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A TRIBUTE TO ADDISON M. BOWMAN

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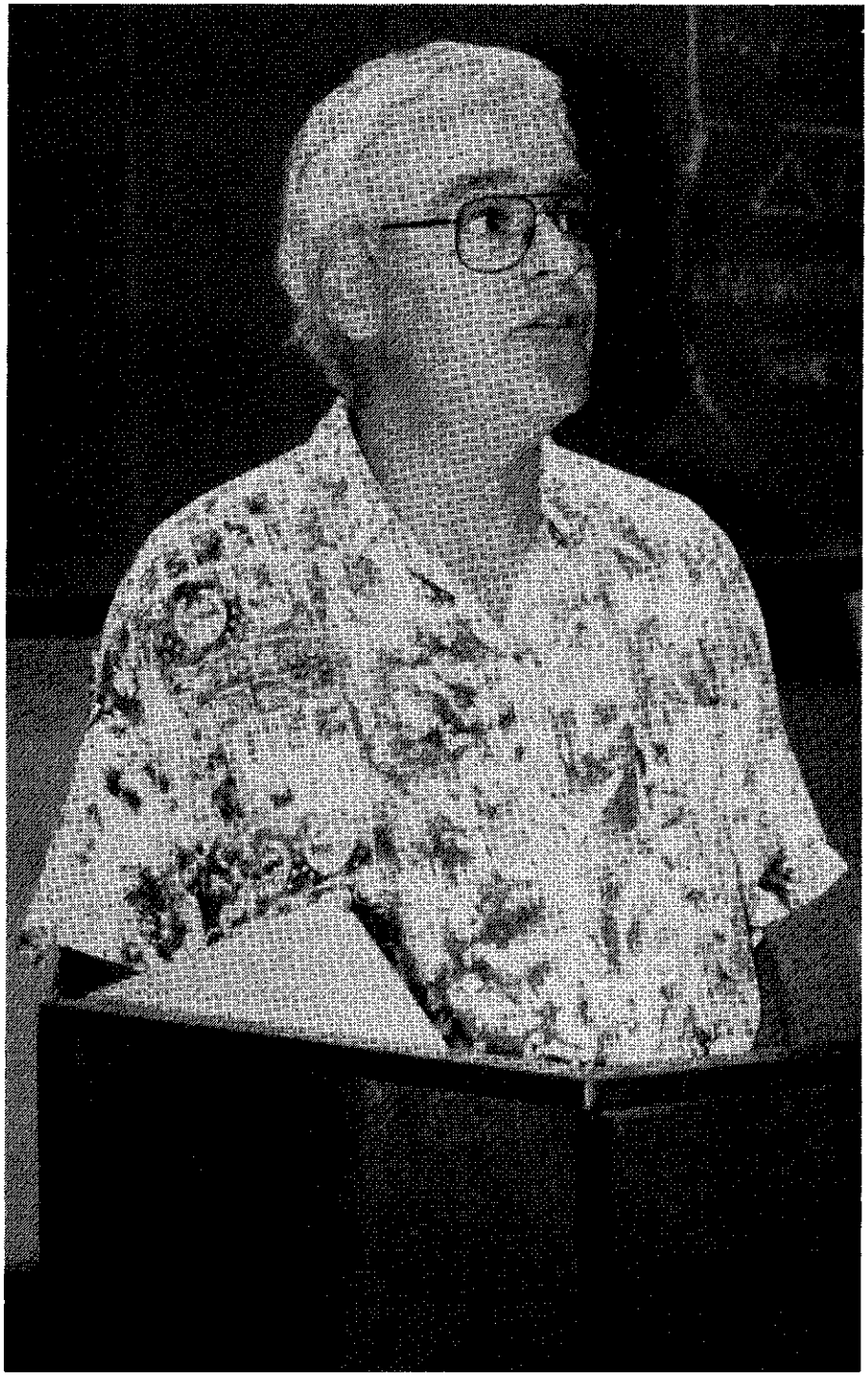
The University of Hawai'i Law Review expresses its appreciation to the administration and staff of the William S. Richardson School of Law. The Law Review would like to give special thanks to Yvonne Kobashigawa and Frieda Honda for their assistance and endless patience.

This Issue is a Tribute to
Addison M. Bowman
upon his retirement from the
William S. Richardson School of Law,
University of Hawai'i at Manoa



ADDISON M. BOWMAN

In Praise of Addison Bowman: The Ideal of Equality in the American Tradition in the Pacific

Williamson B.C. Chang*

With the retirement of Addison Bowman (in a *de jure*, not a *de facto* sense), Professor Jon Van Dyke and I are now the most senior colleagues on the faculty of the William S. Richardson School of Law. Thus, it is my pleasure to comment on the life and work of Professor Bowman, particularly with respect to his life and work in the Pacific.

There are two distinct traditions of American involvement in the Pacific. We are now well aware that America's expansion through Hawai'i to the Philippines and beyond was an orchestrated effort of "expansionists"—namely Theodore Roosevelt, Henry Cabot Lodge, and William Randolph Hearst. These expansionists brought to fruition America's present posture in the Pacific. Their influence at the turn of the century led directly to the annexation of Hawai'i and the possession of Guam and the Philippines. However the expansionists are to be judged, Professor Bowman came to the Pacific with different motives.

Professor Bowman epitomized the "other tradition" as to American involvement in the Pacific—the Jeffersonian tradition by which Americans sought not to interfere with the lives, culture, and sovereignty of others. Jefferson is, of course, only symbolic of this tradition—it was he who balked at the Louisiana Purchase, considering it contrary to the Constitution.

Addison Bowman was born and raised in Pennsylvania Dutch country. He was educated at Dartmouth and received his law degree from Dickinson University. His first exposure to the Pacific was as an officer

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on a Navy cruiser. He was the ship's navigator. Yet, in stories he tells of that experience he belies a distrust of the "fancy," the "modern."

It was always by the stars that Bowman would set his course and guide his behavior. He was wary of the legal realists who, like Oliver Wendell Holmes, sarcastically spoke of law as a "brooding omnipresence." To Addison Bowman, uncertainty about a proper course of action could always be resolved if one navigated one's life by returning to fundamental principles—by looking to the stars. He would thus guide his cruiser and his own life by adherence to a fundamental understanding that righteousness was not a matter of relativity. The heavens were unchanging. So were fundamental values from the eyes of a Pennsylvanian from Lancaster County.

One of those values was humility. This was not to be confused with the deliberate underestimation of one's own duties and importance in a civil society. Rather, humility was that attribute which might be seen as directly the opposite of what drove the expansionists, namely hubris and the superiority of everything American.

An outstanding feature of Professor Bowman's tenure at Hawai'i was that he made no reference, no name dropping or story telling, that suggested the prominence of his prior life in Washington. Bowman invited his colleague and friend Philip Elman to the law school to teach as a visting professor. It would only be through Elman that many in Hawai'i would learn of the esteem Bowman achieved as a young man. In Washington, I was later to learn, Addison Bowman was a name known in every law firm and in every judge's chambers. He was a criminal defense lawyer, and reputedly the best in the nation's capital.

His zeal in representing his clients was the source of legends. He worked tirelessly and endlessly to secure justice. He tested his skills in the most difficult of arenas—death penalty cases. Indeed, as the story is told, after one eloquent and polished closing argument he returned to the defense table where his client, facing the death penalty, said in dead-pan fashion, "Mr. Bowman, that was the finest argument I have ever heard. Whether we win or lose, I really hope that at least you are happy." In short, Professor Bowman's passion was evident in every undertaking. There was a right way for doing everything.

This zeal for excellence was never to be confused with arrogance. He expected the most from his students. In one course on legal method, I asked students to keep a journal of daily life at the law school. I found one student's estimation of Bowman to be particlarly revealing: "Oh no. Didn't do the reading for Bowman's class. . . must go anyway. I live in fear of him calling on me. Addie has such a fine

mind—his way of seeing things is so unique and perceptive. No matter the personal risk, I must take the chance. I hope he doesn't call on me."

Addison Bowman understood and appreciated excellence. His zeal for excellence would be a force guiding the law school in its development. He quickly became the conscience of the law school. His tenure as chairman of the personnel committee brought some some of the finest young minds to Hawai'i. He was a tenured professor at Georgetown prior to coming to Hawai'i. He was much more than a professor; he was an institution. He and others were the first to develop the "clinic" model of legal education, now pervasive in all law schools.

In Washington, Addison Bowman is a renowned figure. He and Samuel Dash, both on the Georgetown faculty at the time, had been considered for the position of special prosecutor to Watergate. His social circle was the elite of the Washington Bar. He was famous as a shrewd poker player, not a small feat when the table was surrounded by Supreme Court law clerks. His friends were among the leading liberals of the Democratic Party. When I served as counsel to a committee for the U.S. Senate, I was constantly asked, "Whatever happened to Addison Bowman?"

Addison Bowman's personal and professional life epitomize the Jeffersonian view as to how America ought to relate to the world: as friend, not as colonial master. He approached others with a view that all people, no matter their appearance, no matter what they owned, possessed a universal dignity and worth equal to his own. This was never more clear than in his work in Micronesia. Professor Bowman on his own created a program through which the faculty of the law school would lend assistance to the development of Micronesian jurisprudence.

Bowman's focus on Micronesia speaks volumes. During this period, all eyes at the university were focused on the potential of institutional relationships with China and Japan. Such ties would certainly have provided more prominent and profitable benefits to the university. Yet Bowman saw that it was the former Trust Territories, now atempting to erect their own judicial systems, that needed assistance most.

Micronesian duty was only for adventurers. Bowman's judicial seminars in Micronesia were for those of like sentiment: born of a desire to assist others rather than to bask in the academic spotlight. Duty in Pohnpei or Truk was not for those academics who sought to present papers in the halls of German or Continental universities. The judges we taught in Micronesia possessed no more than an elementary school

education. Thus, there was no airing of post-modernism or use of terms such as "hermeneutics." Instead, we taught the basics of legal education—basics taught to all first year law students.

The most admirable of Bowman's qualities is reflected in how he approached Micronesia. Despite the vast differences between the complexities of American law and the simple judicial process that was emerging there, Bowman viewed both America and Micronesia as equally complex, as equally deserving of detailed attention. His article on the jurisdiction of the Supreme Court of Micronesia was and still is the seminal piece. One might assume that such a simple judicial system could be described in swift fashion, but Bowman's meticulous attention to detail had all the analytical craftmanship of a Henry Hart or Brainard or David Currie.

Addison Bowman lived his personal life in the same fashion. Bowman's sense of the equal dignity of all people was a pervasive element of how he perceived the world. He presumed that all people were fully good and worthy. He was not naive, however, and did recognize that others could forfeit the presumption of goodness and competence. One lost such respect only by overt conduct. He found goodness in those who opposed him. He could not trifle with hidden self-serving agendas. He always understood the position of those who were born into conditions of powerlessness. He never sided with the bully. He lived as if society was best ruled by a republican virtue that one had a right to be left alone.

Thus, Bowman exemplifies the new American in the Pacific. He left behind the inclination to "manifest destiny" and came to feast in the wonderful adventures and diversity provided by Hawai'i and the Pacific. In Hawai'i he established a record second to none in contributing to the development of the law. He authored the penal code. He will be the father of reforms to the code of professional responsibility. Only one other legal scholar has had so much influence on the current development of law in Hawai'i— Stefan Riesenfeld. Riesenfeld drafted the social legislation that was the essence of the post-statehood platforms of the Democratic Party. Like Bowman, he never sought public recognition for his essential work.

Thus, in this time of rising Hawaiian claims of sovereignty, it is clear that such a movement should not be defined by ethnicity or race. The claims of Hawaiians are against the American government, not the American people. Surely, many Americans, including other lawyers who rose to power have chosen to use Hawai'i for their own personal profit. Yet, their behavior cannot be generalized. Addison Bowman is

an American. But there is also part of the American soul which is Hawaiian at heart. Addison Bowman claims no further ambition than to live out his life with Jo Kim and his three sons deep in "Hawaiian Country." His new home is on the Big Island of Hawai'i, the gathering place of the sovereignty movement.

Addison Bowman's life has been guided by the stars. His life has affirmed a morality that stems from universal citizenship. He has never been troubled by moral relativism or the confusion arising from different schools of legal interpretation. As true of the best in the American tradition, he has stayed the course navigated by his internal compass. He has contributed greatly, and will continue to contribute, through the students who benefited from his teaching, through the developments of the Micronesian legal system, through his wisdom in the codification and development of law, and not in the least in the heritage that will be that of his sons. As a junior colleague, I too, have benefited as "hanaied" or adopted, by Professor Bowman and his legacy.

A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process

E. Gary Spitko*

I try to tighten my heart into a knot, a snarl, I try to learn to live dead, just numb, but then I see someone I want, and it's like a nail, like a hot spike right through my chest, and I know I'm losing.[1]

I. Introduction and Overview

In *Ben-Shalom v. Marsh*,[2] the U.S. Court of Appeals for the Seventh Circuit reasoned that sexual orientation is a conduct-based classification, and, indeed, relates to conduct that the state may criminalize.[3] For this reason, the court concluded, such a classification is not subject to heightened scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause.[4]

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* Associate, Paul, Hastings, Janofsky & Walker, Atlanta, Georgia; A.B., 1987, Cornell University; J.D., 1991, Duke University School of Law. I am grateful to Owen D. Jones for suggesting to me that I write about the implications of science for the law relating to sexual orientation. Also, I am thankful for the helpful comments of Paul T. Cappuccio, Christopher A. Crain, Ronald J. Krotoszynski, Jr., Stephen A. Miller and Charles A. Shanor on an earlier draft of this article. Finally, I conducted much of the research for this article while I was an associate at Covington & Burling in Washington, D.C. and am deeply indebted to that firm and especially to Carolyn F. Corwin for her assistance and support.

[1] Tony Kushner, Angels in America: Millennium Approaches, Act II, Scene 9 (1992) ("Joseph Pitt" to his wife "Harper").

[2] 881 F.2d 454 (7th Cir. 1989).

[3] *Id.* at 464-65.

[4] *Id.* The Equal Protection Clause of the Fourteenth Amendment is applicable to the federal government as part of the Fifth Amendment's Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

Conversely, the district court in *Equality Foundation of Greater Cincinnati v. Cincinnati*,[5] rejected the notion "that homosexuality is a status defined by conduct" and held that sexual orientation is a quasi-suspect classification.[6] These cases are two of many in which a court's notion as to the nature and origin of homosexuality influenced the way the court applied the law to gay people.[7]

This phenomenon echoes that which exists more generally in contemporary American society. It is often the case that a person's beliefs as to the nature and origin of homosexuality are a great influence on her position with respect to how she and society should interact with gay people.[8]

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[5] 860 F. Supp. 417 (W.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995).

[6] *Id.* at 436, 439-40. *See also* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("It is an error of massive proportions to define the entire class of homosexuals by sodomy. . . . [H]omosexuality, like heterosexuality, is a status. . . . [O]ne is a homosexual or a heterosexual while playing bridge just as much as while engaging in sexual activity.").

[7] *See* J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 869-72 (Mo. Ct. App. 1982) (upholding restrictions on a gay father's visitations with his son based, *inter alia*, on the court's conclusion that the father's activities evidenced his desire to induce his son to become gay); Jacobson v. Jacobson, 314 N.W.2d 78, 81-82 (N.D. 1981) (reversing an award of custody to a lesbian mother on the grounds, *inter alia*, that her children might be more likely to become gay or lesbian if left in her custody); Gaylord v. Tacoma Sch. Dist., 559 P.2d 1340, 1347 (Wash. 1977) (upholding the dismissal of a gay school teacher emphasizing the danger that the presence of an openly gay teacher might encourage imitation), *cert. denied*, 434 U.S. 879 (1977). *See also* Baehr v. Lewin, 74 Haw. 530, 584-87, 852 P.2d 44, 66-70 (1993) (Burns, J., concurring) (reasoning that whether sexual orientation is "biologically fated" is crucial to a determination of whether the Hawaii constitution should be read to proscribe the state from permitting opposite-sex marriages while not permitting same-sex marriages).

[8] *See, e.g.*, Neil L. Glazer, *Straight Talk About Homosexuality*, HARV. L. REC., March 5, 1993, at 15 ("[T]he very idea of equating homosexual 'rights' with those of African-Americans or women is absurd; for unlike the former, being black or a woman relates to personhood, and is non-behavioral in origin. I simply cannot accept the argument that homosexuality is an innate and unalterable characteristic, since I have seen too many testimonials from former homosexuals who have been 'cured,' either by psychological or spiritual healing."); Kim Painter, *Studying the Nature of Being Gay*, USA TODAY, March 8, 1993, at 1D (Dr. Simon LeVay, a neurobiologist whose research concerns the structure, function and development of the brain, positing that "[t]here are a lot of people who've been taught that homosexuality is wrong, but [who] can be persuaded (otherwise) by science"); Nancy E. Roman, *Civil Rights for Homosexuals Surfaces as Issue of the 90s*, WASH. TIMES, January 4, 1993, at A1 (legal scholar Bruce Fein stating that if it could be demonstrated that sexual orientation was determined

Some believe that homosexuality is defined by physical sexual activity and, thus, does not exist apart from such activity. For those who hold this belief there is no homosexual "orientation" only homosexual acts. Andrew Sullivan has labeled one political manifestation of this notion the "conservative politics of sexuality" the "fundamental assertion of which is that . . . [h]omosexual behavior is aberrant activity, either on the part of heterosexuals intent on subverting traditional society or by people who are prey to psychological, emotional or sexual dysfunction."[9] "The politics that springs out of this view of homosexuality has two essential parts: with the depraved, it must punish: with the sick, it must cure."[10]

Antithetical to this "conservative politics of sexuality" is the idea that homosexuality is an enduring predisposition toward an erotic, affectional, and romantic attraction to individuals of one's own sex that exists independent of any physical sexual act.[11] Sullivan argues

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at birth, the law would be more sympathetic to gay people). *See also* Joseph P. Shapiro with Gareth G. Cook & Andrew Krackov, *Straight Talk About Gays*, U.S. NEWS & WORLD REP., July 5, 1993, at 42, 48 (citing to a poll demonstrating positive correlations between the belief that gay people "choose to be gay" and opposition to gay civil rights, and, conversely, between the belief that homosexuality is innate and support for civil-rights laws for gay people).

But see, e.g., Painter, *supra*, at 1D (April Martin, a lesbian psychotherapist, commenting that "[t]he question of whether homosexuals should have full legal rights and civil rights and social acceptance (has) nothing whatsoever to do with whether we can or can't help or change our inclination. . . . It has to do with the fact that it is morally wrong to oppress people based on characteristics or behavior which cause no harm to anything except the established social hierarchy.").

[9] Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24. The American Psychiatric Association declared in 1973 that homosexuality is not a form of mental illness and that "homosexuality per se implies no impairment in judgment, stability, reliability or general social or vocational capabilities." Resolution of the American Psychiatric Association, December 15, 1973. The American Psychological Association soon followed in 1975 with a similar resolution. American Psychological Association, *Minutes of the Council of Representatives*, 30 AM. PSYCHOLOGIST 633 (1975).

[10] Sullivan, *supra* note 9, at 25. Similarly, Janet Halley has described this position as "anti-gay constructivism" which "emphasizes the mutability of heterosexual orientation, arguing that heterosexuality must be shored up by anti-gay discrimination, or [which] points to the mutability of homosexual orientation, arguing that discrimination should be designed to convert gay men and lesbians to heterosexuality." Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 517 (1994).

[11] *See* Gregory M. Herek, *Sexual Orientation, in* 1 WOMEN'S STUDIES ENCYCLOPEDIA

that "as long as . . . part of the population is involuntarily gay, then the entire conservative politics of homosexuality rests on an unstable footing. It becomes simply a politics of denial or repression . . . [which] offends against fundamental notions of decency and civility . . . [and is] not simply cruel but politically impossible in a civil order."[12]

In recent years scientists—sociologists, psychologists, physiologists and geneticists—have begun to inform this debate.[13] They have produced the first evidence that the brains of gay men are physiologically different than those of non-gay men and the first direct evidence that homosexuality is genetically influenced.

