposition, the legislators who introduced the bill then proposed the more conservative approach of search and consent.[222] Hawai'i's adoption records law was amended to provide for

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Sess. (1990) (written testimony of Mark D. Stitham, M.D., Hawaii Psychiatric Society).

The Office of Hawaiian Affairs ("OHA") noted that it has the responsibility of improving the lives of those of Hawaiian ancestry. For Hawaiians to qualify for OHA benefits of trust entitlements, they must verify that they have fifty percent or more Hawaiian blood quantum. With the sealed adoption records law, Hawaiian adoptees have a difficult time proving even ethnicity, much less percentages. Other agencies that require proof of Hawaiian ancestry to qualify for benefits are the Kamehameha Schools/Bernice Pauahi Bishop Estate, Queen Liliuokalani Trust, King Lunalilo Trust, Alu Like, Inc., Native Hawaiian Legal Corporation, and other federal health, education, and social programs. *Relating to Adoption: Hearings on H.B. 2089 Before the Senate Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony of the Office of Hawaiian Affairs).

[216] *Relating to Adoption: Hearings on S.B. 2292 Before the House Committee on Judiciary*, 15th Leg., Reg. Sess. (1990) (written testimony from the National Committee for Adoption).

[217] *E.g.*, Testimony of Laurie Loomis, *supra* note 114.

[218] Linda Hosek, *Adoption Measure Moves Ahead*, HONOLULU STAR-BULLETIN, April 7, 1990, at A8.

[219] Winona Rubin, director of the Department of Human Services said:

> While we acknowledge the compelling need "to know," we believe there is an equally compelling need "to remain unknown" by some parties and believe they need to be able to participate in the decision to release identifying information.

Hosek, *supra* note 82, at A3.

[220] 15th Leg., 1990 Reg. Sess., Haw. H.R.J. 656 (1990).

[221] *Adoption Files Let's Consult Birth Parents First*, HONOLULU ADVERTISER, Feb. 11, 1990 at B2 (suggesting requirement of consent from birthparents if a request is received from an adoptee); *Adoptees' Rights*, HONOLULU STAR-BULLETIN, Jan. 22, 1990 at A10 (suggesting creation of a state board to review requests by adoptees for access to their birth records).

[222] Linda Hosek, *Adoption Bill Supporters Hail Conferees' Accord*, HONOLULU STAR-

search and consent procedures and took effect on January 1, 1991.[223] Legislative conferees praised the amended law as landmark social legislation.[224]

A. The Provisions

Under the newly-amended Hawaii Revised Statutes section 578-15, for adoptions occurring before January 1, 1991, adoption records can be opened upon written request of the adoptee or adoptive parents after the adoptee reaches the age of eighteen if certain procedural steps are taken.[225]

In the case of an adoptee request, the family court will send, within sixty days[226] by certified mail,[227] return receipt requested, the court's

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BULLETIN, April 25, 1990, at A4.

Despite this compromise, opponents such as the NCFA criticized the proposal saying, among other things, that it would: (1) make a mockery of the covenants the State previously entered into; (2) violate the parties' constitutional privacy rights; (3) entail exorbitant costs in terms of the cost of the search, the cost of defending constitutional challenges to the law, and the cost of defending the State against lawsuits; (4) put too much of a burden on birthparents to repeatedly insist on anonymity; and (5) have a chilling effect on adoptions. Testimony of NCFA, *supra* note 216.

Regarding the privacy rights that NCFA mentioned, Hawai'i's Constitution expressly recognizes the right of privacy:

> 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, § 6.

[223] Act 338, 1990 Haw. Sess. Laws 1036 (codified as amended at HAW. REV. STAT. § 578-15 (Supp. 1991)).

[224] Stu Glauberman, *Conferees Reach Agreement on Adoption Records*, HONOLULU ADVERTISER, April 25, 1990 at A8.

[225] HAW. REV. STAT. § 578-15(b)(2) (Supp. 1991). Adoption records can also, as before, be opened by court order upon a showing of good cause. *Id.*

[226] The original Act 338 of 1990 stated a 30-day period. Act 338, 1990 Haw. Sess. Laws 1038 (codified as amended at HAW. REV. STAT. § 578-15 (Supp. 1991)). This was changed to a 60-day period during the 1991 legislative session. Act 45, 1991 Haw. Sess. Laws 124 (codified as amended at HAW. REV. STAT. § 578-15 (Supp. 1991)).

[227] The original Act 338 of 1990 provided for registered mail. Act 338, 1990 Haw. Sess. Laws 1038. Because of the higher costs involved with using registered mail, this provision was changed to certified mail during the 1991 legislative session. Act 45, 1991 Haw. Sess. Laws 124.

notice of the request for inspection, a copy of the adoptee's actual request, any accompanying letters or photographs, and a blank affidavit form to the last known address of each birthparent.[228] The notice informs the birthparent that unless an affidavit signed by the birthparent requesting confidentiality is received within sixty days of the date of receipt of the notice, he or she waives any rights of confidentiality, and inspection of the records will be permitted.[229] The notice also informs the birthparent that an affidavit requesting confidentiality for a period of ten years may be filed.[230]

If the family court receives a return receipt for the materials sent but does not receive an affidavit requesting confidentiality within the prescribed time limit, it will allow inspection.[231] If the notice is returned as undeliverable, the family court designates an agent to conduct a good faith and diligent search for the birthparent and to provide the notice and other documents to the birthparent.[232] The search is limited to 180 days.[233] Contacts made by the agent should be personal, whenever possible, and confidential.[234] If the birthparent cannot be found within the time limit, the court allows inspection.[235]

If an affidavit requesting confidentiality is received within the time limit, the court will not allow inspection during the effective period of the affidavit (ten years).[236] Thereafter, the birthparent may refile an affidavit every ten years or may file an affidavit effective for the remainder of the birthparent's lifetime.[237] All subsequent affidavits must be filed within ninety days of the expiration of the current affidavit.[238] An affidavit is effective until the last day of the period for which the

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[228] HAW. REV. STAT. § 578-15(b)(2)(A) (Supp. 1991).

[229] *Id.*

[230] *Id.*

[231] § 578-15(b)(2)(B).

[232] § 578-15(b)(2)(C).

[233] *Id.* In the original Act 338 of 1990, the search time limit was 120 days. Act 338, 1990 Haw. Sess. Laws 1038. This was changed to 180 days during the 1991 legislative session. Act 45, 1991 Haw. Sess. Laws 125.

[234] HAW. REV. STAT. § 578-15(b)(2)(C) (Supp. 1991).

The original Act 338 of 1990 stated that contacts with natural parents shall be personal and confidential and shall not be made by mail. Act 338, 1990 Haw. Sess. Laws 1039. This was changed during the 1991 legislative session. Act 45, 1991 Haw. Sess. Laws 125.

[235] HAW. REV. STAT. § 578-15(b)(2)(D) (Supp. 1991).

[236] *Id.* § 578-15(b)(2)(E).

[237] *Id.* § 578-15(b)(2)(F).

[238] *Id.*

affidavit was filed, until the birthparent revokes the affidavit, or until the birthparent is deceased, whichever occurs sooner.[239] Where two birthparents are involved and confidentiality is waived by only one of them, the inspection of the records will not include any identifying information regarding the other birthparent.[240]

For adoptions occurring after December 31, 1990, each birthparent "shall be informed of the procedures"[241] that must be followed if he or she wants to maintain confidentiality after the adoptee reaches the age of eighteen.[242] Within ninety days before the adoptee reaches the age of eighteen, a birthparent may file an affidavit with the court to request confidentiality.[243] The birthparent may refile affidavits every ten years thereafter or file an affidavit effective for the remainder of the birthparent's lifetime.[244] All affidavits after the initial affidavit must be filed within ninety days before the last effective day of the previous affidavit.[245]

If the birthparents fail to file affidavits, the adoptee and the adoptive parents are allowed to inspect the records after the adoptee reaches the age of eighteen.[246] Again, where two birthparents are involved and confidentiality is waived by only one of them, inspection of the records will not include identifying information regarding the other birthparent.[247]

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[239] *Id.* § 578-15(b)(2)(G).