This article surveys these recent discoveries and discusses their importance for the development of the law related to sexual orientation in two areas of federal constitutional law. Specifically, this article posits that these findings speak to the reality of an irreducible essentialist[14] definition of what it means to be gay, the sole essential element of which is a predominant same-sex erotic, affectional, and romantic attraction, thereby dispelling the notion that a gay sexual orientation does not exist apart from gay sexual conduct and, thus, refuting the most frequently cited rationale for denying heightened scrutiny under the Equal Protection Clause to classifications on the basis of sexual orientation. Moreover, these findings speak also to the involuntary nature of a gay sexual orientation and, thus, lend support to an

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344-46 (H. Tierney ed., 1989) (defining sexual orientation); Equality Found. of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (citing psychologist Dr. John Gonsiorek's testimony that sexual orientation is "a predisposition toward erotic, sexual, affiliation, or affection relationships toward one's own and/or the other gender."), *rev'd*, 54 F.3d 261 (6th Cir. 1995); Richard C. Friedman & Jennifer I. Downey, *Homosexuality*, N. ENGL. J. MED. 331:923 (1994) (defining sexual orientation as "a person's potential to respond with sexual excitement to persons of the same sex, the opposite sex, or both").

[12] Sullivan, *supra* note 9, at 25-26. *See also* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("Equal Protection of the laws . . . must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

[13] *See generally* Chandler Burr, *Homosexuality and Biology*, THE ATLANTIC, March 1993, at 47 (reviewing biological research into the nature of homosexuality).

[14] *See* Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1836 (1993) ("Essentialists in general define gay people as those who experience same-sex desire, believe that there have always been gay people everywhere, and hold that it makes sense to speak of people who experience same-sex desire as a single group regardless of where and when they lived.").

argument that the Due Process Clauses of the Fifth and Fourteenth Amendments, as interpreted by the Supreme Court, should protect a fundamental right to engage in homosexual erotic activity other than sodomy.[15]

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[15] While the discussion in this article is limited to the implications of the scientific findings discussed *infra* to federal constitutional law, these findings, and much of discussion in this article, have relevance also to equal protection and privacy analysis under many state constitutions. For example, in Kentucky v. Wasson, 842 S.W.2d 487 (Ky. 1992), the Supreme Court of Kentucky cited to expert medical and social science testimony that sexual orientation is deeply rooted and not freely chosen in holding that the state's restriction on same-sex sodomy violated the guarantee of equal protection provided for in the Kentucky constitution. *Id.* at 489, 500.

Moreover, such findings, to the extent they support the view that sexual orientation is innate and/or immutable, undermine the stated premise of those who seek to use the law to discourage, prevent and protect people from becoming gay. *See, e.g.*, Evans v. Romer, 882 P.2d 1335, 1347 (Colo. 1994) (noting the State of Colorado's argument that "laws prohibiting discrimination against gay men, lesbians, and bisexuals will undermine marriages and heterosexual families because married heterosexuals will 'choose' to 'become homosexual' if discrimination against homosexuals is prohibited."); Opinion of the Justices, 530 A.2d 21, 25 (N.H. 1987) (New Hampshire law forbidding "homosexuals"—defined as persons who engage in certain sex acts—from adopting children is rationally related to the interest in providing appropriate role models to children in light of "the reasonable possibility of environmental influences" affecting a child's future sexual orientation). *See also supra* note 7.

A misguided foray in the law into this area of science is seen in Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993). In *Baehr*, the Supreme Court of Hawaii held that sex is a "suspect category" under the Hawaii constitution for purposes of equal protection analysis and, thus, a statute that allowed opposite-sex marriages but not same-sex marriages would be unconstitutional unless the state could demonstrate that the statute is narrowly drawn to further a compelling interest. *Id.* at 579-80, 852 P.2d at 66. The supreme court remanded the case for a trial, presently scheduled for September 1996, on whether the statute could survive such heightened scrutiny. *See id.* at 583, 852 P.2d at 68. In a concurring opinion that was necessary for the decision, a judge sitting by designation concluded that the issue of whether sexual orientation is innate is a question of fact that must be determined before the court can adjudicate the statute's constitutionality. *Id.* at 584, 852 P.2d at 68 (Burns, J., concurring). The concurring judge reasoned that if sexual orientation is innate, then a person's sex would include his sexual orientation and the Hawaii constitution's proscription of invidious sex discrimination would also proscribe invidious discrimination on the basis of sexual orientation. *Id.* at 584-87, 852 P.2d at 68-70 (Burns, J., concurring). The concurring opinion failed to explain, however, how other innate traits, such as eye color, can be distinguished meaningfully from sexual orientation for the purpose of determining which innate traits should be included in a person's sex. Moreover, as the plurality in *Baehr* correctly pointed out, if, as the findings discussed *infra* suggest, sexual orientation relates merely to erotic, affectional and romantic desire, then a

A familiarity with these recent scientific findings is prerequisite to fully understanding the constitutional arguments set forth in this article. Part II, below, therefore, sets forth a layman's description of the relevant recent findings in neurophysiology, genealogy and genetics, that give new insight into the nature and origins of homosexuality.

II. The Origins and Nature of Homosexuality

A. Hypothalamic Dimorphism

Simon LeVay, a neurobiologist who studies the structure, function and development of the brain, has in recent years turned his attention to studying the physiological basis of sexual orientation.[16] LeVay has focused his attention particularly on the hypothalamus. The hypothalamus is a group of brain nuclei,[17] about a teaspoonful of tissue, that plays a key role in sex.[18] Each nucleus in the hypothalamus can be identified by its distinct size, shape, position, chemical constituents, and pattern of synaptic connections with other nuclei.[19]

LeVay theorizes that "male-typical" and "female-typical" sexual feelings and behavior originate in separate centers in the hypothalamus.[20] Ablation studies, in which small regions of the brain are deliberately destroyed,[21] and stimulation experiments, in which an electrical stimulus is applied to a part of the brain, support his theory.[22] In many animal species, the male will mount females less readily, or not at all, after the medial preoptic area (which contains several nuclei)

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statute that does not allow same-sex marriage discriminates on the basis of sex but not on the basis of sexual orientation. *See id.* at 543 n.11, 852 P.2d at 52 n.11 ("Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.").

[16] *See* Simon LeVay, The Sexual Brain (1994) (discussing generally the brain mechanisms that are believed to be responsible for sexual behavior).

[17] *Id.* at 37. A brain nucleus is a large clusters of neurons. This type of nucleus is distinct from and not to be confused with the nucleus of a cell. *Id.*

[18] *Id.* at 39. Men who have had hypothalamic nuclei destroyed frequently report a reduction in sexual desires and behavior. *Id.* at 80.

[19] *Id.* at 44-45.

[20] *Id.* at 71.

[21] *See* J.C. Slimp et al., *Heterosexual, Autosexual and Social Behavior of Adult Male Rhesus Monkeys With Medial Preoptic-Anterior Hypothalamic Lesions*, Brain Research 142:105-22 (1978).

[22] *See* LeVay, *supra* note 16, at 72.

of the hypothalamus is destroyed.[23] Male rats and ferrets even show increased female typical behavior, such as lordosis,[24] after suffering lesions in the medial preoptic area.[25] Conversely, electrical stimulation of the medial preoptic area increases male copulatory behavior in these animals.[26] Also, experiments recording the natural electrical activity of individual neurons in the hypothalamus of male monkeys have demonstrated that many neurons in the medial preoptic area increase electrical activity during sexual arousal.[27] From these observations, LeVay concludes that the medial preoptic area plays a key role in male-typical sexual behavior.[28]

Further support for LeVay's theory comes from the fact that the medial preoptic region, in rodents as well as in humans, is sexually dimorphic in that at least one nucleus in the region is larger, on average, in males than in females.[29] In humans, this nucleus is called the INAH-3 (short for third interstitial nuclei of the anterior hypothalamus) and is two to three times larger in males than in females.[30]

Most significantly, LeVay has found that the INAH-3 in the brains of gay men is, on average, the same size as in women and two to three times smaller than in non-gay men.[31] From this, LeVay concludes that gay men differ from non-gay men "in the central neuronal mechanisms that regulate [male] sexual behavior."[32]

This same pattern of sexual and orientational dimorphism is seen with respect to the anterior commissure, which is an axonal connection between the left and right hemispheres of the cerebral cortex. The anterior commissure is larger, on average, in women than in men.[33]

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[23] *Id.* at 72.

[24] *Id.* at 47-48. Lordosis, a term most frequently applied to rodent behavior, is the flexing of the back in a "U" shape so as to expose the genital area for intromission by a male.

[25] *Id.* at 72.

[26] *Id.*

[27] *Id.* at 73.

[28] *Id.*

[29] *See* L.S. Allen et al., *Two Sexually Dimorphic Cell Groups In the Human Brain*, J. NEUROSCIENCE 9:497-506 (1989); LEVAY, *supra* note 16, at 75. Scientists also have found that the shape and position of synapses and the distribution of several neurotransmitters in the medial preoptic area of rats are sexually dimorphic. *Id.* at 77.

[30] LEVAY, *supra* note 16, at 76, 120-21.

[31] Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, SCIENCE 253:1034 (1991); LEVAY, *supra* note 16, at 120-22.

[32] *See* LeVay, *supra* note 16, at 121.

[33] *Id.* at 123.

Recently, researchers have determined that the anterior commissure of gay men, on average, is also larger than in non-gay men and is even larger than in women.[34]

These neuroanatomical studies do not prove that sexual orientation is caused by the physiological dimorphism they uncovered. It may be, for example, that the difference in the size of the INAH-3 does not cause homosexuality, but rather, gay sex causes the INAH-3 to shrink.[35] LeVay points to the difference in the sizes of the anterior commissures of gay men and non-gay men, however, and argues that since this region of the brain is not known to have any function related to the regulation of sexual behavior, it is unlikely that disparate sexual behavior among gay men and non-gay men is responsible for the difference in size.[36] More likely, LeVay argues, the differentiation comes about during the prenatal differentiation of the brain, possibly because of the influence of hormone levels.[37]

Unfortunately, the INAH-3 is too small to image in living subjects with available equipment and techniques.[38] Thus, LeVay's studies were performed using brains from cadavers. The anterior commissure, however, is large enough to be seen, although not clearly, in contemporary magnetic resonance images ("MRI scans").[39] With modest improvements in technique, scientists should be able to measure accurately this region of the brain in living subjects.[40] Thus, it soon should be possible to study subjects longitudinally beginning in preadolescence (before sexual behavior) to determine if differentiation precedes sexual behavior. A finding that orientational dimorphism precedes sexual behavior

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[34] L.S. Allen & R.A. Gorski, *Sexual Orientation and the Size of the Anterior Commissure in the Human Brain*, PROC. NAT'L ACAD. SCI., 89:7199 (1992); LEVAY, *supra* note 16, at 123. As a percentage of total brain size, the anterior commissure of gay men is about equal the size of the anterior commissure of women. *Id.*

[35] DEAN HAMER & PETER COPELAND, THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR 163 (1994). *See also* LEVAY, *supra* note 16, at 122 (one cannot conclude from LeVay's observations whether the structural differences are innate and cause men to become gay or whether the sexual behavior of gay men leads to the structural differences).

[36] LEVAY, *supra* note 16, at 123. *See also* J. Hall & D. Kimura, *Dermatolyglyphic Assymetry & Sexual Orientation in Men*, BEHAVIORAL NEUROSCIENCE 108:1203 (1994) (gay men are more likely than non-gay men to have a greater number of ridges on the fingerprints of their left hand than on the fingerprints of their right hand).

[37] LEVAY, *supra* note 16, at 123.

[38] *Id.* at 122.

[39] *Id.* at 124.

[40] *Id.*

would provide compelling evidence that sexual orientation is not a chosen or freely mutable trait.

B. A Genetic Link to Male Homosexuality

Dean Hamer, chief of the Section on Gene Structure and Regulation at the National Cancer Institute, already has provided compelling evidence on this point. Hamer has demonstrated a link between male homosexuality and "DNA markers" on the X chromosome.[41] Thus, he has provided the most convincing evidence to date that sexual orientation is genetically influenced.[42]

Hamer began his work in this area by trying to determine whether homosexuality runs in families. To do so, he charted the pedigrees or

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[41] *See* D.H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, SCIENCE 261: 321-27 (1993). Hamer describes his study in detail, including why and how he performed the study, in HAMER & COPELAND, *supra* note 35.

[42] HAMER & COPELAND, *supra* note 35, at 20. There are numerous hypotheses for how a gene for male homosexuality, which would seem to be disadvantageous for reproduction, could survive in the gene pool. Hamer theorizes that the gene could increase the reproductive rates of women who carry it, *id.* at 183, or, even if it has no selective advantage, could stay in the gene pool as a result of a high rate of mutation. *Id.* at 185.

Earlier evidence that heredity is at least partly causally related to male homosexuality comes from twin studies. Because identical (monozygotic) twins share 100 percent of their genes, while fraternal (dizygotic) twins share only 50 percent of their genes, a trait that is genetically influenced should be shared more often by identical twins than by fraternal twins. *Id.* at 28. Twin studies indicate that 50%-65% of the monozygotic twins of gay men are themselves gay, while only 25%-30% of the dizygotic twins of gay men are gay. *See* J.M. Bailey & R.C. Pillard, *A Genetic Study of Male Sexual Orientation*, ARCHIVES GEN. PSYCHIATRY 40:1089, 1093 (1991); F. L. Whitam, M. Diamond, J. Martin, *Homosexual Orientation in Twins: A Report of 61 Pairs and Three Triplet Sets*, ARCHIVES SEX. BEHAV. 22:187 (1993). *See also* LEVAY, *supra* note 16, at 112; HAMER & COPELAND, *supra* note 35, at 28.

That environmental factors also influence sexual orientation (as is evidenced from the fact that some identical twins are discordant for sexual orientation) does not necessarily mean that family upbringing has any influence on sexual orientation. As Hamer explains: "[U]ndergoing prenatal development in a womb swimming with male hormones is as much an environmental factor as growing up in a devoutly religious household." *Id.* at 82. *See also* LEVAY, *supra* note 16, at 113 ("[N]ongenetic factors can operate before birth as well as after birth . . . . Even identical twins do not share an identical prenatal environment: the blood supply of one twin may be better than the other's, for example, and this in turn may lead to a difference in the twin's birth weights.").

lineages of a random sample of gay males,[43] noting the presence of gay male relatives (uncles, brothers, cousins, etc.).[44] Hamer interviewed both the gay men who volunteered to be in his study and, whenever possible, their family members.[45] He did not rely on the self-identification (as gay or non-gay) of the men in his study. Rather, Hamer's assessment of the subjects' sexuality was based on a one- to two-hour structured interview covering the etiology of the subjects' sexual, emotional and romantic attractions, fantasies and activities.[46] In total, Hamer collected the histories of seventy-six families by interviewing more than a thousand relatives of seventy-six gay subjects.[47]

Hamer hoped to find significantly elevated rates of homosexuality in the relatives of his gay male subjects as compared to a "background rate of male homosexuality" computed from a survey of the families of lesbians conducted by a colleague at the National Institutes of Health.[48] Hamer did find this,[49] but he also made an unexpected and more telling discovery.

Upon looking at "family trees" resulting from his interviews, Hamer noticed that gay males had far more gay male relatives on their mother's side of the family than on their father's side of the family.[50] Further, Hamer found that the male maternal cousins through aunts of gay

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[43] HAMER & COPELAND, *supra* note 35, at 47-48, 78. The sample was "random" with respect to whether the gay males had gay relatives. *Id.* at 47. The sample of gay men was assembled from patients at the HIV Clinic of the National Institute of Allergy and Infectious Disease, visitors to the Whitman-Walker Clinic in Washington D.C., clients of the Triangle Club, an organization that offers addiction counseling for gay men and lesbians, and members of "Emergence," an organization formed by gay and lesbian Christian Scientists. *Id.* at 48.

[44] *Id.* at 20.

[45] *Id.* at 85.

[46] *Id.* at 54-55. Hamer found that almost all of the men that he interviewed could be classified as "definitely gay" or "definitely straight." Only three percent of the men interviewed scored in the "bisexual" range on two or more of the four "Kinsey" scales used (self-identification, fantasy, attraction, and behavior). *Id.* at 66-67. Hamer also found that the "sexual direction" of the gay participants was evident long before puberty evidencing "that sexual orientation is a deeply ingrained component of a person's psychological makeup, which . . . is consistent with a genetic predisposition." *Id.* at 73. Moreover, Hamer found that most of the men he interviewed had always had the same sexual orientation and expected that it would never change. *Id.* at 65.

[47] *Id.* at 89, 91.

[48] *Id.* at 98-100. Hamer assumed that male and female homosexuality are largely etiologically independent of each other.

[49] *Id.* at 101-02.

[50] *Id.* at 20, 93.

men were more likely to be gay than were the male maternal cousins through uncles of gay men or than were paternal cousins (through either paternal aunts or paternal uncles).[51]

This "sex-linked" pattern suggested to Hamer that a gene on the X chromosome influences male homosexuality.[52] Fathers always transmit only their single Y chromosome to their sons (and only their single X chromosome to their daughters) and mothers always transmit one of their two X chromosomes to their sons (as well as to their daughters),[53] thus, X-linked traits inherited by males always are passed to those males through the mother's side of the family.[54] Thus, a "gay gene" on the X chromosome would result in more gay men on the mother's side of the family of a gay man.[55] Also, a "gay gene" on the X chromosome would result in more gay male cousins through maternal aunts than through maternal uncles because there is no father to son (uncle to male cousin) transmission of the X chromosome; thus, even maternal uncles with the "gay gene" could not pass it on to their sons.[56]

Although Hamer's family trees hinted at a "gay gene" on the X chromosome, family environmental influences, in theory, also could have caused the patterns he saw.[57] To prove that genes do play a role in homosexuality, Hamer next looked directly at the DNA of gay men. To maximize the possibility that he would uncover a "gay gene," Hamer utilized "genetic loading"—the notion that the best place to search for a gene influencing a certain trait is in persons from families in which the trait is clustered.[58] Thus, Hamer used forty pairs of gay

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[51] *Id.* at 95-96.

[52] *Id.* at 20.

[53] *Id.* at 79.

[54] *Id.* at 95. Two well-known examples of recessive X-linked inheritance are color-blindness and hemophilia. *Id.*

[55] *See id.* at 95.

[56] *Id.* at 96. Of the eight types of males relatives Hamer considered (fathers, brothers, maternal uncles, paternal uncles, maternal cousins through an aunt, maternal cousins through an uncle, paternal cousins through an aunt, and paternal cousins through an uncle), only brothers, maternal uncles, and maternal cousins through an aunt had significantly elevated rates of homosexuality. *Id.* at 102. This suggests X chromosome linkage as the mode of inheritance. *Id.* at 104. An X linked gay gene would account for gay men having non-gay sons in the same proportion as non-gay men. A father would never pass the "gay gene" to his son. Rather, a son's sexual orientation would be determined by the X chromosome inherited from his mother.

[57] *Id.* at 106.

[58] *Id.* at 107.

brothers in this phase of his search for the "gay gene."[59] "[G]ay brothers served as signposts that their families were likely to have the gene for homosexuality, if such a gene existed."[60]

The method Hamer used to locate the "gay gene" is called "linkage analysis."[61] Linkage analysis works because genes found close to one another on a chromosome are usually inherited together (because strands of DNA only rarely break in two and so genes close to each other on a certain piece of DNA are likely to travel together into the germ cells that make up a human zygote).[62] Thus, persons who share a gene are likely also to share a piece of DNA that is close to that gene.[63] This principle enabled Hamer to go fishing for the location of the "gay gene" using numerous "DNA markers" the locations of which on the X chromosome have become known through the "Human Genome Project."[64] To be clear, a successful marker does not cause the trait in question, it merely is inherited along with the gene for the trait.[65]

It is important that the DNA markers Hamer used to go fishing for the "gay gene" all came in two versions, called "alleles."[66] If both brothers have inherited the same allele of the marker, they are concordant for the marker. If the brothers have inherited different alleles of the marker, they are discordant.[67] Hamer theorized that if a "gay gene" exists, there would be markers close to it for which more than half of the pairs of gay brothers were concordant (chance alone would result in half of the pairs of gay brothers being concordant for any DNA marker not linked to homosexuality).[68]

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[59] *Id.* at 107, 110-11. Thirty-eight of these sibling pairs were found through advertisements placed in gay-focused newspapers in Baltimore and Washington, D.C.; two of the pairs were located through Hamer's initial survey of the families of gay men. *Id.* at 49-50, 111. Upon surveying the families of these forty sibling pairs, Hamer found the same pattern he had observed in his initial survey: the highest rates of male homosexuality were found among maternal uncles and cousins through a maternal aunt. *Id.*

[60] *Id.* at 107.