[240] *Id.* § 578-15(b)(2)(H).

[241] The original Act 338 of 1990 said the "family court shall inform each natural parent of the procedures required under this paragraph if the natural parent desires to maintain confidentiality after the adopted individual attains the age of eighteen." Act 338, 1990 Haw. Sess. Laws 1039. This was changed during the 1991 legislative session. Act 45, 1991 Haw. Sess. Laws 125-26.

Family court will not be held responsible for informing the birthparents of the procedures for maintaining confidentiality because in most cases, placement of the child occurs many months before the court hearing. By the time the court hearing takes place, the birthparents usually have moved, and the court is unable to contact them. *Relating to Family Court: Hearings on S.B. 600 Before the Senate Committee on Judiciary*, 16th Leg., Reg. Sess. (1991) (written testimony of Marjorie H. Manuia, District Family Judge, Family Court, First Circuit).

[242] HAW. REV. STAT. § 578-15(b)(3)(A) (Supp. 1991).

[243] *Id.* § 578-15(b)(3)(B).

[244] *Id.*

[245] *Id.*

[246] *Id.* § 578-15(b)(3)(C).

[247] *Id.* § 578-15(b)(3)(D).

The same type of procedure is followed if the birthparent requests identifying information.[248] However, upon request by a birthparent, he or she may receive a copy of the original birth certificate any time after the adoptee reaches the age of eighteen.[249]

Notwithstanding any affidavit requesting confidentiality, upon request by the adoptee or adoptive parents for ethnic background and medical information, access is allowed.[250]

VII. Impact of The New Law

A. The Final Details

Family court set forth detailed procedures to be followed in gaining access to adoption records.[251] For an adoptee, the procedure is as follows: First, the adoptee fills out an application form and verifies his or her identification.[252] If the form is mailed in, it must be notarized.[253] The adoptee is given a summary of the law and is reminded that he or she must apply to the circuit in which the adoption took place.[254] Second, a copy of the application, a consent form, a blank affidavit form, and a notice from the court is sent by certified mail, return receipt requested to the last known address of each birthparent.[255] Letters and photos from the adoptee can be enclosed, but additional postage must be paid by the adoptee.[256]

Within sixty days of the date notice is received, the birthparent should send back either the consent form or the affidavit requesting confidentiality.[257] If the notice was delivered successfully and no response is sent back from the birthparent within sixty days, the adoptee

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[248] *Id.* § 578-15(b)(4).

[249] *Id.* § 578-15(b)(5).

[250] *Id.* § 578-15(b)(6).

[251] In the bill that passed (H.B. No. 2089), the judiciary was appropriated $100,000 to administer the program. Act 338, 1990 Haw. Sess. Laws 1040.

[252] Telephone Interviews with Darlene Yamauchi, Family Court Attorney, and Susan Jong, Family Court Clerk (Aug. 27, 1992 and Sept. 14, 1992).

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

may inspect the records.[258] The adoptee may pick up a copy of the records or request that it be mailed.[259] The adoptee must pay the usual copying fee to the court.[260]

If one birthparent consents and the other denies access, the adoptee may obtain identifying information only on the birthparent who gave consent.[261] If there is any information in the file on other adopted siblings, the adoptee may not access this information.[262]

If the notice is undeliverable, the court refers the request to one of two designated searchers.[263] The following is an example of the way a search works.[264] Upon receiving a referral, the searcher sends a letter giving information about the searcher and clarifying the procedure for the search to the adoptee.[265] Before the search is commenced, the adoptee must pay the fee of $300 and must send in a consent form to the court so that the searcher can access the information in the records.[266] Once these two requirements are met, the searcher has 180 days to complete the search.[267] Searching is primarily conducted through accessing public records via computer and through telephone calls.[268]

Once the searcher locates a birthparent, the searcher phones him or her to verify the identity and to confirm a mailing address.[269] The searcher then sends the packet of materials (the notice, the application, the consent form, the blank affidavit, and any letters or photographs) to the birthparent.[270] The birthparent should respond within sixty days with either the consent or the affidavit of confidentiality.[271] If nothing is received within the sixty days, the adoptee will automatically obtain access to the records.[272]

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[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.* The details regarding the designated searchers' services for family court were worked out when their contracts were drafted. Telephone Interview with Darlene Yamauchi, *supra* note 252.