[61] *Id.* at 112.

[62] *Id.* at 113.

[63] *Id.* at 113.

[64] *See id.* at 113-14. In 1990, the U.S. government began the "Human Genome Project." The goal of the project is to map the entire human genome. *Id.* at 36.

[65] *Id.* at 114.

[66] *See id.* at 116.

[67] *Id.* at 116.

[68] *Id.* at 116, 138.

Hamer tested the DNA of the forty pairs of gay brothers for twenty-two different markers found at different points on the X chromosome.[69] Hamer found that thirty-three out of the forty pairs of gay brothers were concordant for a series of five markers in a region of the X chromosome known as "Xq28."[70] The odds that this many pairs of the gay brothers would be concordant for those DNA markers by chance are one in ten thousand.[71]

Thus, while Hamer did not isolate a "gay gene" itself, he detected the presence of at least one such gene[72] and he narrowed the search for that gene to a small region of the X chromosome—Xq28.[73] That area is big enough to contain approximately 200 genes.[74] Researchers in this area expect that within the next five to fifteen years the Human Genome Project will catalog each of them. Thus, Hamer is confident that the "gay gene" will be found.[75]

In light of LeVay's findings of orientational dimorphism at the INAH-3, Hamer hypothesizes that a "gay gene" could encode for a protein that influences the growth or death of neurons in the INAH-

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[69] *Id.* at 138.

[70] *Id.* at 21, 138. Hamer also found that sexual orientation was not linked to any other region of the X chromosome. *Id.* at 139.

[71] *Id.* at 137, 138. Shortly before this article went to publication, Hamer and his co-researchers confirmed and extended the results of the study finding a link between male homosexuality and Xq28. *See* Stella Hu et al., *Linkage Between Sexual Orientation and Chromosome Xq28 in Males But Not in Females*, NATURE GENETICS 11: 248-256 (1995). The 1995 study replicated in a new group of gay brothers the earlier finding that linked male homosexuality to markers on Xq28. *Id.* at 249. Moreover, concordant gay male sibling pairs were discordant with their non-gay brothers for Xq28 markers. *Id.* at 249. Finally, Hamer and his research team also analyzed 36 families in which there were two lesbian sisters. They found no linkage between Xq28 DNA markers and female homosexuality. *Id.* at 251-252. Thus, Hamer and his team theorize "that a locus at Xq28 influences sexual orientation in men but not in women." *Id.* at 253.

[72] Hamer estimates that the gene in Xq28 influences the sexual orientation of at most 67 percent of gay men. HAMER & COPLAND, *supra* note 35, at 145. Other genes or environmental factors could influence the sexual orientation of the remaining gay men.

[73] *Id.* at 133, 147.

[74] *Id.* at 147.

[75] *Id.* at 148. For those who doubt that a single gene could influence something as complex as sexual orientation, Hamer points out that out of the 100,000 or so genes in every human, *one*, a gene that codes for the testis determining factor ("TDF"), accounts for virtually all of the biological differences between men and women. *Id.* at 151. For a description of how this one gene controls the biological differentiation of the sexes during prenatal development, see *id.* at 151-55.

3 or that regulates the region by hormones.[76] LeVay himself has theorized that the receptors in the brain that respond to hormones may differ between gay men and non-gay men.[77]

III. The Fundamental Liberty Interest In Homosexual Erotic Activity

The physiology and genetics findings relating to the nature of homosexuality discussed *supra*, at a minimum, are compelling evidence that sexual orientation is not a freely chosen or easily mutable trait. We do not choose our genes. And, to date, no one has even suggested a means for altering the relevant brain structures that are implicated in sexual orientation.

There is reason to be optimistic (or anxious) that at least by early in the next century science will have progressed to the point that we will know with some certainty which genes influence sexual orientation and how they do so.[78] This knowledge is likely to alter profoundly the dynamics of the ongoing discourse within American society on the role—whether that of pariah or of moral and/or social equivalent—that gay people should play in our society.[79] It should be expected then, that this knowledge also will affect the way that society and the courts apply the law to gay people.

Although the connection is not immediately obvious, a careful analysis of the Supreme Court's substantive due process jurisprudence reveals that the notion that a gay sexual orientation is involuntarily determined and not easily mutable should impact on the scope of protection afforded by the Due Process Clause to the physical expression of that sexual orientation. The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life,

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[76] *Id.* at 163. *See also* LeVay, *supra* note 16, at 140 (speculating that the "gay gene" could be a gene regulating the development of the hypothalamus).

[77] LeVay, *supra* note 16, at 126.

[78] Hamer & Copeland, *supra* note 35, at 148, 218 (noting the rapid development of DNA sequencing technology and expressing optimism that a "gay gene" will be found, if necessary, by looking at every coding sequence in Xq28); LeVay, *supra* note 16, at 140 (asserting that "the significance of [Hamer's genetic] finding[s] to our understanding of sexual orientation can hardly be overestimated. Although the gene itself has not yet been isolated and sequenced, it probably will be within a few years. When this happens, it will be possible to ask how and when the gene works.").

[79] *See supra* notes 8-12 and accompanying text.

liberty, or property, without due process of law."[80] The quest to define the scope of the "liberty" in the Due Process Clause has generated a controversy every bit as heated as the controversy over the nature of homosexuality.

On its face, the Due Process Clause relates only to the procedures that a state must use before depriving a person of life, liberty, or property. Therefore, a sound textual argument can be made that the Due Process Clause, although commanding that the state must provide certain processes, provides no substantive rights against the state. Such a Due Process Clause would allow one injured by state action to argue that the process by which he was injured was flawed, but would not allow a challenge under the Due Process Clause to the substance of the legislation at issue.

For over a century, however, the Supreme Court has held that the Due Process Clause contains also a substantive component which provides that the infringement of certain liberties is outside the scope of the government's authority to legislate, regardless of the procedure involved.[81] A first subset of such impermissible legislation relates to state action that is irrational. Thus, the Due Process Clause provides for a liberty interest in being free from irrational legislation.[82]

A second subset of impermissible state action relates to limitations that infringe a fundamental liberty interest without sufficient justification. The state may infringe such a fundamental liberty interest, but only when necessary to further a compelling state interest.[83]

Given that the Supreme Court has recognized a substantive component to the Due Process Clause, the question arises, what interests are fundamental liberty interests? In *Bowers v. Hardwick*,[84] a gay man argued that Georgia's sodomy law violated his due process rights by

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[80] U.S. CONST. amend XIV, § 1. Similarly, the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Discussion herein of "the Due Process Clause" is intended to reference the Due Process Clauses of both the Fifth and Fourteenth Amendments.

[81] *See* Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) (citing Mugler v. Kansas, 123 U.S. 623, 660-61 (1887), in support of this proposition.)

[82] *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83-84 (1978).

[83] Roe v. Wade, 410 U.S. 113, 155 (1973).

[84] 478 U.S. 186 (1986).

infringing upon his fundamental liberty interest in engaging in consensual sodomy.[85] The Court rejected this claim.

The Court reasoned that none of the privacy interests previously pronounced to be fundamental liberty interests "b[ore] any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."[86] Specifically, the Court characterized its previously recognized fundamental privacy liberty interests as relating to "family, marriage, or procreation" and yet "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other ha[d] been demonstrated."[87]

The Court expressed belated awareness that it undermines its own legitimacy when it announces new substantive rights against the state not grounded in the history or text of the Constitution.[88] The Court noted that

> [In s]triving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 151, 152 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description

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[85] *Id.* at 188. Although the challenged law criminalized sodomy irrespective of the genders of those engaging in the activity, *see id.* at 188 n.1, the Court framed "[t]he issue presented [a]s whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. The Court expressly noted that the respondent did not challenge the sodomy statute "based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment." *Id.* at 196 n.8.

[86] *Id.* at 190-91. The Court cited to Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Pierce v. Society of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158, (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Roe v. Wade, 410 U.S. 113 (1973).

[87] Bowers, 478 U.S. at 190-191.

[88] *Id.* at 194-95 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of th[e Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.").

> of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 1937 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."[89]

Finally, pointing to historical proscriptions against sodomy, the Court concluded "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[90]

The *Bowers* Court decided only the issue of whether the Due Process Clause gives rise to a fundamental liberty interest to engage in consensual sodomy.[91] Despite the broad language of *Bowers*, the issue of whether the Due Process Clause would preclude a state from proscribing all same-sex erotic activity, such as kissing, massage, etc., remains an open one.[92] Arguably, this is particularly so in light of the *Bowers* Court's seeming reliance on the historical prohibitions against sodomy as controlling the issue before it because no state proscribes same-sex kissing, hand-holding or caressing.[93] Only Missouri expressly outlaws same-sex mutual masturbation.[94]

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[89] *Id.* at 191-92.

[90] *Id.* at 191-194.

[91] The sodomy statute at issue in *Bowers*, Georgia Code Annotated § 16-6-2 (1984), provided in pertinent part, as follows: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . ." *Bowers*, 478 U.S. at 188 n.1 (quoting GA. CODE ANN. § 16-6-2 (1984)).

[92] *See* High Tech Gays v. Defense Industrial Sec. Clearance Office, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("[I]t is not proper to assume generally that 'homosexual conduct . . . can be criminalized.' There are many varieties of conduct that might be characterized as homosexual, from hand-holding to sodomy. *Hardwick* establishes only that the latter may be criminalized." (citation omitted)); High Tech Gays v. Defense Industrial Sec. Clearance Office, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987) ("The Supreme Court in *Hardwick* simply did not address the issue of all homosexual activity."), *rev'd*, 895 F.2d 563, 571 (9th Cir. 1990).

[93] *See* High Tech Gays, 668 F. Supp. at 1371-72; State v. Walsh, 713 S.W.2d 508, 514 (Mo. 1986) (Blackmar, J. dissenting) (rationale of *Bowers* does not extend to same-sex sexual activity that has not traditionally been proscribed). *See also* EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 15 (1989) ("[G]iven its reliance on history, *Hardwick* should not extend beyond its facts to apply to other types of same-sex sexual activity that have not been the subject of historical prohibitions.").

[94] Missouri criminalizes "any [same-sex] sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person." MO. ANN. STAT. §§ 566.010, 566.090 (Vernon 1982).

The instant discussion relating to whether the Due Process Clause should today be found to protect a fundamental right to engage in at least some same-sex erotic activity starts from the premise that, as an original matter, those decisions that have ascribed a substantive component to the Due Process Clause are in error.[95] The text of the Constitution says nothing of substantive due process rights, and the histories of the Fifth and Fourteenth Amendments provide no clear support for the proposition that the framers intended for the Due Process Clause to afford any substantive protections, let alone provide guidance as to which substantive protections it should afford.

Nevertheless, the Supreme Court is not likely anytime soon to retreat from the view that certain due process liberty interests are fundamental.[96] In *Planned Parenthood of S.E. Pennsylvania v. Casey*,[97] the Supreme Court reexamined the holding of *Roe v. Wade*,[98] which recognized a substantive due process right to have an abortion. Without ever stating that *Roe* was correctly decided as an original matter, the Court reaffirmed "the essential holding" of *Roe*.[99]

The Court explained that "when [it] reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[100] The

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[95] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring) ("If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and purest of men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."); TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2727 (1993) (Scalia, J., concurring) (rejecting the proposition that the due process clause "is the secret repository of all sorts of . . . unenumerated [substantive] rights."). *See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 8-11 (1971).

[96] *See* Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833 (1992) (reaffirming, largely on stare decisis grounds, a woman's fundamental liberty interest in aborting her fetus without undue interference from the state).

[97] 505 U.S. 833 (1992).

[98] 410 U.S. 113 (1973).

[99] *See Casey*, 505 U.S. at 845-46.

[100] *Id.* at 854.

Court found the "cost" of overruling *Roe* to be too high. The Court concluded that overruling a constitutional interpretation such as that in *Roe* in reliance upon which "for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society," especially in light of the "political pressure" to overrule *Roe*'s holding, would do "both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."[101] This stare decisis analysis applies a fortiori to substantive due process in general.

Thus, the question remains—what interests are fundamental liberty interests? *Bowers* suggests that only those privacy interests "that are deeply rooted in this Nation's history and tradition" can be fundamental liberty interests.[102] *Bowers* is sharply at odds, however, with the cases that preceded it.

Because the text and the history of the Due Process Clause can provide little guidance to courts on how to give meaning to the term "liberty," the Supreme Court has used tradition as a guide for its decisions and to limit the discretion of the judiciary.[103] Tradition, however, is not an element of liberty.[104] Rather, because society is likely to have protected those interests that are fundamental, tradition is a signpost for liberty. In other words, tradition correlates (imperfectly) with liberty.[105]

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[101] *Id.* at 856, 869. *See also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2116 (1995) ("*Casey* explained how considerations of stare decisis inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for 'the ideal of the rule of law.'") (citation omitted).

[102] Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

[103] *See* Michael H. v. Gerald D., 491 U.S. 110, 121-22 (1989) (Scalia, J., plurality opinion).

[104] *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1171 (1988) ("Tradition has not been and should not be the exclusive focus of the Court's due process jurisprudence.").

[105] *See* Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 40 (1991) (Kennedy, J., concurring) (with respect to procedural due process, "[h]istorical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair").

Support for this thesis is found in the seminal privacy cases that do not mention tradition as a required element of liberty.[106] Further, one of the earliest in-depth discussions of tradition in the privacy area indicates that tradition was meant only as a limitation on judicial discretion. In *Griswold v. Connecticut*,[107] the Court held that a law forbidding the use of contraceptives intruded upon the right of marital privacy.[108] In response to the dissent's expressed fear that, lacking any textual limitations, Justices would use their private notions of right and wrong in deciding cases in this area, Justice Goldberg, concurring, wrote that the Justices must look for guidance to the "traditions and (collective) conscience of our people" to determine if an interest is fundamental.[109] Similarly, Justice Harlan, concurring, stated that respect for the teachings of history and the values that underlie our society will keep "judges from roaming at large in the constitutional field[.]"[110]

Moreover, in practice, the Court has recognized a fundamental right to do certain things that society not only has not protected, but has criminalized. In *Loving v. Virginia*,[111] the Court struck down a Virginia prohibition on interracial marriage as violative of the fundamental right to marry.[112] This despite the Court's expressed awareness of the fact that miscegenation had been banned in Virginia since colonial times.[113] At the time of the *Loving* decision, sixteen states banned interracial marriage.[114] Fourteen other states had only recently repealed their prohibitions within the preceding fifteen years.[115] In *Eisenstadt v. Baird*,[116]

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[106] *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (the right of an instructor to teach a foreign language, and the right of a parent to engage the teacher to so instruct his child, are within the liberty of the fourteenth amendment); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (statute requiring child's attendance at public school—thus, not allowing child's attendance at private school—deprived parents of their right to direct the upbringing of their children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (sterilization of certain habitual criminals violated their "right to have offspring," which was "among the basic civil rights of man").

[107] 381 U.S. 479 (1965).

[108] *Id.* at 485-86.

[109] *Id.* at 493 (Goldberg, J., concurring) (citation omitted).

[110] *Id.* at 501-02 (Harlan, J., concurring).

[111] 388 U.S. 1 (1967).

[112] *Id.* at 12.

[113] *Id.* at 6.

[114] *Id.*

[115] *Id.* at 6 n.5.

[116] 405 U.S. 438 (1972).

the Court held that a prohibition on the distribution of contraceptives violated the right of privacy.[117] Many states, however, traditionally had banned the distribution of contraceptives.[118] Finally, in *Roe v. Wade*,[119] the Court held that a law prohibiting abortions at any stage of a woman's pregnancy violated the right to privacy.[120] As Justice Rehnquist correctly pointed out in dissent, however, a majority of the states had placed restrictions on abortion for more than a century.[121] In light of these cases, tradition cannot be properly regarded as an element of liberty.[122] Rather, tradition is merely an asserted limitation on discretion.

Yet *Bowers*, in which arguably tradition alone controlled the Court's decision on whether the Due Process Clause provides a fundamental right to engage in sodomy, speaks loudest to the issue of whether that clause provides a fundamental right to engage in at least some same-sex erotic activity because of the great similarity of the nature of the interests at issue. To the extent that *Bowers* does hold that a tradition of protection is a prerequisite to recognition of a fundamental liberty interest in this area, *Bowers* should be followed only if it is "intrinsically sounder" than those privacy cases that have not found tradition to be a controlling factor lest the Court "compound [its] recent error and . . . make [an] unjustified break from previously established doctrine complete."[123]

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[117] *Id.* at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[118] *See* Poe v. Ullman, 367 U.S. 497, 554-55 & n.16 (Harlan, J., dissenting) (citing also to the laws of Belgium, France, Ireland, Italy, and Spain forbidding or otherwise regulating the distribution of contraceptives).

[119] 410 U.S. 113 (1973).

[120] *Id.* at 153.

[121] *Id.* at 174 (Rehnquist, J., dissenting).

[122] *See* Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (Scalia, J., plurality opinion) (with respect to whether an interest has traditionally been protected by our society, "[t]he protection need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude . . . a societal tradition of enacting laws *denying* the interest").

[123] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2115 (1995) ("Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it . . . .") (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

In reexamining a prior holding, the Court also looks to whether that holding's

The *Bowers* Court trumpeted tradition as a restraint on the judiciary, lest judges be tempted to impose their own values on the state and federal governments when defining "liberty."[124] Thus, whether, for the purposes of the instant discussion, *Bowers* is "intrinsically sounder" than the privacy cases that came before it, is a function of the merits of tradition as a judicial restraint.[125] In practice, reference to tradition in defining liberty is unworkable; thus, its use will not lead to predictable or reproducible results. Any claimed judicial restraint through the use of tradition, therefore, is illusory, and tradition fails on the very grounds that supposedly justify its use.[126]

First, the use of tradition does not allow a court to evade the original question—"what is liberty?" It cannot be asserted seriously that "liberty" includes all interests that society traditionally has protected. For example, the government has in recent years "protected" the right of home owners to deduct the interest on their mortgage. Yet, the Supreme Court is not likely to hold that the home mortgage interest deduction is a fundamental liberty interest. Indeed, since the 1930's, the Supreme Court has refused to recognize fundamental rights in the economic sphere.[127] Thus, after determining that an asserted interest is one that society traditionally has protected, a court still must ask whether the

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factual underpinning has changed or has "come to be seen differently, as to have robbed the old rule of . . . justification." Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 855 (1992). As discussed *infra* the physiology and genetics findings discussed in part I, *supra*, call into question the factual underpinning of *Bowers* that "[n]o connection [exists] between family, marriage, or procreation on the one hand and homosexual activity on the other." Bowers v. Hardwick 478 U.S. 186, 191 (1986). This provides a second arguable justification for not following *Bowers* in this area, and, indeed, for overruling *Bowers*.

[124] *Bowers*, 478 U.S. at 191-92.

[125] For a broader criticism of the overreliance on tradition in substantive due process analysis, see E. Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337 (1991).

[126] *See generally id.*, at 1348-52.

[127] *See* Nebbia v. New York, 291 U.S 502, 537 (1934) ("So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397-98 (1937); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("[W]e emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'") (quoting Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955)).

interest is fundamental without reference to tradition. Tradition only limits the set of possible "liberties."

But does it? Arguably, "tradition" is no less illusory a concept than is "liberty." To agree on a common workable definition of "tradition" is no mean feat. *Bowers* itself illustrates well that giving meaning to "tradition" necessarily involves subjective, value-laden decisions. In *Bowers*, Justice White's opinion for the Court cited to the common law prohibition on sodomy, the fact that at one time all fifty states outlawed sodomy, and that, as he wrote his opinion in 1986, twenty-four states and the District of Columbia continued to outlaw at least same-sex sodomy, as evidence of a societal tradition disapproving same-sex sodomy.[128] By 1986, however, twenty-three states had repealed their prohibitions on sodomy[129] and the high courts of New York and Pennsylvania had struck down sodomy restrictions as violative of the right to privacy and equal protection respectively.[130] How is a judge to decide whether this evidences a new tradition respecting a liberty to engage in sodomy? At what point does modern protection of an interest take precedence over historical proscriptions?[131]

Justice Burger's concurring opinion in *Bowers* raises the converse of this question. Justice Burger cited, *inter alia*, to the fact that "[h]omosexual sodomy was a capital crime under Roman law," specifically the Justinian Code, to support his conclusion that participation

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[128] *Bowers*, 478 U.S. at 192-94.

[129] *See* Survey on the Law, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526-27 (1986).

[130] *See* People v. Onofre, 415 N.E.2d 936 (N.Y. 1980) (statute criminalizing adult consensual sodomy violates, *inter alia*, the right to privacy in the New York constitution); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) (statute criminalizing sodomy outside of marriage "exceeds the valid bounds of the police power while infringing the right to equal protection of the laws guaranteed by the Constitution of the United States and of th[e] Commonwealth" of Pennsylvania).

Since 1986, Nevada, the District of Columbia, and Pennsylvania have repealed their restrictions on sodomy. Also, the Supreme Court of Kentucky has held that Kentucky's prohibition of sodomy violated the right to privacy and the guarantee of equal protection provided for in the Kentucky constitution. Commonwealth v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992).

[131] *See* Michael H. v. Gerald D., 491 U.S. 110, 138 (1989) (Brennan, J., dissenting) (criticizing the plurality's overreliance on tradition in defining "liberty" by noting that such an approach assumed the Court's ability "to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer").

in sodomy was not a fundamental liberty interest.[132] Gay sex was not proscribed, however, during the Roman Republic nor during the early days of the Roman Empire.[133] Should such a pre-Justinian "tradition" of respect for the individual's right to practice homosexual sodomy enter into a court's liberty calculus? If so, what weight should it be given?

Moving on, and assuming *arguendo* that jurists could settle on a reproducible working definition of tradition, even greater uncertainty arises when one tries to understand the traditions of past societies and apply that understanding to contemporary cases. This uncertainty arises from the fact that the content of a tradition cannot be understood apart from the societal context in which it arose.[134] Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*[135] demonstrates this difficulty.

In *Michael H.*, a putative biological father, Michael H., asserted a substantive liberty interest in continuing his relationship with his putative daughter who had been conceived and born while her mother was married to another man.[136] Justice Scalia focused on the common law presumption of legitimacy—providing that a newborn child is presumed to be the biological child of the mother's husband—and concluded that "our traditions have protected the marital family ([the mother, her husband], and the child they acknowledge to be theirs) against the" claims of adulterous fathers.[137]

The presumption of legitimacy, however, could be rebutted at common law by proof that the husband was impotent, sterile, or had no access to his wife during the period of the child's conception.[138] Arguably, this allowance for rebuttal of the presumption evinces a "tradition" allowing for an adulterous father to prove his paternity whenever there existed compelling evidence that the husband was not the child's

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[132] *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

[133] JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY, 68-71 (1980) (the first Roman legal restrictions "against homosexual behavior can be dated precisely to the third century A.D." Moreover, homosexual relations were not categorically prohibited by Roman law until the sixth century.).

[134] *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 797 (1983).

[135] 491 U.S. 110 (1989).

[136] *Id.* at 113-14, 121.

[137] *Id.* at 124.

[138] *Id.*

father. Thus, the question arises—what would the society that gave rise to the presumption of legitimacy, a society which did not know blood tests, have done in the face of a blood test showing a 98.07% certainty that Michael H. was the father of the child he claimed as his own?[139]

The presumption of legitimacy might not reflect a tradition preferring the marital family over the parental relationship, but might merely be a recognition that a child born to a marriage is most often a child of the marriage. We cannot know with certainty. Moreover, to ask the question itself seems to be an unnecessary distraction from the original issue—whether the interest Michael H. has in the continuation of his relationship with his putative daughter is an interest for which the Due Process Clause should provide substantive protection—because the answer tells us nothing about the nature of the relationship between Michael H. and his daughter.[140]

Thus, because judges remain free to choose their own definition of "tradition" and because we are sure to disagree as to the meanings that our forebears attached to their actions, tradition is an unsuitable guide for defining liberty and an unworkable judicial restraint. The *Bowers* rationale is intrinsically unsound, therefore, and should not be followed. Moreover, we need no longer fear that "judges [will be left] roaming at large in the constitutional field"[141] even were courts to abandon reference to tradition in substantive due process adjudication altogether. Having set forth in the last sixty years an ample body of case law giving meaning to "liberty" within the privacy sphere of the Due Process Clause, the Supreme Court is better able to distill directly from those cases the principles that speak to the definition of liberty.

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[139] A test of Michael H.'s blood indicated a 98.07% probability that he was the biological father of his putative daughter. *Id.* at 114. *See* Sunstein, *supra* note 104, at 1173 ("[T]radition cannot by itself be controlling in close cases, and the constitutional question must be answered instead by an inescapably normative inquiry into how the relevant tradition is best characterized."). *See also Michael H.*, 491 U.S. at 140 (Brennan, J. dissenting) (noting that the blood test to determine paternity was not available at the time that the presumption of legitimacy arose).

[140] Whether or not society traditionally has protected an asserted liberty speaks not to the nature of the asserted liberty, but rather to the interest society has in infringing that asserted liberty. Thus, tradition analysis conflates the question—is there a liberty interest—with the question—what is the state's interest in infringing the liberty interest. *See id.* at 146-47 (Brennan, J., dissenting).

[141] Griswold v. Connecticut, 381 U.S. 479, at 501-02 (1965) (Harlan, J., concurring).

This is particularly so in light of the previously stated premise of the instant discussion—that as an original matter all substantive due process adjudication is illegitimate, and its continued application is justified only by prudential concerns grounded in stare decisis.

The recent joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of S.E. Pennsylvania v. Casey*[142] elucidated well enough these principles that speak to the definition of liberty.

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.[143]

The Court would do well to abandon its pretense that substantive due process is somehow legitimated through the use of tradition as a limitation on the personal predilections of the judiciary and instead be guided by these principles derived from the privacy case law.

Application of these principles to the issue at hand gives rise to the question whether same-sex erotic activity relates to family relationships or "involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." The physiology and genetics findings set forth *supra* in Part II, at a minimum, militate in favor of an affirmative answer to both of these unavoidably subjective questions.[144]

The science is pertinent because it informs the voluntarism/determinism debate. Determinists believe that by some means, whether nature or the environment, sexual orientation is given to an individual and cannot be changed. Voluntarists argue that an individual is free to voluntarily choose his sexual orientation or can choose to change it without difficulty.[145] The science evinces that gay people do not choose

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[142] 505 U.S. 833 (1992).

[143] *Id.* at 852. *See also id.* at 852 (stating that a woman's suffering in giving birth to a child "is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture").

[144] Whether decisions relating to marriage, procreation, contraception, [non-gay] family relationships, child-rearing, and education are "central to personal dignity and autonomy" is no less subjective a question.

[145] *See* Ortiz, *supra*, note 14, at 1837 (defining the nature/nurture and determinism/voluntarism debates and distinguishing the two).

their sexual desires. It evinces that same-sex erotic activity is not merely "aberrant activity, either on the part of heterosexuals intent on subverting traditional society or by people who are prey to psychological, emotional or sexual dysfunction"[146] but, rather, is the "natural"[147] expression of a genetically influenced organization of the brain resulting in an enduring predisposition toward an erotic, affectional, and romantic attraction to individuals of one's own sex that exists independent of any physical sexual act.[148]

Given that a gay person cannot choose to be non-gay—to redirect his erotic, affectional and romantic desires—but can only choose whether or not to act on those desires, then the decision to engage in same-sex erotic activity would surely seem to be among "the most intimate and personal choices a person may make in a lifetime."[149] The decision to express a same-sex attraction, to remain celibate, or to have an "intimate" opposite-sex relationship without the possibility of satisfying intimacy profoundly impacts the decision-maker's self-identity, happiness, "personal dignity and autonomy" and is commensurate with such other deeply personal, and constitutionally protected, decisions relating to family, marriage, and procreation. Thus, the Due Process Clause, as the Supreme Court has given it substance, should protect this choice.[150]

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[146] Sullivan, *supra* note 9, at 24.

[147] The notion that homosexual sex is "unnatural" frequently is cited as a justification for discrimination against gay people. *See* Debbie Howlett, *Lesbian Ruling Stirs Fury, Praise*, USA TODAY, Sept. 9, 1993, at 3A (quoting Anne Kincaid, of the Family Foundation, asserting that gay "sexual behaviors . . . are against the laws of nature" and applauding a Virginia court's removal of a two year old boy from his lesbian mother's custody on the ground that she was in a lesbian relationship).

[148] *See* Herek, *supra* note 11; Equality Foundation of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (citing psychologist Dr. John Gonsiorek's testimony that sexual orientation is "a predisposition toward erotic, sexual, affiliation or affection relationship towards one's own and/or the other gender"), *rev'd*, 54 F.3d 261 (6th Cir. 1995).

[149] *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1st ed. 1978) (arguing that same-sex sodomy is "central to the personalities of those singled out by" prohibitions on such activity).

[150] *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1370, 1372 (holding that the Due Process Clause protects the right of gay people to engage in at least some same-sex erotic activity "because this aspect of life occupies such an important part of all human beings' lives") (N.D. Cal. 1987), *rev'd*, 895 F.2d 563, 571 (9th Cir. 1990).

IV. Heightened Scrutiny For Classifications Based On Sexual Orientation

The physiology and genetics research relating to homosexuality also has implications for equal protection analysis of sexual orientation classifications. When Hamer published his study linking Xq28 to male homosexuality, some gay legal activists theorized that Hamer's finding would lead to heightened judicial scrutiny of sexual orientation classifications because it advanced the argument that sexual orientation is immutable.[151] A careful analysis of the Supreme Court's equal protection jurisprudence reveals, however, that immutability of a characteristic is neither a prerequisite to nor a sufficient condition for heightened scrutiny of a classification relating to that characteristic. The science is still pertinent, however, not for what is says about the immutability of a gay sexual orientation, but simply because it evinces that a gay sexual orientation necessarily connotes nothing more than a same-sex desire and, thus, it undermines the notion that homosexuality cannot exist apart from homosexual sexual conduct—a notion that repeatedly has precluded heightened scrutiny for classifications that discriminate against gay people as gay people.

A court reviewing the constitutionality of a governmental classification applies one of three levels of scrutiny: "strict," "intermediate," or "rational basis."[152] A classification that infringes upon a fundamental right or that is "suspect" is reviewed with strict scrutiny to determine if it is narrowly tailored to serve a compelling governmental interest.[153] A classification that is "quasi-suspect" is reviewed with intermediate scrutiny and is constitutional only if it is substantially related to an important governmental interest.[154] Finally, a court reviews for a rational basis a government classification that is neither suspect nor quasi-suspect and that does not infringe upon a fundamental right.[155] Under the "rational basis" test, a classification will be found constitutional if it is rationally related to a legitimate governmental purpose.[156]

The judiciary's expressed justification for subjecting some legislative classifications, but not others, to "heightened scrutiny" derives from

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[151] *See, e.g.*, Hamer & Copeland *supra* note 35, at 22, 210-11.

[152] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985).

[153] *See id.* at 429-30.

[154] *See id.* at 430.

[155] *See id.* at 440.

[156] *See id.*

"the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."[157] Thus, classifications based upon race and national origin, which the Supreme Court in this context has treated as interchangeable with race,[158] are "suspect" and deserving of heightened scrutiny by the courts.

In addition to race and national origin, the Supreme Court has recognized alienage as a suspect classification, except for when such a classification differentiates between aliens and citizens with respect to "government functions."[159] Also, the Supreme Court has recognized gender as a quasi-suspect classification.[160] Finally, the Supreme Court has subjected classifications that discriminate on the basis of illegitimacy to a "somewhat heightened" standard of scrutiny.[161]

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[157] McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[158] *See* Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely on the basis of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classifications . . . based on race alone ha[ve] often been held to be a denial of equal protection." (citing to two cases that addressed classifications that discriminated against persons of Chinese descent and one case that addressed a classification that discriminated against black people)); Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting with respect to a classification that placed limitations upon persons because of their Japanese ancestry that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.").

[159] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate."). *Compare with* Ambach v. Norwick, 441 U.S. 68, 72-75 (1979) (explicating a "governmental functions" exception to the general standard of heightened scrutiny applicable to classifications based on alienage).

[160] Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (plurality opinion announcing a strict scrutiny standard); Craig v. Boren, 429 U.S. 190, 197 (1976) (announcing an intermediate standard).

[161] *See* Mathews v. Lucas, 427 U.S. 495, 505 (1976) (illegitimacy is not a suspect classification); Trimble v. Gordon, 430 U.S. 762, 767 (1977) ("As we recognized in *Lucas*, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations. . . . We nevertheless concluded that the analogy was not sufficient to require 'our most exacting scrutiny.' . . . Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . *Lucas* also establishes that the scrutiny 'is not a toothless one.'").

In arriving at these ends, however, the Supreme Court has failed to articulate cogently its means for determining whether a classification other than race or national origin deserves heightened scrutiny.[162] At various times, the Supreme Court, in adjudicating this issue, has expressly mentioned each of the following factors as potentially relevant: (1) whether the classification historically has been used to discriminate against a group classified thereunder;[163] (2) whether the classification is informative as to any given individual's intrinsic ability to participate in or contribute to society[164] and similarly whether the classification has been used to "saddle[] with disabilities" on the basis of prejudice or inaccurate stereotypes members of a group classified thereunder;[165] (3) whether the classification relates to a characteristic that is immutable,[166] or similarly relates to a characteristic that is not within an individual's control;[167] and (4) whether members of a group classified under such a classification have been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[168] The Supreme Court, however, has never required all of these factors for a classification to be suspect.[169]

One can view the Supreme Court's jurisprudence in this area of the law as an attempt to determine whether asserted suspect classifications

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[162] *See Trimble*, 430 U.S. at 777 (Rehnquist, J., dissenting) ("Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle."); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) ("Several formulations might explain our treatment of certain classifications as 'suspect.'").

[163] *Frontiero*, 411 U.S. at 684-85; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 28 (1973).

[164] *Cleburne*, 473 U.S. at 441-444; *Frontiero*, 411 U.S. at 686; Mathews v. Lucas, 427 U.S. 495, 505 (1976); *Murgia*, 427 U.S. at 310-11, 315.

[165] *Rodriguez*, 411 U.S. at 28 (1973); *see also Frontiero*, 411 U.S. at 684-85; *Murgia*, 427 U.S. at 313.

[166] *See Frontiero*, 411 U.S. at 686; *see also Cleburne*, 473 U.S. at 441-42; *Plyler*, 457 U.S. at 220.

[167] *See Frontiero*, 411 U.S. at 686; *Cleburne*, 473 U.S. at 441; *Plyler*, 457 U.S. at 217 n.14 ("Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.").

[168] *Rodriguez*, 411 U.S. at 28; *see also Plyler*, 457 U.S. at 216-17 n.14.

[169] *See, e.g.*, *Plyler*, 457 U.S. at 216-17 & n.14.

are sufficiently similar to race and national origin to merit heightened scrutiny under the Equal Protection Clause.[170] More particularly, the cases can be read to support the thesis that the Supreme Court has merely generalized the rationale of *McLaughlin*:[171] a classification, like race, that historically has been used to saddle certain people with disabilities on the basis of a characteristic that otherwise would be irrelevant to an individual's ability to contribute to society is inherently suspect as more likely to have been the product of irrational prejudice, and thus, is deserving of heightened equal protection scrutiny.[172] Seen in this light, the cases reveal that the criteria relating to "immutability" and "political powerlessness" are neither necessary nor even significant factors in the suspect classification analysis.[173]

That a classification relates to an immutable characteristic over which an individual has no control does not alone merit heightened scrutiny of that classification.[174] Nor is a relationship to such a characteristic a prerequisite for heightened scrutiny.[175] The Supreme Court repeatedly

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[170] *See* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1065 (1979) ("[T]he Supreme Court has moved beyond the original understanding of the equal protection clause . . . by broadening the category of groups protected by equal protection, distilling from the principle of the moral irrelevance of race the more general principle of the moral irrelevance of any trait that reveals nothing about the moral worth or desert of a person.")

[171] *See* McLaughlin v. Florida, 379 U.S. 184 (1964).

[172] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985) ("[W]hat differentiates [a suspect classification] from a nonsuspect [classification] . . . is that the [suspect classification] frequently bears no relation to ability to perform or contribute to society."); *Plyler*, 457 U.S. at 216 n. 14 ("[Such] classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)). *See also Cleburne*, 473 U.S. at 440 (classifications grounded "on factors . . . so seldom relevant to the achievement of any legitimate state interest that [they are] deemed to reflect prejudice and antipathy . . . [toward] the burdened class," are suspect).

[173] *Compare* Equality Found. of Greater Cincinnati, Inc. v. Cincinnati, 860 F. Supp. 417, 434-35 (S.D. Ohio 1994) ("Evidently, the most decisive factors the Supreme Court has considered . . . are whether the group's defining characteristic is at all related to its members' ability to participate in or contribute to society . . . and whether the characteristic is beyond the individual's control") (citations omitted), *rev'd*, 54 F.3d 261 (6th Cir. 1995).

[174] *See Cleburne*, 473 U.S. at 442 (holding that the mentally challenged are not a suspect class); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (stating that the elderly are not a suspect class).

[175] *See* Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kan. 1991) ("[A]bsolute

has omitted immutability in setting forth the characteristics of a suspect classification.[176] Further, the Court has held that classifications relating to alienage are suspect even though alienage is a condition that is both voluntarily assumed and mutable.[177] Thus, whether sexual orientation is innate and immutable or voluntarily chosen should not control the issue of heightened scrutiny for classifications that discriminate on the basis of sexual orientation.[178]

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immutability simply is not a prerequisite for suspect classification."), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993); *see also* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073, 1074 n.51 & n.52 (1980) (immutability is "neither sufficient nor necessary"; "even if race or gender became readily mutable by biomedical means, . . . laws burdening those who choose to remain black or female would properly remain constitutionally suspect").

[176] *See Cleburne*, 473 U.S. at 440-41; *Murgia*, 427 U.S. at 313; San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[177] *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

[178] *See also* Stephen B. Pershing, *"Entreat Me Not to Leave Thee": Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 WILLIAM & MARY BILL OF RIGHTS JOURNAL 289, 311 n.81 (1994) (arguing that even if gays and lesbians could readily change their sexual orientation, courts should not "apply an immutability theory to preclude suspect class status for sexual orientation" since "persons of minority sexual orientation have significant social or cultural bonds to one another that derive affirmatively, not just as a matter of defensive necessity, from their defining characteristic"; thus, denial of suspect class status premised on an immutability theory would implicate important intimate and expressive associational interests). *But see* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571, 573-74 (9th Cir. 1990) (finding that "[h]omosexuality is not an immutable characteristic" and holding that homosexuality is not a suspect classification); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990).

The physiology and genetics research discussed in Part II, *supra*, speaks, although not conclusively, to the immutability criterion. That a region of the brain that plays a key role in sex is orientationally dimorphic strongly suggests that sexual orientation is fixed as the brain develops prenatally. *See supra* part II.A. Nevertheless, the possibility that such dimorphism results from rather than precedes certain sexual behavior cannot yet be excluded. *See supra* part II.A. Hamer's demonstration of a link between male homosexuality and DNA markers on the X chromosome is compelling evidence that sexual orientation is genetically influenced but also shows that sexual orientation is not wholly determined by genetics. *See supra* part II.B. *See also* HAMER & COPELAND, *supra* note 35, at 211.

Both Hamer and LeVay have testified with respect to the nature and origins of sexual orientation in litigation in which the appropriate level of scrutiny for sexual orientation classifications was at issue. *See id.* at 210-11 (discussing Hamer's testimony

"Political powerlessness" is central to "process" theories of equal protection which see heightened scrutiny as a means of protecting those who cannot fend for themselves in the political process.[179] A critique of the merits of such theories is beyond the scope of the present discussion. It should suffice to note that the recognition of gender as a classification meriting heightened scrutiny suggests that this criterion is either an inclusive one, rather than an exclusive one, or else the criterion is so broad as to be almost meaningless. Regardless, if women, who constitute a majority of the voting-age population in our democracy, fit under the umbrella of the "politically powerless" then that umbrella must be big enough to cover gay people also.[180]

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in Evans v. Romer, 92-CV-7223 (Colo. Dist. Ct. Dec. 14, 1993), that there is a greater than 99% probability that sexual orientation is genetically influenced in some men); Thomasson v. Perry, Civ. A. No. 95-252-A (E.D. Va. June 8, 1995) (plaintiff's summary judgment brief, LeVay Decl. (exhibit O)) (LeVay testifying that "[g]enes alone are responsible for approximately one-half of the causation of a person's orientation as homosexual, bisexual, or heterosexual," LeVay Decl. at ¶ 42, and that to the extent that sexual orientation is not influenced by genes alone, it appears to be influenced "by biological processes occurring before birth and/or "within the first one or two years of life." LeVay Decl. at ¶ 7-8).