[264] Telephone Interview with Claudia Glienke, Family Court Searcher (Sept. 18, 1992).

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] *Id.*

A search must be conducted for all parties before an adoptee can gain access to the records.[273] In some cases, there is a birthmother, birthfather, and legal father.[274] A legal father is involved when the birthmother was married to someone else at the time of the child's birth.[275] In this case, the law requires the adoptee to search (and pay the searching fee) for three people.[276] The adoptee can choose, however, to do one search at a time.[277] He or she may choose to search for the birthmother first.[278] If the birthmother is found and consents to a meeting, the birthmother may have information on the birthfather.[279] If so, the adoptee may be able to meet with the birthfather (if the birthfather is amenable) and not need to inspect the adoption records for information.[280] If the birthmother is deceased or cannot be located, however, the unfortunate consequence is that the adoptee must search for the birthfather (and subsequently the legal father if he exists) and allow another 180 days for search time.[281] If the birthfather is deceased, cannot be located, or gives consent, the adoptee may inspect the records.[282] If the birthfather wants confidentiality, the adoptee would then have access only to the information on the birthmother.[283]

For those adoptions occurring after December 31, 1990, family court sends letters to the birthparents at their last known addresses informing them of the requisite procedures to request confidentiality.[284] Family court has also instructed attorneys and placement agencies to advise the birthparents of these procedures before the child is placed for adoption.[285] Furthermore, all consents filed by birthparents on or after March 1, 1991 should include language confirming that the birthparents

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[273] *Id.* Note, however, that information cannot be given out on other adopted siblings. *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] Memorandum from Daniel G. Heely, Chairperson, Board of Senior Family Court Judges and Directors, to All Family Law Attorneys and Placement Agencies (December 18, 1990) (on file with author).

[285] *Id.*

have been advised of the requisite procedures.[286] If affidavits requesting confidentiality are not received within the ninety days preceding the adoptee's eighteenth birthday, the adoptee may access the records.[287]

Because the amended law affords reciprocal rights to the adoptee, a letter explaining the requisite procedures to request confidentiality should be given to the adoptee before the adoptee's eighteenth birthday.[288] At the adoption hearing, the judge instructs the petitioners to give a copy of the court's explanatory letter to the adoptee before the adoptee reaches eighteen.[289]

B. Initial Problems

Because of the different scenarios that may occur in a given case, family court personnel and searchers say it is difficult for adoptees to understand why the process takes so long and why they cannot give adoptees estimated timeframes.[290] Family court personnel and searchers cannot give estimated timeframes because of the many factors that come into play in any given case.[291] For example, timeframes depend on the quantity and kind of information in the records, the number of times a birthmother has remarried and changed names, the number of named parties in the file, the number of times the parties have relocated, how fast the found party responds to the notice, etc.[292]

When the new law took effect on January 1, 1991, there was an influx of applications.[293] Family court is still reeling from the backlog of this initial period.[294] Court personnel are not keeping detailed statistics so it is difficult to quantify the impact of the new law.[295] However, they estimate that before the law changed, they averaged less than twenty requests per month.[296] In the first month of the new

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[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] Telephone Interviews with Darlene Yamauchi and Susan Jong, *supra* note 252; Telephone Interview with Claudia Glienke, *supra* note 264.

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] Telephone Interview with Susan Jong, *supra* note 252.

law, they received about 121 requests.[297] The requests have tapered off now, but court personnel have not caught up with the initial backlog.[298] The first referrals were not sent to the searchers until seven months after the effective date of the law.[299] At this time, referrals to searchers are being sent out in batches approximately once every three to four months.[300]

C. *How the Searches Are Working Out*

According to one of the two designated family court searchers, about 500 cases have been assigned to the searchers as of July 1992.[301] About thirty-five percent of the applicants referred decide to go ahead with the search.[302] Some applicants are daunted by the fees.[303] Others want to wait a while but eventually do decide to search.[304] Their cases are left pending until they decide.[305] Some applicants decide they are satisfied with the nonidentifying information.[306]

Of the cases searched, an estimated eighty-seven percent are successfully completed.[307] In approximately five percent of the cases, the searches reveal the parties are deceased.[308] About thirteen percent are not located within the time limit, and about three percent are located but contact cannot be made.[309] The searcher may be unable to reach a person who does not have a phone or permanent address.[310] These persons are treated as if they were not located.[311] In some cases, the searcher's phone call is never returned.[312] In others, the party is incarcerated, and the searcher is unable to make personal contact.[313]

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[297] *Id.*
[298] *Id.*
[299] Telephone Interview with Claudia Glienke, *supra* note 264.
[300] Telephone Interview with Susan Jong, *supra* note 252.
[301] Telephone Interview with Claudia Glienke, *supra* note 264.
[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*

If a party is not located, the applicant who subsequently inspects the records will see the searcher's report contained therein.[314] The report details the sources checked and the information found, if any, by the searcher.[315]

Approximately ninety percent of the cases are searches for birthparents.[316] Very few found birthparents ask for confidentiality.[317] The searcher cannot accurately estimate the percentage of birthparents who want to remain confidential.[318] This is so because the searcher is not always told when the birthparent sends in a confidential affidavit.[319] Family court personnel say they do not have the staff to keep statistics on the different consequences that may result from a given application.[320] Claudia Glienke, the searcher interviewed by the author, thought that most of the birthparents who were adamant about confidentiality probably sent in their affidavits within the first couple months of the new law's existence.[321] In any event, Glienke estimates that less than five percent of birthparents immediately relay (over the telephone) a desire to remain confidential.[322] Moreover, in the majority of the cases, after the initial shock wears off, the birthparent changes his or her mind.[323]

Glienke reported that the most typical reaction of a phone call to a birthparent is great joy, crying, and "This is the call I've been waiting for."[324] Most people know exactly what Glienke is calling about as soon as she identifies herself as a search agent for the family court.[325] Adoptees or birthparents who ask for assistance are referred to adoption support groups and helpful literature to aid them in coping with their emotions and frustrations.[326]

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[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] *Id.*

[319] *Id.* Only in some cases will an adoptee call the searcher to let the searcher know what happened. *Id.*

[320] Telephone Interview with Darlene Yamauchi, *supra* note 252.

[321] Telephone Interview with Claudia Glienke, *supra* note 264.

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] *Id.* A note about birthfathers: Sometimes birthfathers did not even know they had a child. At other times, birthfathers have told the searcher that they had tried to get custody of the child but were unsuccessful. *Id.*

[326] *Id.*

D. Future Concerns

Adoption reform advocates say further changes are needed to improve the adoption system.[327] One area of their concern is the practice of amending birth certificates.[328] Should the government condone the altering of documents? Is the purpose of amending the birth certificate to protect the adoptee or to protect the birthparents and adoptive parents from having to explain the origins of the adoptee?

Furthermore, adoption reform advocates are concerned about lack of representation of the child in adoption proceedings.[329] This problem is especially significant in independent adoptions where one attorney represents both the birthparents and adoptive parents.[330]

VIII. Conclusions of the Author

This author supports open records. However, because promises of confidentiality have been made in the past, for adoptions that occurred before the law changed, the compromise solution of seeking consent of the sought-after party seems fair. The registry system is not as effective as the search and consent system because it is too passive. Of course, this compromise legislation will not satisfy all parties. However, the legislature properly realized that there are alternatives to the all-or-nothing approach. For adoptions occurring after the change in the law, it is not a burden to require birthparents who want to remain confidential to submit affidavits before the adoptee reaches eighteen.

Hawai'i did have an imbalance in favor of the confidentiality rights of the birthparent that required adjustment. Even though the use of the intermediary, the searcher, is an obstacle, the law is progressive because it allows actual inspection of records with the most personal of information, it applies retroactively, and it allows access even when the birthparent is not located. Nonidentifying information should always be readily available, and the changed law makes this possible. Both the adoptee and the birthparent should have the opportunity to initiate a reunion, and the new law takes care of that concern The law does not require the adoptee or birthparent to "jump through more hoops"

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[327] Interview with Laurel Johnston Mitchum, former president of Adoption Circle of Hawaii, in Honolulu, Haw. (Sept. 15, 1992).