In Evans v. Romer, the court, which referred to Hamer in its opinion as a "genetic explorer," *Evans*, 92-CV-7223, slip op. at 13, cited to Hamer's testimony in finding that "the preponderance of the credible evidence suggests that there is a biological or genetic "component" of sexual orientation . . . ." *Id.* slip op. at 14. Nevertheless, the court made no determination on the immutability issue. *Id.* Rather, the court held that no adequate showing had been made that gay people were "vulnerable or politically powerless and [thus,] in need of 'extraordinary protection from the majoritarian political process' in today's society." *Id.* slip op. at 14-15.

In Thomasson v. Perry, the district court rejected the argument of a gay naval lieutenant that sexual orientation classifications deserved heightened scrutiny. The Court concluded that "[b]ecause the government is free to criminalize homosexual conduct, . . . 'a group that is defined by reference to that conduct cannot constitute a 'suspect class.'" *Thomasson*, Civ. A. No. 95-252-A, slip op. at 16 (quoting Steffan v. Perry, 41 F.3d 677, 684 (D.C. Cir. 1994)). This reasoning is critiqued extensively *infra*.

[179] *See* Tribe, *supra* note 175, at 1073 (1980); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 828-30 (1984) (arguing that homosexuality classifications merit heightened scrutiny because gay people "are a political minority and victims of the majoritarian system").

[180] *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) (in comparison to black people who "are protected by three federal constitutional amendments, [seven extant] major federal Civil Rights Acts . . . , as well as antidiscrimination laws in 48

Far more controlling in the heightened scrutiny analysis is whether a classification is informative as to an individual's intrinsic ability to contribute to society. A classification that is helpful in separating individuals as to their intrinsic ability to function in society will not merit heightened scrutiny.[181] The Supreme Court has held that classifications with respect to the mentally challenged are not suspect or quasi-suspect, in part because the mentally challenged "have a reduced ability to cope with and function in the everyday world."[182] Similarly, the Court has refused to apply heightened scrutiny to classifications based on age, in part since "there is a general relationship between advancing age and decreasing physical ability."[183] Most telling is the

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of the states, . . . and by absolute standards as well, homosexuals are politically powerless"); Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988) (gay people lack the political power necessary to obtain redress for discrimination), *vacated and aff'd on other grounds*, 875 F.2d 1329, 1349 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); Equality Foundation of Cincinnati v. Cincinnati, 860 F. Supp. 417, 437-39 (S.D. Ohio 1994) (citing to evidence that "of the total of 497,155 elected officials in the United States, a total of 73 are openly gay" and concluding that gay people "are sufficiently politically powerless"), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995); Jantz v. Muci, 759 F. Supp. 1543, 1549-50 (D. Kansas 1991) (concluding that gay people are unable to protect their rights through the political process), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987) (because of discrimination, gay people have been unable to secure a "politically viable voice"), *rev'd*, 895 F.2d 563 (9th Cir. 1990).

But see High Tech Gays, 895 F.2d at 574 (citing to the passage of anti-discrimination legislation and concluding that gay people "are not without political power"); Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (citing only to a magazine report that "one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual" and to the fact that the mayor of Chicago had marched in a gay pride parade and concluding that "[h]omosexuals are not without political power"); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991) (citing *inter alia* to the fact that the mayor of New York had marched with gay marchers in the St. Patrick's Day Parade and concluding that gay people are not politically powerless); *Evans*, 92-CV-7223, slip op. at 14-15 (holding that no adequate showing had been made that homosexuals were "vulnerable or politically powerless and [thus,] in need of 'extraordinary protection from the majoritarian political process' in today's society").

[181] *See* Sunstein, *supra* note 104 , at 1177 (1988) ("As the defining case of blacks reveals, the question whether a group deserves special solicitude under the Equal Protection Clause depends on an inescapably normative inquiry into the legitimacy of the reasons ordinarily used to disadvantage that group.")

[182] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

[183] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 310-11 (1976) (internal quotations omitted).

Court's treatment of classifications based on alienage. The Court has held a classification based on alienage merits heightened scrutiny[184] unless the classification relates to a governmental function.[185] Such a classification relating to a governmental function is not inherently suspect because "[t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times . . . indicating that the status of citizenship was meant to have significance in the structure of our government."[186] It is this relevance to legitimate governmental functions that renders heightened scrutiny inappropriate for such classifications.

A number of courts have held that sexual orientation "bears no relationship whatsoever" to an individual's ability to function in and contribute to society.[187] Given that, as the physiology and genetics research discussed *supra* in Part II suggests, homosexuality is an enduring predisposition toward an erotic, affectional, and romantic attraction to individuals of one's own sex,[188] however, one cannot dismiss out of hand the argument that homosexuality does speak to a gay person's ability to provide the most suitable home to a child—arguably one of the greatest contributions an individual can make to society. Lacking a romantic or erotic attraction to persons of the other sex, seemingly would handicap a gay person, relative to a non-gay person, in maintaining a long-term co-parenting relationship with a person of the other sex. Thus, to the extent that one believes that a child is best raised in one stable household with both a mother and a father, sexual orientation arguably is highly relevant to an individual's ability to contribute to society.[189]

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[184] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

[185] Ambach v. Norwick, 441 U.S. 68, 75 (1979).

[186] *Id.*

[187] Equality Foundation of Cincinnati v. Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995). *See also* Watkins v. U.S. Army, 847 F.2d 1329, 1346 (9th Cir. 1988), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kansas 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1369-70 (N.D. Cal. 1987), *rev'd*, 895 F.2d 563, 571 (9th Cir. 1990).

[188] *See* Herek, *supra* note 11.

[189] Recent findings in biopsychology point to other, less significant, indications that gay men, as a whole, are differently-abled than non-gay men. Non-gay men, as a

Finally, the Supreme Court has required a history of significant "purposeful unequal treatment" as a prerequisite to heightened scrutiny, most likely to ensure that the judiciary does not unnecessarily interfere with the right of the majority to legislate as it sees fit.[190] In *Mathews v. Lucas*,[191] the Court concluded that the status of illegitimacy, like race, is irrelevant to an individual's ability to contribute to society.[192] The Court also noted that "the law has long placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances."[193] But because "this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and [black people]," the Court declined to afford strict scrutiny to such a classification.[194] The Court, however, has examined classifications based on illegitimacy for more than just a rational basis.[195] For the purposes of

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group, outperform gay men, as a group, on some tasks requiring spatial or visuospatial skills. LEVAY, *supra* note 16, at 99, 117-18. For example, non-gay men, as a group, are better at "mental rotation" when they are shown different views of a complex object and are asked to determine if the views are of the same object. *Id.* The same result holds true for the "water-level" test which requires the subject to mark the imagined surface level of water in an illustration of a tilted flask. *Id.* at 100, 117-18.

Women tend to perform similar to or even worse than gay men on these tasks. *Id.* at 99-100, 117-18. One study found that 92% of men but only 28% of women correctly drew the surface level in the "water-level" test as horizontal. *Id.* at 100. Thus, given that gender is a quasi-suspect classification, the finding that gay men and non-gay men differ in visuospatial ability should not of itself influence the heightened scrutiny analysis for sexual orientation classifications.

[190] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (rejecting heightened scrutiny for classifications based on age, in part because the elderly "have not experienced a 'history of purposeful unequal treatment'"); Lyng v. Castillo, 477 U.S. 635, 638 (1986) (same with respect to classifications based on familial relatedness); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (same with respect to classifications based on wealth); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion noting a "long and unfortunate history of sex discrimination" and concluding that gender is a suspect classification); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443 (1985) (noting that legislators have recently been addressing the problems of the mentally challenged "in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary").

[191] 427 U.S. 495 (1976).

[192] *Id.* at 505.

[193] *Id.* at 505-06.

[194] *Id.* at 506.

[195] *See* Trimble v. Gordon, 430 U.S. 762, 767 (1977) (Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . *Lucas* also establishes that the scrutiny 'is not a toothless one.'").

the present discussion, the issue can be considered moot. Every federal court that has considered the issue has concluded that gay people have suffered a history of discrimination on account of their classification as gay people.[196]

Thus, in adjudicating whether a classification that discriminates on the basis of sexual orientation is deserving of heightened scrutiny, a court should look only at (1) whether gays and lesbians have suffered a history of discrimination and (2) whether their sexual orientation affects their ability to contribute to society.

For the federal courts of appeals that have considered the issue, however, another factor has proven decisive. Seven of the thirteen federal courts of appeals have considered the claims of gay people for heightened scrutiny of classifications that discriminate against them as gay people. All of these courts found that sexual orientation does not constitute a suspect classification. The five courts of appeals that provided an explanation for their decision[197] all found that homosexuality, unlike race or gender, is a conduct-based classification. Indeed, these courts concluded that the conduct that defines the class of homosexuals is conduct that, under *Bowers*, the state may criminalize. This conclusion led each court to further hold that classifications based on sexual orientation are not suspect.[198]

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[196] *See, e.g.*, Watkins v. U.S. Army, 847 F.2d 1329, 1345 (9th Cir 1988), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); Equality Found. of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417, 436-37 (S.D. Ohio 1994), *rev'd on other grounds*, 54 F.3d 261 (6th Cir. 1995); Jantz v. Muci, 759 F. Supp. 1543, 1548-49 (D. Kansas 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1369-70 (N.D. Cal. 1987) *rev'd on other grounds*, 895 F.2d 563 (9th Cir. 1990).

[197] The United States Courts of Appeals for the Fifth Circuit and the Tenth Circuit have held that classifications based on sexual orientation do not merit heightened scrutiny but neither provided any discussion of a rationale for its decision. *See* Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) ("[W]e refuse to hold that homosexuals constitute a suspect or quasi-suspect classification . . . ."); Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984) ("A classification based on one's choice of sexual partners is not suspect.").

[198] *See* Equality Found. of Greater Cincinnati v. Cincinnati, 54 F.3d 261, 268 (6th Cir. 1995) ("*Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a 'suspect class' or a 'quasi-suspect class.'"); Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) ("If the government can criminalize homosexual conduct, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'") (citing Padula v. Webster, 822

The seminal case in this area is *Padula v. Webster*.[199] In *Padula* the United States Court of Appeals for the District of Columbia Circuit adjudicated a lesbian's claim that the FBI had refused to employ her because she had been and currently was a "practicing homosexual."[200] The court expressly noted that the case did not concern a classification based on "sexual orientation" and framed the issue before the court precisely as "only whether homosexuals, when defined as persons who engage in homosexual conduct, constitute a suspect or quasi-suspect classification."[201]

The court ruled that the Supreme Court's holding in *Bowers*, that a Georgia law criminalizing sodomy did not offend the Due Process Clause, controlled the issue of whether a classification based on homosexual "conduct" should receive heightened protection under the Equal Protection Clause. "It would be quite anomalous, on its face, to declare status defined by conduct that states may criminalize as deserving of strict scrutiny under the equal protection clause."[202]

The *Padula* court made two profound errors. First, the court failed to appreciate that the protections of the Equal Protection Clause are

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F.2d 97 (D.C. Cir. 1987) ("If the Court [in Bowers v. Hardwick, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.")); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) ("If for federal analysis we must reach equal protection of the Fourteenth Amendment by the Due Process Clause of the Fifth Amendment . . . and if there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment . . . it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component of the Due Process Clause of the Fifth Amendment."); Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes. The Constitution, in light of *Hardwick*, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result."); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.").

[199] 822 F.2d 97 (D.C. Cir. 1987).

[200] *Id.* at 99. The opinion does not make clear what homosexual conduct the plaintiff practiced.

[201] *Id.* at 102.

[202] *Id.* at 103.

independent of those of the Due Process Clause.[203] The *Bowers* Court itself noted that the case did not present the Court with an equal protection challenge.[204] Cass Sunstein has pointed out:

> The principal flaw in . . . *Padula* . . . is that [the court] read the Constitution as an undifferentiated unit, rather than as a set of entitlements and prohibitions that are targeted at quite discrete problems. Each constitutional provision must be taken on its own. [For example], [t]he fact that the Fourth Amendment does not prevent the state from regulating all speech-related activities could not plausibly be a reason to immunize speech from special First Amendment scrutiny.[205]

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[203] *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) (noting that "there are *two alternate* routes to higher levels of scrutiny under the equal protection clause [infringement of a fundamental right or adoption of a suspect classification]" and criticizing the opinion of a prior panel which "seems to collapse the two separate routes into one"); Watkins v. United States Army, 847 F.2d 1329, 1339-42 (9th Cir 1988) (rejecting the argument that *Bowers* precluded an equal protection challenge to regulations that discriminate on the basis of sexual orientation), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991) ("The *Bowers* court only addressed the respondent's claim that the Georgia statute was a violation of due process; equal protection was not in issue."), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993).

See also Sunstein, *supra* note 104, at 1164 (1988) ("statutes that are unaffected by the Due Process Clause may be drawn into severe doubt by principles of equal protection"); Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV., 617, 625 (1989) (arguing that *Bowers v. Hardwick* does not foreclose heightened scrutiny of classifications that disadvantage same-sex relationships since "[a] same-sex relationship is in no way defined by, nor dependent upon, sodomy"); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 545 (1992) (pointing out that if *Bowers v. Hardwick* had held that the Due Process Clause protected a right to engage in sodomy, sexual orientation classifications would not thereby have become suspect under the Equal Protection Clause); EDITORS OF THE HARVARD LAW REVIEW, *supra* note 93, at 15, 59-60.

[204] Bowers v. Hardwick, 478 U.S. 186, 196 n.8 (1986).

[205] Sunstein, *supra* note 104, at 1167. Indeed, that sodomy may be and is criminalized has been held repeatedly to be insufficient justification to infringe First Amendment rights. *See* Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317, 1328 (5th Cir. 1984) (rejecting state's interest in preventing speech likely to promote sodomy as justification for state university's refusal to officially recognize a gay student group); Gay Lib. v. Univ. of Missouri, 558 F.2d 848, 853-54 (8th Cir. 1977) (even accepting "at face value" testimony that "homosexual behavior is compulsive" and "wherever you have a convocation of homosexuals, . . . you are going to have increased . . . sodomy" a prior restraint on the First Amendment right of gays to associate is not

Thus, even if the *Padula* court had been presented with a challenge to an FBI practice of excluding sodomites from employment, *Bowers* would not have determined whether a classification discriminating against sodomites should receive heightened scrutiny under the Equal Protection Clause.

The classification at issue in *Padula*, however, was not based on participation in sodomy, but rather participation in "homosexual conduct."[206] This points out the *Padula* court's second profound error. The *Padula* court equated "homosexual conduct" with sodomy.[207] As noted *supra* in Part III, *Bowers* dealt only with a challenge to Georgia's law banning sodomy and did not hold that all types of gay erotic, romantic and affectional conduct could be criminalized.

The Court of Appeals for the District of Columbia Circuit compounded this error in *Steffan v. Perry*[208] by equating homosexual orientation with sodomy. In *Steffan*, a former Naval Academy cadet challenged the Academy's regulation prohibiting those with a homosexual *orientation* from being enrolled at the Academy.[209] The court rejected the argument that such a classification was suspect, reasoning that "as we explained in *Padula*, if the government can criminalize homosexual *conduct*, a group that is defined by reference to that conduct cannot constitute a 'suspect class.'"[210] Thus, for the purposes of its heightened scrutiny analysis, the court ignored the fact that the classification before it

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justified); Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976) (even if associational activity of gays increases the opportunity for illegal gay sex, "that fact is insufficient" to overcome the associational rights of members of a gay organization); Gay Students Org. of N.H. v. Bonner, 509 F.2d 652, 662 (1st Cir. 1974) ("undifferentiated fear" of illegal gay sex occurring is not a sufficient justification for infringing First Amendment rights). *See also* Fricke v. Lynch, 491 F. Supp. 381, 387-89 (D. R.I. 1980) (high school senior enjoys a First Amendment free speech right to attend his senior prom escorted by his same-sex date).

[206] Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987).

[207] *Id.* at 102-04.

[208] 41 F.3d 677 (D.C. Cir. 1994).

[209] Steffan v. Perry, 41 F.3d 677, 682 (D.C. Cir. 1984). The court expressed uncertainty as to whether the Naval Academy had relied on Academy regulations or those of the Department of Defense in recommending that Steffan be separated from the academy in light of his statement that he was a homosexual. *See id.* at 684. Both the relevant Academy regulation and the relevant regulation of the Department of Defense provided for separation based on sexual orientation alone. *See id.* at 682-83; *id.* at 707 (Wald, J., dissenting).

[210] *Id.* at 685 n.3 (emphasis added).

related to orientation, not conduct, and redefined gay people as those who engage in sodomy.

Having rejected the application of heightened scrutiny to the challenged regulation on this ground, the court conceded in subjecting the regulation to rational review that "it is conceivable that someone would describe himself as a homosexual based on his orientation . . . notwithstanding the absence of any ongoing conduct or the probability of engaging in such conduct. That there may be exceptions to the assumption on which the regulation is premised is irrelevant, however, so long as the classification . . . in the run of cases furthers its purpose, and we readily conclude that it does."[211] Thus, the court concluded "[T]he military may reasonably assume that when a member states that he is a homosexual, that member either engages or is likely to engage in homosexual conduct."[212]

Remarkably, the other federal courts of appeals that have addressed the issue have mirrored the Court of Appeals for the District of Columbia Circuit in effectively equating a homosexual orientation with the practice of sodomy.[213] Indeed, the Court of Appeals for the Seventh

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[211] *Id.* at 686. The *Steffan* Court's reasoning is paradigmatic of what David Halperin has identified as the "discourses of homophobia" which "operate precisely by deploying a series of mutually contradictory premises in such a way that any one of them can be substituted for any other, as different circumstances may require, without changing the final outcome of the argument." DAVID M. HALPERIN, SAINT FOUCAULT: TOWARD A GAY HAGIOGRAPHY, 37-38 (1995). Had the *Steffan* Court conceded in addressing the heightened scrutiny argument that "it is conceivable that someone would describe himself as a homosexual based on his orientation . . . notwithstanding the absence of any ongoing conduct or the probability of engaging in such conduct," it could not logically have concluded that sexual orientation is defined by conduct.

[212] *Steffan*, 41 F.3d at 686.

[213] *See* Equality Found. of Greater Cincinnati v. Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995) ("[I]t is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct."); Meinhold v. U.S. Dep't of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994) (in adjudicating a challenge to a classification based on sexual orientation, citing to High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990), which held that a classification based on homosexual conduct was not suspect, for support of the proposition that "classifications having to do with homosexuality may survive challenge if there is any rational basis for them"); Ben-Shalom v. Marsh, 881 F.2d 454, 463-65 (7th Cir. 1989) ("[T]he regulation [which classified plaintiff based upon her status as a lesbian] does not classify plaintiff merely based upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future.");

Circuit was even more explicit when engaging in such circular reasoning in *Ben-Shalom v. Marsh*.[214] In *Ben-Shalom* a sergeant in the Army Reserve challenged a regulation that barred her reenlistment because of her homosexual orientation.[215] After noting that the regulation on its face discriminated against persons with a homosexual orientation "absent any allegations of sexual misconduct,"[216] the Court of Appeals for the Seventh Circuit remarked:

> In the present case, plaintiff is an avowed lesbian, there is no confusion about that. . . . Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff merely based upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future.[217]

The court then concluded that because homosexual "conduct" may constitutionally be criminalized, homosexuals do not constitute a suspect or quasi-suspect class.[218] "The Constitution, in light of *Hardwick*, cannot

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Woodward v. United States, 871 F.2d 1068, 1074 n.6 (Fed. Cir. 1989) (noting that the plaintiff had admitted that "he was attracted sexually to, or desired sexual activity with, members of his own sex, that since he knew of no gay officers he sought the company of gay enlisted men, that he [does], and will continue to associate with other homosexuals, and that he wanted to remain in the Navy as an honest, open, gay officer" and concluding "[w]hile acts of sodomy have not been expressly admitted by [plaintiff], . . . in view of the above [non-sexual behavior] we need not address the factual situation where there is action based solely on status as a person with a homosexual orientation" (internal quotation marks omitted)), *cert. denied*, 494 U.S. 1003 (1990).

See also generally Hunter, *supra* note 203, at 533-43 (describing how courts have come to transform sodomy into a proxy for homosexuality).

[214] 881 F.2d 454 (7th Cir. 1989).

[215] *Id.* at 457 n.3 (the regulation at issue disqualified from service any homosexual and defined a homosexual as "an individual . . . who *desires* bodily contact between persons of the same sex . . . with the intent of obtaining or giving sexual gratification" even if there is no evidence that the individual has engaged in homosexual acts) (emphasis added).

[216] *Id.* at 463.

[217] *Id.* at 464.

[218] *Id.* at 464-65.

otherwise be rationally applied, lest an unjustified and indefensible inconsistency result."[219]

Ben-Shalom and *Steffan* suffer from two fatal errors, one of legal reasoning and the other factual. The reasoning is flawed analytically because the courts failed to address the classification before them. No classification can be suspect under such an analysis.

Assume, for example, an equal protection challenge to a law that bans men from military service because men are statistically more likely to commit rape than are women. Under the explicit reasoning of *Ben-Shalom*, and the implicit reasoning of *Steffan*, "[p]laintiff's [maleness], if not an admission of [rape], at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to [commit rape]. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in [rape]. To this extent, therefore, the regulation does not classify plaintiff merely based upon his status as a [man], but upon reasonable inferences about his probable conduct in the past and in the future."[220]

In transforming sexual orientation—the classification before it—into a classification based on presumed group sexual conduct, and then deciding the heightened scrutiny issue by reference to the latter classification, the *Ben-Shalom* court went astray of "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups."[221] For the purposes of equal protection jurisprudence, there are no "suspect classes" per se, only suspect classifications.[222] Thus, the focus of the court should be on the classification before it as it relates to the individual plaintiff.

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[219] *Id.*

[220] *Id.* at 464. *See also* Dahl v. Secretary of the Navy, 830 F. Supp. 1319, 1334-35 n.17 (E.D. Cal. 1993) (military's homosexual exclusion policy "is indistinguishable from a patently unconstitutional hypothetical policy providing that ethnic minorities must be excluded from military service because they have a 'propensity' to engage in theft, although non-minority service members are not excluded unless and until they engage in theft").

[221] *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). *See also id.* at 2118 (Scalia, J., concurring) ("[U]nder our constitution there can be no such thing as a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual.").

[222] Thus, a ruling that sexual orientation is a suspect classification would confer no "special rights" upon gay people, since non-gay people also have a sexual orientation. Indeed, heightened scrutiny of such classifications would render state affirmative action

The sexual behavior of gay people as a class remains relevant to this analysis only to the extent that it informs as to the meaning the government intended for its classification. The factual error that *Steffan* and *Ben-Shalom* have in common is the equation of a gay sexual orientation with sodomy. This equation pervades the law.[223]

In reality, while the majority of non-gay people engage in sodomy,[224] many gay people do not.[225] Indeed, no sexual behavior is common to

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or other special entitlements for gay people inherently suspect. *See Adarand*, 115 S. Ct. 2097 (all remedial race-based government action is subject to strict scrutiny).

The perception that gay people will benefit disproportionately from heightened scrutiny of all classifications based upon sexual orientation reflects the reality that homosexuals have suffered and continue to suffer disproportionately under such classifications.

[223] *See* Gay Activists v. Lomenzo, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971) ("in order to be a homosexual, the prohibited act [of sodomy] must have at some time been committed, or at least presently [be] contemplated"), *rev'd sub nom.* Owles v. Lomenzo, 329 N.Y.S.2d 181 (App. Div. 1973), *aff'd sub nom.* Gay Activists Alliance v. Lomenzo, 293 N.E.2d 255 (N.Y. 1973); Head v. Newton, 596 S.W.2d 209 (Tex. Ct. App. 1980) (the term "queer" is slanderous per se because it imputes criminal sodomy); *see also* Gaylord v. Tacoma School District, 559 P.2d 1340, 1342 (Wash. 1977) ("sexual gratification with a member of one's own sex is implicit in the term homosexual"), *cert. denied*, 434 U.S. 879 (1977). *See also* Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317, 1323 (5th Cir. 1984) (reciting the testimony of Dr. Paul Cameron that "it would be a shock really, if there were not homosexual acts engaged in at or immediately after a meeting of a homosexual student organization"); Pershing, *supra* note 178, at 292-93 n.11 (1994) (pointing out the error of courts that deny child custody to a gay parent because of the illegality of sodomy in the jurisdiction: "[N]o personal relationship, regardless of the living arrangement that attends it and the sexual orientation of the parties, *necessarily* entails certain intimate acts or should be presumed to do so."); Constant A. v. Paul C.A., 496 A.2d 1, 5 (Pa. 1985) (expressing the fear that permitting a lesbian mother to travel with her children outside of Pennsylvania, which does not criminalize homosexual sodomy, "could clearly place the children in a situation with the mother and [her lesbian partner], where the adults could be subject to arrest and prosecution for deviant sexual behavior").

But see Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317, 1328 (5th Cir. 1984) ("[W]hile Texas law may prohibit certain homosexual practices [sodomy], no Texas law makes it illegal to be a homosexual."); Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976) ("While Virginia law proscribes the practice of certain forms of homosexual [sex] . . . Virginia law does not make it a crime to be a homosexual. Indeed, a statute criminalizing such status and prescribing punishment therefor would be invalid.") (citing Robinson v. California, 370 U.S. 660 (1962)).

[224] *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 98, 101-07 (1994) (a survey of a representative

all gay people. The physiology and genetics research discussed *supra* in Part II speaks directly to this issue because it evidences that sexual orientation is only a genetically influenced and physiologically based predisposition toward an erotic, affectional and romantic attraction to individuals of one's own sex.[226] Such evidence speaks to the reality of an irreducible essentialist conception of homosexuality—connoting only same-sex desire. Thus, such evidence debunks the factual premise—that homosexuality is a status defined by conduct, specifically, gay sexual conduct—that undergirds in part the decisions denying heightened scrutiny to classifications based on sexual orientation.[227]

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sample of American adults between the ages of 18 and 60, conducted by the National Opinion Research Center at the University of Chicago, found that approximately 70% of non-gay respondents had engaged in oral sex and that nearly 20% of the non-gay female respondents had engaged in oral sex during their most recent sexual experience); *see also*, PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 236 (1983) (finding that 90% of non-gay couples have engaged in fellatio and 93% in cunnilingus and that same-sex couples engaged in oral sex only slightly more frequently than opposite sex couples), *cited in* EDITORS OF THE HARVARD LAW REVIEW, *supra* note 93, at 130 n.85; S. HITE, THE HITE REPORT ON MALE SEXUALITY 1121 (1981) (approximately 96% of the male survey respondents had performed cunnilingus on a female partner); C. TARVIS & S. SADD, THE REDBOOK REPORT ON FEMALE SEXUALITY 163 (1977) (85% of female survey respondents performed fellatio on their husbands at least "occasionally" and 20.3% of the female survey respondents had engaged in anal intercourse with their husbands more than once); S.N. Seidman and R.O. Reider, *A Review of Sexual Behavior in the United States*, AM. J. PSYCHIATRY 151: 330 (1994) (anal intercourse is practiced by 10% of non-gay couples at least occasionally).

[225] *See, e.g.*, PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 236 (1983) (finding that 23% of lesbians rarely or never engage in oral sex and that mutual masturbation is the most common practice among gay male couples), *cited in* EDITORS OF THE HARVARD LAW REVIEW, *supra* note 93, at 59 n.99; Sister Marla, *Gay and Celibate at Sixty-Five*, *in* LESBIAN NUNS 133 (R. Curb & N. Manahan eds. 1985 (lesbian nun declaring her celibacy), *cited in* EDITORS OF THE HARVARD LAW REVIEW, *supra* note 93, at 59 n.100. *See also* D.E. KANOUSE ET AL., RESPONSE TO THE AIDS EPIDEMIC: A SURVEY OF HOMOSEXUAL AND BISEXUAL MEN IN LOS ANGELES COUNTY (RAND, 1991) (13% of gay and bisexual men reporting that they had no sexual partner in the previous year); ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITY 109 (1978) (finding manual stimulation to be the sexual technique most commonly employed in lesbian sex).

[226] *See* Herek, *supra* note 11.

[227] *Compare* Halley, *supra* note 10, at 517. Halley recognizes the importance of distinguishing between status and conduct for equal protection analysis of sexual orientation classifications. She argues, however, that "[t]he constructivist view that sexual orientation is mutable because of slippages and rearrangements of desire, fantasy, behavior, private identity, and public identity is possibly the strongest refutation of a

Even though a gay sexual orientation provides sound information about which sexual conduct an individual may prefer, it exists independent of that conduct. The common essential element that defines all gay people as gay people is only a same-sex desire. One can be gay even if one also is celibate or even if one practices exclusively heterosexual sex.[228]

Thus, unless a classification expressly defines gay people as persons who engage in same-sex sodomy,[229] a court should treat a classification

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definition of homosexuality that makes sodomy its essence . . . by emphasizing the variety of gay, lesbian, bisexual, and queer identities." *Id.* at 564. Although Halley concedes that most contemporary attempts at justification for anti-gay discrimination derive from the view that sexual orientation is mutable, *id.* at 518, she nevertheless argues against making pro-gay arguments premised on a biological etiology of sexual orientation because such a premise leaves unchallenged the arguments that gay sex is immoral or disrupts the civil order and, therefore, may validate the premises of anti-gay eugenics. *Id.* at 506, 521, 523. This argument is divorced from reality. Even when a gene that influences sexual orientation is isolated, it will not be possible to determine definitively based upon whether a person carries that gene if that person is gay or will grow up to be gay. *See* HAMER & COPELAND, *supra* note 35, at 218 (drawing this conclusion from studies that indicate that the identical twin of a gay man has only a roughly 50% chance of being gay). Moreover, it is unlikely, to say the least, that an expectant mother who knows that her fetus carries a "gay gene" and who does not wish to have a gay child will be induced to abort her fetus because gay litigants have advanced the "nature" argument in court or will be deterred from aborting her fetus because queer theorists have argued against recognition and use of medical reality.

Halley further argues against making equal protection arguments premised on any theory that sexual orientation is immutable (regardless of whether its original cause is biological or environmental) because people who suffer anti-gay discrimination differ with respect to their position as to the immutability of their sexual orientation, and, thus, such a premise excludes from protection a subset of those on whose behalf it is articulated. Halley, *supra* note 10, at 528, 556, 564. What is significant for equal protection purposes about the physiology and genetics research, however, is not that it supports the immutability argument (which is does), but that it suggests that sexual orientation exists apart from any sexual conduct. Even those with a same-sex desire who believe that their sexual orientation is "constructed" and mutable would share in the protection likely to derive from judicial recognition of this status/conduct distinction. Further, to the extent that those who have constructed their "gay, lesbian, bisexual, and queer identities" (or who have had those identities constructed for them) do not even possess a same-sex desire necessary to fall within the essentialist definition of "gay" set forth in my argument above, it is difficult to see how they can be classified as gay without respect to their conduct.

[228] Further, that an individual is gay does not necessarily say anything about how that individual experiences his sexuality. For example, one can be gay and at the same time reject gay sex as immoral.

[229] *See, e.g.*, N.H. REV. STAT. ANN. § 170-B:4 (1987) (New Hampshire law forbidding

based on homosexuality or sexual orientation as one independent of any conduct.[230] Indeed, courts have begun to recognize that homosexual orientation exists apart from any sexual conduct.[231]

The latest federal appeals court to address the issue of whether sexual orientation is a suspect classification, the Court of Appeals for the Sixth Circuit, however, has not only repeated the errors of *Padula* and *Ben-Shalom*, but has added a novel error to this line of cases, grounded in part in its misunderstanding of the natures of both sexual orientation and equal protection. In *Equality Foundation of Cincinnati v. Cincinnati*,[232] the Court of Appeals for the Sixth Circuit reviewed the holding of the district court that sexual orientation is a quasi-suspect classification,

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any "homosexual" from adopting children and defining "homosexual" as "any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender").

[230] *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("It is not enough to say that the category is 'behavioral.' One can make behavioral classes out of persons who go to church on Saturdays, persons who speak Spanish, or persons who walk with crutches. The question is what causes the behavior? Does it arise from the kind of a characteristic that belongs peculiarly to a group that the equal protection clause should especially protect?").

[231] *See, e.g.*, Meinhold v. U.S. Dep't of Defense, 34 F.3d 1469, 1478 (9th Cir. 1994) (referring to a navy regulation that, as applied, assumed that persons who say they are gay will engage in certain prohibited sexual conduct, the court remarked "at least a serious question is raised whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not"); Cammermeyer v. Aspin, 850 F. Supp. 910, 919, 925 (W.D. Wash. 1994) (citing to "substantial uncontroverted evidence that a distinction between homosexual orientation and homosexual conduct is well grounded in fact" and, therefore, holding that "to the extent that the Government's policy [of expelling gay service members from the military] is based on the unfounded presumption that service members with a homosexual orientation will engage in proscribed homosexual conduct, the policy is not rationally based"); Evans v. Romer, 882 P.2d 1335, 1350 (Colo. 1994) ("While it is true that such a law [prohibiting homosexual sodomy] could be passed and found constitutional under the United States' constitution, it does not follow from that fact that denying the right of an identifiable group [homosexuals] (who may or may not engage in homosexual sodomy) to participate in the political process is also constitutionally permissible."); Donovan v. Fiumara, 442 S.E.2d 572, 575, 577 (N.C. 1994) (holding that "the label of 'gay' or 'bisexual' does not carry with it an automatic reference to any particular sexual activity," and thus, rejecting plaintiff's argument that defendant's claim that plaintiffs were gay or bisexual imputes to them commission of the crime of sodomy under North Carolina law).

[232] 54 F.3d 261 (6th Cir. 1995).

which was premised in part on the district court's findings "that there is a broad distinction between sexual orientation, and sexual conduct" and that sexual orientation is an immutable and involuntary trait.[233]

The Court of Appeals for the Sixth Circuit provided dual rationales for overruling the district court. In accordance with *Ben-Shalom*, the court found that "it is virtually impossible to distinguish or separate individuals of a particular orientation which predisposes them toward a particular sexual conduct from those who actually engage in that particular type of sexual conduct."[234] Thus, in accordance with *Padula*, the court concluded: "*Bowers v. Hardwick* and its progeny command that, as a matter of law, gays, lesbians, and bisexuals cannot constitute either a 'suspect class' or a 'quasi-suspect class.'"[235]

The *Equality* court also provided a novel rationale for its holding that sexual orientation is not a classification deserving of heightened scrutiny. Accepting, for the sake of argument only, the trial court's characterization of the nature of sexual orientation,[236] the court concluded that "no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and

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[233] Equality Found. of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (citing to testimony that "sexual orientation" is a "predisposition toward erotic, sexual, affiliation or affection relationship toward one's own and/or the other gender"), *rev'd*, 54 F.3d 261 (6th Cir. 1995). The Equality Foundation of Cincinnati filed this law suit to challenge the constitutionality of a voter-enacted amendment to the Charter of the City of Cincinnati which provided in part:

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule, or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

Id. at 422.

[234] *Id.* at 267. The court cited specifically only to testimony that "most people either engage in sexual behavior which is consistent with their sexual orientation or engage in no sexual behavior at all." *Id.* Such testimony expressly contradicts the court's holding that sexual orientation is indistinguishable from sexual behavior, unless one interprets the testimony to mean that those who engage in no sexual behavior have no sexual orientation.

[235] *Id.* at 268.

[236] *Id.* at 267.

unapparent characteristics such as innate desires, drives, and thoughts. Those persons having a homosexual 'orientation' simply do not, as such, comprise an identifiable class."[237] Noting that "[m]any homosexuals successfully conceal their orientation," the court further reasoned that gay people, therefore, could only be identified through conduct "such as public displays of homosexual affection or self-proclamation of homosexual tendencies" and, thus, could only be discriminated against on the basis of such conduct.[238]

The court's truncated reasoning leaves the reader seeking an explanation for its unstated conclusion. The court does not explain why it believes that discrimination that is actualized only as a result of self-identification does not offend the constitution.[239] More precisely, in light of the settled law that a state is not free to discriminate, for

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[237] *Id.*

[238] *Id.* at 267. People who have negative attitudes toward gay people are less likely to have had personal contact with a person whom they know to be gay. Gregory M. Herek, *Assessing Heterosexuals' Attitudes Toward Lesbians and Gay Men: A Review of Empirical Research With the ATLG Scale*, *in* LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH, AND CLINICAL APPLICATIONS 206, 219 (Beverly Greene & Gregory M. Herek eds., 1994); Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey* J. SEX RES. 30:239-44 (1993) ("Heterosexual men and women who report knowing someone who is gay express generally more positive attitudes toward lesbians and gay men than do heterosexuals who lack contact experiences."); Gregory M. Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY (John C. Gonsiorek & James D. Weinrich eds., 1991) (summarizing the research). This suggests that much hostility toward gay people is based on popular stereotypes rather than first-hand information.

Thus, even if an individual gay person may decrease his chances of suffering discrimination aimed at him personally by "successfully conceal[ing his] sexual orientation," his decision to remain closeted about his sexual orientation might also tend to perpetuate discrimination against gay people in the aggregate. *See* Jonathan Rauch, *Homosexuals and Victimology: Beyond Oppression*, NEW REPUBLIC, May 10, 1993, at 18, 23 (arguing that social progress for gays will come, not through an "oppression model" of politics that seeks enactment of anti-discrimination legislation, but through "personal action" whereby openly gay people change anti-gay attitudes through honesty and moral example); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 610 (Cal. 1979) ("[O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preferences, and to associate with others in working for equal rights.").

[239] The explanation that discrimination that is actualized only upon self-identification is somehow inherently less invidious must be rejected. Taken to its logical extreme, such reasoning would justify even Nazi Germany's extermination of those Jews who identified themselves as Jewish.

example, against Americans of Irish descent merely because an Irish-American could pass as an American of English descent, the court does not explain why the "closet" exception to the Equal Protection Clause is applicable to classifications based on sexual orientation but not to classifications based on national origin.

Further, the court's conclusion that no law can be drafted to successfully discriminate against a closeted gay person is also fallacious. Leaving aside the issue of discrimination based on perceived sexual orientation and the question of whether sexual orientation is, as the Court of Appeals for the Sixth Circuit suggests, always concealable, a law that, for example, bans a gay person from adopting a child[240] undeniably discriminates against the gay person who wants to adopt a child. He must either break the law or forego adopting a child.

Moreover, such a law also discriminates profoundly against every gay person, regardless of whether or not he or she has any interest in adopting a child, because of the stigma such a law attaches to a gay sexual orientation.[241] "To separate [gay people] from others of similar . . . qualifications solely because of their [sexual orientation] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[242] Indeed, "[b]ecause the stigma [against homosexuality] is attached not simply to an obviously random characteristic, such as skin pigmentation, but to the deepest desires of the human heart, . . . it can eat away at a person's sense of his own dignity with peculiar ferocity."[243]

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[240] *See* FLA. STAT. ANN. § 63.042(2)(3)(d) (West 1985) ("No person eligible to adopt under this statute may adopt if that person is homosexual.").

[241] *See* Ellen Goodman, *Gay Policy Won't Work*, THE DALLAS MORNING NEWS, July 16, 1993, at 23A ("[T]he primary symbol of gay repression hasn't been the ghetto or a list of segregation laws. It's been the much more psychologically complex image of the closet: the dark place where cultural hate meets, and makes, self-hate . . . ."). *See also Employment Discrimination Against Gay Men*, *in* HOMOSEXUALITY IN INTERNATIONAL PERSPECTIVE 27, 28 (J. Harry & M. Das eds. 1980) (closeted gays may hurt their chances for career advancement by intentionally limiting their job related social interactions).

[242] *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954). *See also* Miller, *supra* note 179, at 1290 (arguing that "[r]elegating sexuality to the private sphere revives an element of the old 'separate but equal' doctrine—the belief that the separation of one group from the world of more general social interaction is neither unequal nor stigmatizing").

[243] Sullivan, *supra* note 9, at 24, 35 (arguing that discrimination on the basis of sexual orientation differs from that based on race in that the former "attacks the very heart of what makes a human being human: her ability to love and be loved").