[328] *Id.*

[329] *Id.*

[330] *Id.*

like forcing the parties to obtain counseling or to obtain adoptive parents' consent.

People have been trying for years to open adoption records in other states without success. I am amazed that Adoption Circle of Hawaii was able to get this legislation enacted upon their first try. Because of this legislation, the person who makes the final decision regarding the opening of sealed records is an involved party, not a disinterested judge, court official, or adoption agency. This legislation balances the desires of those who want to know with the rights of those who want to preserve confidentiality.

Regarding future concerns, I, too, question the importance of continuing the amended birth certificate tradition. By the time an adoptee understands the significance of a birth certificate, he or she will or should already know that he or she is adopted. Adoptees certainly know about ethnic or age disparities between their adoptive parents and themselves. The "falsification" of a birth certificate is a deception in the parent-child relationship. According to Hawai'i's rules, we must treat the birthparent as nonexistent or dead. Do we want a legal system that promotes fictional beliefs? On the other hand, the original birth certificate does contain the birthparents' names and addresses. Minors, in all likelihood, do not have the psychological or emotional maturity to start or maintain relationships with birthparents. Teenagers should be provided with all of the nonidentifying information on their birthparents. However, they should not be given identifying information until they reach adulthood.

One thing I definitely would like to see is a change in the law to allow the adoptee to search for an adult adopted sibling. This change is important because, in some cases, both birthparents may be deceased. The adoptee's only link to the birthfamily may be through an adopted sister or brother.

I agree with adoption reform advocates that the legislature should address concerns regarding the potential for black market abuses that go along with independent adoptions. Hawaii has not had a Joel Steinberg-type case yet.[331] We should not wait for this kind of tragedy to occur before taking action. In independent placements, a homestudy of the adoptive family is not required, and the family court judge does not have the data needed to make an informed decision on the placement of a child.

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[331] See *supra* note 42 for discussion of Joel Steinberg case.

I am also concerned with an attorney's dual representation of birthparents and adoptive parents in independent adoptions. Two separate attorneys should be employed. Or, at a minimum, a guardian *ad litem* should be appointed to represent the child in those cases.

In any event, although the means to achieving the end continue to be disputed, I am glad that society has opened its eyes to the fact that some changes to adoption records laws must be made to correct the damage that prolonged secrecy has inflicted.[332] Removing the restraints on potential reunions does not force a reunion against a person's will. "Society can open records, but it can't legislate whether a door gets slammed or a welcome mat goes out."[333]

Bobbi W. Y. Lum

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[332] One commentator has observed:

> Secrets are powerful agents, and we sense their mystery, attraction, and danger even from early childhood. As adults, we all know from experience that to keep a secret requires a healthy dose of will power; that keeping a secret can make us feel guilty, duplicitous, or unauthentic; and that, over a long period of time, it can have a powerful influence on character and personality.

GEDIMAN & BROWN, *supra* note 4, at 13.

[333] *Id.* at 251.

International Workshop

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PARTICIPANTS

Lewis N. Klar
University of Alberta

Robert B Leflar
University of Arkansas, Fayetteville

Sabrina S. McKenna
University of Hawaii at Manoa

Yasutomo Morigiwa
Nagoya University

Sir Geoffrey Palmer
Victoria University of Wellington/ University of Iowa

Gary T. Schwartz
University of California at Los Angeles

Stephen D. Sugarman
University of California at Berkeley, Boalt Hall

Yutaka Tejima
Hiroshima University

Yoshitomo Kojima
Sumitomo Life Insurance Co.

Tsuneo Matsumoto
Hitotsubashi University

Richard S. Miller
University of Hawaii at Manoa

Akio Morishima
Nagoya University

George L. Priest
Yale Law School

Itaru Shimazu
Asia University

Shigeaki Tanaka
Kyoto University

Margaret A. Vennell
University of Auckland