V. Conclusion

Classifications, like race, that historically have been used to saddle certain people with disabilities on the basis of a characteristic that otherwise would be irrelevant to an individual's ability to contribute to society are inherently suspect as more likely to have been the product of irrational prejudice and, thus, are deserving of heightened equal protection scrutiny. Thus, in adjudicating whether a sexual orientation classification is deserving of heightened equal protection scrutiny, a court should ask only whether gay people have suffered a history of discrimination and whether their sexual orientation says anything about their ability to contribute to society.

The federal courts of appeals that have adjudicated the constitutionality of such sexual orientation classifications have avoided answering these questions, however, by holding that homosexuality, unlike race, is a classification based on conduct that falls outside the scope of protections afforded by the "liberty" of the Due Process Clause. These courts have not only failed to appreciate that the protections of the Equal Protection Clause are independent of those of the Due Process Clause, but have also profoundly erred in equating a gay sexual orientation with participation in homosexual sex. Further, in concluding, if only implicitly, that a state may constitutionally proscribe all same-sex erotic activity, these courts also have failed to recognize that the decision of a gay person to participate in such same-sex erotic activity is among "the most intimate and personal choices a person may make in a lifetime, [is] central to personal dignity and autonomy, [and, thus, is] central to the liberty protected by the Fourteenth Amendment."[244]

The physiology and genetics research discussed *supra* in Part II should inform both the equal protection and the due process analyses at issue. This research evidences that sexual orientation is only a genetically influenced and physiologically based predisposition toward an erotic, affectional and romantic attraction to individuals of one's own sex and exists independent of any physical sexual conduct. Thus, such evidence speaks to the reality of an irreducible essentialist conception of homosexuality—connoting only same-sex desire—which undermines the factual premise—that homosexuality is a status defined

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[244] *See* Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

by conduct—of the equation of a gay sexual orientation with gay sex. Further, this research evidences that sexual orientation, unlike sexual conduct, involves no volition. We cannot choose to redirect our sexual orientation. For this reason, the decision to engage in same-sex erotic activity, or to abstain from doing so, is qualitatively commensurate with such other deeply personal, and constitutionally protected, decisions relating to family, marriage, and procreation and should be commensurate in constitutional status under the Due Process Clause.

Finally, we can be confident that science will speak even louder to these issues in the near future. While geneticists to date have only detected the presence of a "gay gene," that gene and others that influence sexual orientation are almost certain to be isolated in the very near future. Then it will be possible to determine both how and when these genes influence sexual orientation. This knowledge is likely to impact not only the constitutional analyses relating to laws that repress gay people but also many of the homophobic conceptions that manifest themselves in the enactment of such laws.

Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i

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I. Introduction

The people who inhabit nonself-governing territories (such as the five U.S.-flag territories and commonwealths) have a right to self-determination and self-governance under international law.[1] In addition, the indigenous peoples in these, and other, communities have rights under international (and domestic) law that are separate and

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[1] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, Annexes, Agenda Item No. 38, at 9, U.N. Doc. A/4684 (1960). *See* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. Haw. L. Rev. 445, 503-05, 510-16 (1992) [hereinafter Van Dyke, *Evolving Legal Relationships*]. The five U.S.-flag territories and commonwealths are American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands.

distinct from the rights of colonized peoples, and these rights of indigenous peoples also include rights of self-determination and self-governance.[2]

These two separate claims to self-determination and self-governance may sometimes come into conflict, or appear to do so. The situation in Guam presents a clear example of this apparent conflict because (a) the people of Guam and (b) its indigenous inhabitants (the Chamorro people who currently make up about 45 percent of Guam's population) each have separate claims to exercise their rights to self-determination and self-government.

Similarly in Hawai'i, which was a nonself-governing territory of the United States from 1898 to 1959, the residents of the Hawaiian islands exercised their right to self-determination in 1959 when they voted to become a state,[3] and they are now a self-governing political community.

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[2] *See, e.g.*, GORDON BENNETT, ABORIGINAL RIGHTS IN INTERNATIONAL LAW (1978); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 74-103 (1990); S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 2:1 (1991); Russell Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); ; John Howard Clinebell & Jim Thompson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669 (1978); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991); Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 89-90 (1985) [hereinafter Van Dyke, *Constitutionality*].

[3] Even this statement has been challenged, because the only options offered to the people of Hawai'i were (1) to become a state or (2) to remain a territory. Some have argued that the resolutions of the United Nations General Assembly cited *supra* in note 1 require that nonself-governing peoples be given the additional options of complete independence and free associated state status.

Another complaint that has been lodged regarding the 1959 vote in Hawai'i is that the immigration to Hawai'i of large numbers of non-Hawaiians denied the people of Hawaiian ancestry of their unique right to exercise self-determination in their native islands. Some General Assembly resolutions have criticized colonial powers who have allowed migration into a colony to overwhelm the indigenous population. Such migration certainly occurred in Hawai'i; in fact, it began even before the United States annexed the islands.

Although no clear principles have emerged regarding whether durational residency requirements can be imposed upon those who vote in a self-determination plebiscite, such requirements would appear to be appropriate to ensure that those voting are committed to being members of the political community seeking self-determination. The Matignon Accords, which have established a self-determination process for New Caledonia, call for a vote in 1998 in which only those persons who were residents of

But the Native Hawaiian population has never had an opportunity to exercise its separate right to self-determination and to reestablish itself as a self-governing autonomous native nation.

This article presents the governing international law principles regarding self-determination of nonself-governing peoples and compares these principles to the principles governing the rights of indigenous peoples. Examples from the laws of the United States and other nations with indigenous populations are also discussed briefly.

II. BACKGROUND: GUAM

Because of Guam's strategic importance, the unincorporated territory of Guam is "one of the oldest colonial dependencies in the world."[4] The Chamorro struggle to reclaim indigenous political and cultural control of the island of Guam has had a lengthy history. The colonization of Guam and its people has included 230 years of Spanish subjugation, three years of Japanese World War II occupation, and nearly a century of U.S. dominance. Since World War II, the island has housed a major U.S. munitions depot. The United States claims

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New Caledonia in 1988 will be allowed to participate.

For a perspective on the right to self-determination in Hawai'i different from the views presented in this article, see Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (1995); *see also* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 334-36 (1994) [hereinafter Anaya, *Native Hawaiian People*].

[4] Robert F. Rogers, *Guam's Quest for Political Identity*, 12 PAC. STUD. 49-70 (1988) [hereinafter Rogers, *Guam's Quest*]; Laura Souder-Jaffery, *A Not So Perfect Union: Federal-Territorial Relations Between the United States and Guam*, *in* CHAMORRO SELF-DETERMINATION 7-32 (L. Souder-Jaffery and L. & R.A. Underwood eds., 1987). *See generally*, Peter Ruffato, *U.S. Action in Micronesia as a Norm of Customary International Law: The Effectuation of the Right to Self-Determination for Guam and Other Non-Self-Governing Territories*, 2 PACIFIC RIM L. & POL. J. 377 (1993).

The present article does not contain a general background on Hawai'i's unresolved issues because this topic has been addressed frequently in earlier writings. *See, e.g.*, NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody K. MacKenzie ed., 1991); Anaya, *Native Hawaiian People*, *supra* note 3; Karen Blondin, *A Case for Reparations for Native Hawaiians*, 16 Haw. B.J. 13 (Winter, 1981); Noelle M. Kahanu and Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427 (1995); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 2:77 (1991); Van Dyke, *Constitutionality*, *supra* note 2.

that a continued U.S. military presence on Guam maintains the nation's status as a Pacific power, power that the United States considers crucial to its self-proclaimed role of maintaining "peace and stability" in Southeast Asia.[5]

The face of Guam and its people remain permanently altered from hundreds of years of foreign intrusion. The United States military currently claims a substantial percentage of Guam's Chamorro homelands. And Chamorros, although still the largest single group, now constitute (in part because of U.S. immigration practices) less than half of the current island population.[6]

Although some historians have claimed that the Chamorros readily accepted early Spanish presence and religion, in fact, the Chamorros engaged in nearly 30 years of indigenous rebellions, 17 of which are commonly labeled the Spanish-Chamorro Wars.[7] The United States gained control over Guam in the 1898 Treaty of Paris wherein Spain ceded the island as a result of the Spanish-American War. The United States has maintained this "ownership" of Guam except for the short-lived Japanese occupation of the island during World War II.

Although the United States has been a strong advocate of decolonization in other parts of the world, progress towards self-government and self-determination for its territory of Guam has lagged. Chamorros petitioned for some fifty years before attaining U.S. citizenship and a Bill of Rights, which were finally granted to them in the Organic Act of 1950. Seventy years of U.S. military rule and president-appointed governors preceded the decision of Congress in 1968 finally to permit the people of Guam to elect their first full-term governor. An additional two years passed before the United States allowed Guam's citizens limited Congressional representation. Today, the island remains as a U.S. territory, and certain U.S. constitutional provisions still do not apply to Guam.[8]

Frustrated with the slow process of amending the Organic Act on a piecemeal basis, which was exacerbated by the unwillingness of Congress to deal with the question of Guam's relationship to the United States, islanders created the Guam Political Status Commission in 1973. What began as an effort to examine and improve Guam's

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[5] *Report: U.S. to Remain Pacific Power*, PAC. DAILY NEWS, March 20, 1995, at 10.

[6] Rogers, *Guam's Quest*, *supra* note 4, at 273.

[7] Francis X. Hezel & Marjorie C. Driver, *From Conquest to Colonization: Spain in the Mariana Islands*, 23:2 J. PAC. HIST. 137 (1988).

[8] *See* Rogers, *Guam's Quest*, *supra* note 4.

relationship with the United States evolved later into "external" and "internal" self-determination movements.

The first "external" goal is to reclaim Guam's self-governing authority from the United States, which currently possesses plenary authority over the island and its people. The Guam Legislature later created the Commission on Self-Determination in May 1980, with the Governor as chairperson. This Commission has been tasked with providing position papers on the various status options open to Guam as well as with drafting a Federal Territorial Relations Act, which came to be called the Guam Commonwealth Act.[9] It was also empowered to hold plebiscites on the various status options available to Guam. In a 1982 plebescite, Guam residents selected Commonwealth over Statehood as the status option of choice by 73 percent.[10]

The second "internal" goal evolved during these years of political activity as controversial issues served to guide and refine indigenous causes. A small group of Chamorro activists petitioned the United Nations in the 1970s, advocating their right as Chamorros of Guam to indigenous self-determination. These activists saw Guam's quest for commonwealth status as a means to realize Chamorro rights and establish a less oppressive relationship for Guam with the United States. These efforts caused the Commonwealth Act to be revised with "a strong Chamorro imprint."[11] The proposed Commonwealth Act states in Article I, Section 103(a):

> The [U.S.] Congress further recognizes that Commonwealth does not limit the pursuit by the Chamorro people of any ultimate status which they may seek in their progress toward fulfillment of their inherent right of self-determination as expressed in Article 73 of the Charter of the United Nations and in United Nations Resolution 1514.[12]

Although many people of Guam interpret self-determination as an indigenous-only redress for historic wrongs,[13] the United States government through its Task Force[14] has suggested that the Chamorro-only self-determination movement is unconstitutional. This perspective

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[9] Guam Commonwealth Act, H.R. 98, 101st Cong., 1st Sess. (1989).

[10] Rogers, *Guam's Quest*, *supra* note 4, at 8.

[11] *Id.* at 59; R.F. ROGERS, GUAM'S COMMONWEALTH EFFORT: 1987-1988 (1988).

[12] Guam Commonwealth Act, *supra* note 9, art. I, § 103(a).

[13] *See* CHAMORRO SELF-DETERMINATION (L. Souder-Jaffery and L. & R.A. Underwood eds., 1987).

[14] FEDERAL TASK FORCE REPORT ON GUAM'S COMMONWEALTH ACT, *reprinted in* PAC. SUNDAY NEWS, Aug. 6, 1989, at 2D.

is insensitive to the rights of indigenous peoples under U.S. law and ignores the separate rights that they have been able to establish.[15]

The sluggish U.S. pattern of addressing the concerns of Guam's people continues. Eight years have passed since the Commonwealth Act was first introduced into the U.S. House of Representatives as a bill in 1988. This Act was again introduced to the House for the fifth time on February 24, 1995, this time as H.R. 1056. Guam's current Congressional Delegate, Robert A. Underwood, stated that the Guam Commonwealth Act was chosen as his first bill to the 104th U.S. Congress "because the resolution of political status must be the first priority of the federal government in its relations with Guam. And the desire to take our place as a new Commonwealth is the first and foremost goal of the representatives of the people of Guam."[16]

Ironically, Chamorros living in the Northern Marianas (which include Saipan, Rota, and Tinian) who had been under U.S. Trust Territory supervision and control for thirty years following the conclusion of World War II in the Pacific, have successfully negotiated their self-determination in a covenant with the United States, and are now the "Commonwealth of the Northern Mariana Islands."[17] Such action is particularly significant to Guam because the United States in a 1977 (formerly confidential) document adopted the position that the United States should negotiate a commonwealth agreement with Guam that would be "no less favorable than that concluded with the Northern Marianas."[18] Chamorros of the Northern Mariana Islands have certain

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[15] Because preferences for native peoples have been viewed as "political" rather than "racial" in nature, they do not trigger heightened scrutiny and are constitutional if they have a rational basis. Morton v. Mancari, 417 U.S. 535 (1974); *see generally* Van Dyke, *Constitutionality*, *supra* note 2, at 73-80. Preferences for "Indians" have been interpreted to extend to other native groups. *See, e.g.*, Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982); Naliielua v. Hawaii, 795 F. Supp. 1009 (D. Haw. 1990), *aff'd*, 940 F.2d 1535 (9th Cir. 1991) (unpublished opinion).

[16] Delegate Robert A. Underwood, Speech to the Speaker of the U.S. House of Representatives (Feb. 24, 1995) (manuscript on file at the office of Guam Delegate Robert A. Underwood).

[17] Hope A. Cristobel, *The Organization of People for Indigenous Rights: A Commitment Towards Self-Determination*, *in* CHAMORRO SELF-DETERMINATION 103-24 (L. Souder-Jaffery and L. & R.A. Underwood eds., 1987); Van Dyke, *Evolving Legal Relationships*, *supra* note 1, at 480-87.

[18] Richard H.J. Wyttenbach-Santos, *Guam's Past, Present, and Future: Time Is on Who's Side?*, *in* THE 14TH ISLAND CONFERENCE ON PUBLIC ADMINISTRATION: LIBERATION

political authority over their islands and are provided many benefits—such as control over immigration and freedom from certain federal laws—that are currently unavailable to the people of Guam.[19]

Despite the United States' "confidential" promise to Guam, despite the nearly 100 years of relations between Guam and the United States whereby Guam has provided strategic U.S. military benefits, and despite over 35 years of recognition of Guam by the United Nations as a nonself-governing territory with rights to self-determination, Guam's quest for political self-determination and indigenous self-determination remains unresolved. Guam's public and political atmosphere continue to evolve. Indigenous rights and Guam's drive for increased political autonomy have been common themes in the island's daily newspaper. Activists known for their strong indigenous rights stances were elected as senators in Guam's 1994 elections. As recently as March 1995, Guam Congressional Delegate Robert A. Underwood stated that it appeared to be time for Guam to change tactics in its quest for political and indigenous self-determination.

III. The International Law Principles Governing the Rights of Colonized Peoples to Self-determination and Self-governance

The U.N. General Assembly adopted two resolutions in 1960[20] that recognize, in no uncertain terms, the right of all nonself-governing peoples to be free of "alien subjugation, domination and exploitation" and to exercise "the right to self-determination."[21] This right to self-determination includes the right to "freely determine their political status and freely pursue their economic, social and cultural development."[22] The second of these resolutions states (a) that "self-determination" must be accomplished through "free-expression," *i.e.*, a "free

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'44 Guam 50 Years Later 153-71 (J. Guthertz & D. Singh eds., 1994) (citing Memorandum from Fred M. Zeder II, Director of Territorial Affairs, Dep't of Interior, to Chairman, Special Comm. on Guam, Under Secretaries Committee, Jan. 5, 1977, declassified Dec. 31, 1985).

[19] Rogers, *Guam's Quest*, *supra* note 4; Van Dyke, *Evolving Legal Relationships*, *supra* note 1, at 505-10.

[20] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 1; G.A. Res. 1541, *supra* note 1.

[21] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 1.

[22] *Id.* at ¶¶ 1, 2.

and voluntary choice by the people of the territory concerned,"[23] and (b) that "self-government" must result in one of three possible political statuses: independence, free association, or integration with the metropolitan country.[24]

Both the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[25] and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations[26] state that the right to self-determination is not necessarily a right to secede and that countries cannot be dismembered if they are allowing all their citizens to participate equally in governmental affairs. The key is whether the country allows the "people" seeking self-determination to participate in the political life of the nation in a nondiscriminatory basis.[27] Because the people of Guam do not have voting rights in the U.S. Congress and do not vote for the U.S. President, they do not meet this criterion and thus have the right to self-determination.[28]

It is sometimes argued that because the people of the Northern Marianas voted in 1975 to approve a covenant with the United States,[29]

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[23] G.A. Res. 1541, *supra* note 1.

[24] *Id.*; *see generally* Peter Bergsman, Note, *The Marianas, the United States, and the United Nations: The Uncertain Status of the New American Commonwealth*, 6 CAL. W. INT'L L. J. 382, 394, 400-02 (1976).

[25] Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 1, ¶ 6.

[26] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. 1/8028 (1970).

[27] *Id.* The key language is found in the last paragraph of the section entitled "The principle of equal rights and self-determination of peoples":

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.

Id., *reprinted in* 9 I.L.M. 1292 (1970).

[28] Van Dyke, *Evolving Legal Relationships*, *supra* note 1, at 510.

[29] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (set out under 48 U.S.C. § 1681 note (1987)), *reprinted in* 15 I.L.M. 651 (1976) [hereinafter CNMI Covenant].

and because the people of the U.S. Virgin Islands[30] and Puerto Rico[31] have expressed their status preferences in referenda, that they have engaged in definitive acts of self-determination that foreclose their right to do so again at a later time.[32] The opposing and more persuasive perspective is that if the choice adopted is not one of the three options endorsed by the U.N. General Assembly in Resolution 1541,[33] the people of these islands remain in a nonself-governing status and continue to have a right to self-determination so that they can become self-governing.[34]

Hawai'i's situation is different. Hawai'i has been a state in the United States since 1959, and the people of Hawai'i taken as whole are now self-governing. All of Hawai'i's many ethnic groups participate actively in its political life,[35] the people of Hawai'i are able to enact their own laws, and to participate in the enactment of U.S. laws. The Native Hawaiian people, on the other hand, have been deprived of their sovereignty[36] and are entitled to reestablish an autonomous sovereign nation as indigenous people.[37]

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[30] The people of the Virgin Islands voted in a status referendum in 1993 and approved continuing the current relationship.

[31] The people of Puerto Rico approved the compact that established the commonwealth relationship in the 1950s, *see* Van Dyke, *Evolving Legal Relationships*, *supra* note 1, at 472-80, and reaffirmed that decision by a 48% to 46% vote (over the option of statehood) in November 1993.

[32] Interview with Hurst Hannum, Professor, Fletcher School of Law and Diplomacy, Tufts University, in Medford, Mass. (Aug. 1992). The United States made this argument with regard to the Commonwealth of the Northern Marianas in a legal brief filed in March 1990 in the case of United States *ex rel* Richards v. Sablan, No. 89-16404 (9th Cir.), which is discussed in Van Dyke, *Evolving Legal Relationships*, *supra* note 1, at 485.

[33] G.A. Res. 1541, *supra* note 1.

[34] *See* Van Dyke, *Evolving Legal Relationships*, *supra* note 1, at 504, stating:

> Even if it could be established that the residents of the Marianas knowingly sought this subservient status, it would not comply with the requirements of international law, just as a contract in which a person agrees to become a slave of another would not be enforced in a domestic court.

Id.

[35] For example, a Native Hawaiian, John Waihee, was Governor of the State of Hawaii from 1987 to 1995.

[36] This loss was recognized explicitly by the U.S. Congress in the Apology Resolution, Pub. L. No. 103-150, 170 Stat. 1510 (1993), and by the Hawaii State Legislature in Act 359, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws 1009. This topic is analyzed in detail in Kahanu & Van Dyke, *supra* note 4.

[37] Some Native Hawaiians seek total independence from the United States as their ultimate goal. The "right of secession" under international law is a complicated one.

For the people of Guam, their right to self-determination is clear, but they have been denied the opportunity to exercise this process. The people of Guam have indicated support for a commonwealth-type status, defined in their own specific way,[38] but the United States has thus far been unresponsive. The indigenous people of Guam—the Chamorros—also have a separate right to self-determination as the next section explains.

IV. The International Law Principles Governing the Rights of Indigenous Peoples to Self-determination and Self-governance

A. Defining "Indigenous People"

Indigenous peoples are found in many countries and have diverse cultures and historical situations,[39] making it difficult and inappropriate to adopt a rigid or uniform approach to dealing with all such people.

Although the formula quoted from the 1970 Friendly Relations Declaration in footnote 27 *supra* remains the governing international law standard—forbidding secession of those "peoples" that have full rights of political participation—it must also be noted that secessions or separations have occurred in recent years and that the international community generally accepts such occurrences when they happen. Among the recent examples are the separation of Czechoslovakia into the Czech Republic and Slovakia, the separation of the Soviet Union into 15 new states, the separation of Yugoslavia into (at least) four new states, the secession of Eritria from Ethiopia, the secession of Bangladesh from Pakistan, and, earlier, the separation of Panama from Colombia. All of the new states created by these actions have been accepted by the world community. And Quebec continues to wrestle with whether it should secede from Canada.

We have also seen examples of mergers of states in recent years, including the merger of West and East Germany, the merger of North and South Yemen, the creation of the European Union, and the merger of the Northern Mariana Islands with the United States.

From this amalgam of state-practices, it appears that no clear norm has emerged, and that each claim to the right of secession must be evaluated on its own facts. *See generally* Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 Case W. Res. J. Int'l L. 257 (1981).

[38] Van Dyke, *Evolving Legal Relationships, supra* note 1, at 488-91.

[39] *See* Independent Commission on International Humanitarian Issues, Indigenous Peoples: A Global Quest for Justice 11 (1987) [hereinafter A Global Quest].

The number of indigenous people varies greatly depending on the definition one adopts. It is frequently estimated that there are 200 million indigenous people in the world totalling approximately four percent of the global population. They live in all continents and in rich and poor countries. They cut across ideological and regional frontiers.

The situation of indigenous communities that have long maintained contact with the dominant society but are nevertheless concerned with the right of self-determination cannot easily be compared with that of threatened forest-dwelling groups in remote areas of the world who are only now coming into contact with nonindigenous people.[40]

In one important sense, however, most indigenous peoples throughout the world do share a common experience. Most have suffered the imposition of, and abuse from, dominant societies, which in dealing with them have generally shown scant respect for their traditional cultures, lifestyles, land relationships, and social systems. In many instances, this imposition by dominant societies continues to occur today.[41]

Although agreement has not yet been reached on a universal definition of indigenous peoples, certain elements of such a definition appear to be acceptable to most people:[42]

1. Preexistence—the population is descended from persons who were in an area prior to the arrival of another population.
2. Nondominance—their cultural style does not dominate.
3. Cultural difference—their culture is different from the dominant culture.
4. Self-identification as indigenous—the people identify themselves and the group as indigenous.[43]

A composite definition incorporating these elements has been presented to the United Nations Commission on Human Rights by Jose Martinez Cobo, the Special Rapporteur, on the "Problem of Discrimination Against Indigenous Populations" for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and the United Nations Working Group on Indigenous Populations (WGIP):[44]

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[40] *See* Jose Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.1983/21/Add.1, at 2 [hereinafter *Martinez Cobo Study*]. This study was conducted by Jose Martinez Cobo between 1971 and 1982 and was published in 1982 and 1983.

[41] *See* BENNETT, *supra* note 2, at 1-3. *See also Martinez Cobo Study*, *supra* note 40, at 2.

[42] *See* A GLOBAL QUEST, *supra* note 39, at 5-8.

[43] *See* U.N. Doc. E/CN.4/Sub.2/1986/7. Even these elements may not always apply; the native Fijians do, for instance, dominate in many senses over the Fiji Indians and other ethnic groups in Fiji, even though they are a numerical minority.

[44] The Commission on Human Rights is an intergovernmental body based on

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.[45]

Under this definition, the Chamorro people of Guam[46] would be classified as indigenous. By contrast, the residents of Puerto Rico and the Virgin Islands would not be viewed as indigenous peoples, because they are not linked with the "pre-invasion and pre-colonial societies that developed in their territories" even though they have experienced

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Article 68 of the U.N. Charter, which serves as the central policy organ in the field of human rights. Much of the Commission's activity is initiated by working groups or other arrangements. The Commission annually establishes a working group to consider situations of alleged gross violations of human rights referred to it by its Sub-Commission under the Resolution 1503 procedure.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities was established by the Commission on Human Rights pursuant to Resolution 9 (II) of the Economic and Social Council with powers inherently deriving from the U.N. Charter and is composed of people serving in their individual capacity. The Sub-Commission has established relevant working groups on communications, slavery, and indigenous populations with powers in the nature of investigation and recommendation.

The creation of the Working Group on Indigenous Populations (WGIP) was proposed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its Resolution 2 (XXXIV) of September 8, 1981. This Resolution was endorsed by the Commission on Human Rights in its Resolution 1982/19, March 10, 1982, and authorized by ECOSOC in its Resolution 1982/34 of May 7, 1982.

The WGIP was established in 1982 and has convened periodically to evaluate existing worldwide situations concerning indigenous populations. Since 1985, the WGIP has met for the additional purpose of formulating an indigenous rights declaration which will ultimately lead to a formal General Assembly declaration. *See infra* notes 62-71 and accompanying text.

[45] *See Working Group on Indigenous Populations Report*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, ¶ 379.

[46] Section 103 of the Guam Draft Commonwealth Act, *supra* note 9, defines "the indigenous Chamorro people of Guam" as those who are "born on Guam before August 1, 1950, and their descendants." This definition is thus not literally a racial classification, but rather a political classification, referring to those individuals who historically are linked to the pre-colonial Chamorro islanders and who lived on Guam during the period of total U.S. control, and their descendants.

domination and do have distinct cultures which they wish to protect and preserve.

B. The Rights of Indigenous Peoples

Indigenous peoples are entitled to all the fundamental freedoms and human rights that are recognized and embodied in existing international instruments, which apply universally to all persons. These existing international human rights instruments do not, however, adequately respond to and protect the specific concerns of indigenous peoples.[47]

In 1971, the United Nations' Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Jose Martinez Cobo as Special Rapporteur to study "discrimination against indigenous populations." The Martinez Cobo Study, with its conclusions and recommendations, was released in several stages until its completion in 1983, and it is now considered to be an accepted authority on the problems of indigenous populations.[48]

The conclusion of this study is that present international instruments are not "wholly adequate for the recognition and promotion of the specific rights of indigenous populations as such within the overall societies of the countries in which they now live."[49] The study also concluded that existing human rights standards are insufficient and inadequate because they are not fully applied to indigenous peoples.[50] This report gives particular attention to the right of indigenous peoples to "self-determination":

> Self-determination, in its many forms, must be recognized as a basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future . . . . [S]elf-determination constitutes the exercise of free choice by indigenous peoples, who must to a large extent create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may

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[47] *See Working Group on Indigenous Populations Report*, U.N. Doc. E/CN.4/Sub.2/1985/22, at 14, ¶¶ 58, 60, 61.

[48] Interview with Erica Irene A. Daes, Professor of Law, University of Florence, Italy, in Honolulu, Hawai'i (July 1987). Professor Daes has been the Chairperson of the United Nations Working Group on Indigenous Populations and the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities.

[49] *See Martinez Cobo Study*, *supra* note 40, Add.8, at 1.

[50] *Id.*

> live and to set themselves up as sovereign entities. The right may in fact be expressed in various forms of autonomy within the State.[51]

Regarding the definition of the concept "indigenous," the study concludes that the indigenous people themselves must be consulted about criteria (such as ancestry, culture, and language) that they consider valid, because it is their right to determine who is indigenous and who is not.[52] The study also identified special areas for urgent action, such as health, housing, education, language, culture, social and legal institutions, employment, land, political rights, religious rights and practices, equality in administration of justice, and legal assistance.[53]

C. ILO Convention No. 169

In 1989, the International Labor Organization (ILO) adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169),[54] which has already been ratified by several countries. This treaty does not explicitly use the term "self-determination," but it includes many provisions that recognize the separate and distinct rights of indigenous peoples. Among these provisions are the following:

** Article 6(a) requires governments to consult with indigenous peoples "whenever consideration is being given to legislative or administrative measures which may affect them directly."[55]

** Article 6(c) requires governments to "establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose."[56]

** Article 7(1) recognizes the rights of indigenous peoples to decide their own destinies:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and

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[51] *Id.* at 74, ¶ 581.

[52] *Id.* at 48-49, ¶¶ 362-82.

[53] *Id.* at 54-78.

[54] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention 169, June 27, 1989, 28 I.L.M. 1382 (1989).

[55] *Id.* art. 6(a).

[56] *Id.* art. 6(c).

> to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.[57]

** Article 8(2) recognizes the right of indigenous peoples "to retain their own customs and institutions," so long as they are not incompatible with "internationally recognised human rights."[58]

** Articles 13-19 cover the rights of indigenous peoples to land and resources. Article 14(1) recognizes the "rights of ownership and possession" of indigenous peoples "over the lands which they traditionally occupy,"[59] and Article 14(2) requires governments "to guarantee effective protection of their rights of ownership and possession."[60] Similarly, Article 15(1) requires governments to safeguard the rights of indigenous peoples "to the natural resources pertaining to their lands."[61]

D. The Declaration on the Rights of Indigenous Peoples

While the International Labor Organization was sponsoring the drafting of this new treaty, the U.N. Economic and Social Council decided in 1982 to establish a Working Group on Indigenous Populations, which devoted its annual summer meetings to the drafting of a document for adoption by the General Assembly, which has been given the working title of "Draft Declaration on the Rights of Indigenous Peoples." The current draft of this document provides more detail than the ILO Convention regarding the rights to self-determination and autonomy of indigenous peoples. The working draft that is being considered[62] contains the following rights:

** Article 3 recognizes that "[i]ndigenous peoples have the right of self-determination. By virtue of that right they freely determine their

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[57] *Id.* art. 7(1).

[58] *Id.* art. 8(2).

[59] *Id.* art. 14(1).

[60] *Id.* art. 14(2).

[61] *Id.* art. 15(1).

[62] Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex I, at 50 (1993).

political status and freely pursue their economic, social and cultural development."[63]

** "Indigenous peoples have the collective right to live in freedom, peace and security *as distinct peoples* and to full guarantees against genocide or any other acts of violence . . . ."[64] Indigenous peoples have the right to be protected against "any form of assimilation or integration by any other cultures . . . ."[65]

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[63] *Id.* art. 3. The U.S. observer to the 1993 meeting, Kathryn Skipper, sought to make clear that this right does not necessarily include the right to secede from a nation by saying that self-determination can be achieved "through arrangements other than independence. The United States could not accept this inclusion of self-determination as applying specifically to indigenous groups if it implies or permits full independence generally recognized under international law." *U.S. Concerns About the Draft Declaration*, KE KIA'I, Sept. 1, 1993, at 1 (a publication of the Native Hawaiian Advisory Council, Honolulu, Hawai'i).

Other governments also voiced concern with the phrasing and intent of the provision recognizing the right of indigenous peoples to self-determination. During the 1992 session, for instance, Canada's representative stated that Canada could support the inclusion of the right to self-determination

> provided that it be understood that the right of self-determination is exercised a) within the framework of existing nation-states, and b) in a manner which recognized an interrelationship between the jurisdiction of the existing State and that of indigenous communities, where the parameters of jurisdiction were mutually agreed upon.

U.N. Doc. E/CN.4/Sub.2/1992/33, ¶¶ 64-65 (1992). The delegate stated that governments wanted to avoid wording in the draft declaration that might be misconstrued "as protecting the right of indigenous peoples to independence as a separate State." *Id.*

Australia's representative supported the inclusion of a reference to the right to self-determination, because the recognition of such a right would assist indigenous peoples "to overcome the barriers to full democratic participation in the political process by which they are governed," and also noting that the notion of sovereignty had evolved in such a way that the world "had witnessed the emergence of the view that there might be ways in which the right of self-determination could be legitimately exercised short of the choice of separate status as an independent sovereign state." *Id.* ¶ 66.

Erica Daes, Chairperson of the Working Group on Indigenous Populations, summarized the discussions by saying that the term "self-determination" was used in the Draft Declaration "in its internal character, that is short of any implication which might encourage the formation of independent states." *Id.* ¶ 67.

See generally Don Betz, *The Past is Prologue: Indigenous Peoples Take International Center Stage in 1993* (presented to the Sovereignty Symposium VI, Tulsa, Oklahoma, June 7-10, 1993).

[64] Draft Declaration on the Rights of Indigenous Peoples, *supra* note 62, art. 6 (emphasis added).

[65] *Id.* art. 7(d) .

** Indigenous peoples have "the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such."[66]

** Indigenous peoples have "the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning."[67]

** Article 19 provides that indigenous peoples have the right to participate in all levels of decision-making on matters affecting them through representatives they choose in accordance with their own procedures, "as well as to maintain and develop their own indigenous decision-making institutions."[68]

** Indigenous peoples have the right to develop and maintain their own health, housing, and other economic and social programs through their own institutions.[69]

** Indigenous peoples have the right to recognition of their distinctive spiritual and material relationship with their lands and territories and with the total environment associated with their lands and territories. They also have the right to control, own, and manage their lands and territories.[70]

** Indigenous peoples have the right to autonomy in internal and local matters such as education, information, media, culture, religion, health, housing, employment, social welfare, land and resource management, and internal taxation.[71]

E. Domestic Initiatives

While these international developments have been underway, several nations have taken dramatic steps to recognize and protect the rights of indigenous peoples. In northern Canada, a land area the size of Texas has been recognized as being under the autonomous governance of the indigenous peoples of that region. In Australia, the *Mabo* court

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[66] *Id.* art. 8.
[67] *Id.* art. 15.
[68] *Id.* art. 19.
[69] *Id.* art. 23.
[70] *Id.* art. 25-26.
[71] *Id.* art. 31. .

decision[72] has recognized the preexisting rights of the aboriginal peoples and has required the government to come up with a comprehensive approach toward the protection of these rights. In New Zealand, the Waitangi Tribunal has been adjudicating cases and returning lands and resources to the Maori people. In the United States, several tribal settlements returned lands to Native Americans. And on November 23, 1993, the United States Congress formally apologized to the Native Hawaiian people for the "participation of agents and citizens of the United States" in the "overthrow of the Kingdom of Hawai'i on January 17, 1893" and the resulting "deprivation of the rights of Native Hawaiians to self-determination."[73]

V. How Do These Principles Apply?

A. Guam

The Guam Draft Commonwealth Act,[74] if approved by Congress, would be an act of self-determination by the people of Guam, and Section 102(b) of that Act recognizes that all qualified residents of Guam have the right to participate in any referendum to be held on Guam's status.[75] At the same time, Section 102(a) of this Draft Act contains the following provision recognizing the separate right to self-determination of the Chamorro people:

> The Congress recognizes the inalienable right of self-determination of the indigenous Chamorro people of Guam, defined as all those born on Guam before August 1, 1950, and their descendants. The exercise of such right of self-determination shall be provided for in a Constitution of the Commonwealth of Guam.[76]

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[72] Mabo v. Queensland, 66 Austl. L.J. Rep. 408-99 (1992); *see* ESSAYS ON THE MABO DECISION (Law Book Company ed., 1993); Anthony Bergin, *A Rising Tide of Aboriginal Sea Claims: Implications of the Mabo Case in Australia*, 8 INT'L J. MARINE & COASTAL L. 359 (1993).

[73] Joint Resolution, 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 170 Stat. 1510 (1993).

[74] Guam Commonwealth Act, *supra* note 9. The "commonwealth" created by this Draft Act would be one in which the United States authority could be exercised only with the "mutual consent" of the Guam government. *Id.* §§ 103, 202. The relationship thus created is closer to one of free association than the commonwealth relationships now found in Puerto Rico and the Northern Marianas. *See* Van Dyke, *Evolving Legal Relationships*, *supra* note 1, at 488-91.

[75] Guam Commonwealth Act, *supra* note 9, § 102(b).

[76] *Id.* § 102(a).

Section 102(f) authorizes the establishment of a "Chamorro Land Trust," composed of lands now held by the federal government, which is designed to be for the benefit of "the indigenous Chamorro people of Guam."[77]

This Draft Act thus recognizes the separate claims of the people of Guam and the Chamorro people. These claims need not be in conflict, although the Chamorro people could seek an autonomous sovereign status that would give them authority over their own resources and activities. Whether they would be free from regulation by the government of Guam would depend on the nature of their autonomy as recognized by the United States Congress.

B. Hawai'i

In 1959, Hawai'i became the 50th state in the United States and is now fully integrated into the political life of the country. The indigenous people of Hawaiian ancestry nonetheless have a right to self-determination that remains unfulfilled. They are by logic and by law entitled to the same range of rights that other Native Americans have, including the right to an autonomous sovereign status.[78] Hawaiian groups are now actively involved in creating an autonomous sovereign Hawaiian nation and are developing strategies to receive more formal federal recognition. What form this sovereign nation will take will depend on the will and wishes of the Hawaiian people.[79]

C. Elsewhere

The contrast between the two types of self-determination is not seen as clearly in the other U.S. territories and commonwealths, but the distinction may still become important. All five of these island communities—Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, Puerto Rico, and the U.S. Virgin Islands—are nonself-governing and the peoples of all these islands retain their right to self-determination.[80]

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[77] *Id.* § 102(f).

[78] *See generally* Van Dyke, *Constitutionality*, *supra* note 2.

[79] The Hawaiian Sovereignty Elections Council is described in Kahanu & Van Dyke, *supra* note 4, at 451-53.

[80] See Van Dyke, *Evolving Legal Relationships*, *supra* note 1.

Section 805 of the Covenant establishing the Commonwealth of the Northern Marianas[81] states that only "persons of Northern Marianas descent" can acquire permanent and long-term interests in land. This recognition of the separate rights of the indigenous people of the Northern Marianas was accepted as legitimate by the U.S. Court of Appeals for the Ninth Circuit[82] in order to protect the native culture.[83]

The population of American Samoa is almost entirely Samoan, partly because the American Samoan government is entitled to control and limit immigration to the island[84] and partly because land ownership is tightly controlled by Samoan custom. If the population were ever to become more mixed, the Samoan people would be entitled to retain control over the land and to exercise their separate right to self-determination.

The peoples of the U.S. Virgin Islands and Puerto Rico do not have the status of indigenous peoples, but they nonetheless have the right to "enjoy their own culture, to profess and practice their own religion, [and] to use their own language," just as any minority group has under Article 27 of the International Covenant on Civil and Political Rights.[85] Although the meaning of the right to "enjoy" one's own culture has yet to be fleshed out, it must include the right to protect one's culture from being submerged by the dominant society, and to that extent may require some separate rights and some level of autonomy.

VI. Conclusion

The right to self-determination is a powerful right that reflects the yearning of all peoples for recognition of their unique heritage and values. This right manifests itself in two distinct ways depending upon whether it is asserted by (a) a nonself-governing people or (b) an indigenous people. All peoples have the right to govern themselves, and all indigenous peoples also have this right. Nonself-governing

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[81] CNMI Covenant, *supra* note 29.

[82] Wabol v. Villacrusis, 898 F.2d 1381 (9th Cir. 1990), *as amended*, 908 F.2d 411, *as amended*, 958 F.2d 1450, *cert. denied sub nom.* Philippine Goods, Inc. v. Wabol, 113 S. Ct. 675 (1992).

[83] *Id.* at 1392.

[84] *See* Arnold H. Leibowitz, Defining Status 447-51 (1989).

[85] International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 (1967).

peoples have the right to become self-governing either by (i) becoming independent, (ii) becoming integrated with their metropolitan power, or (iii) becoming a freely-associated state with the metropolitan power. Although indigenous peoples do not necessarily have the right to secede and become fully independent, they do have the right to enough autonomy and sovereignty to ensure that they are able to preserve themselves as a distinct cultural community and to make the fundamentally important decisions for themselves. By vigorously protecting this right, we can protect the inherent dignity of each group and ensure that the diversity of the world's populations will continue to enrich the lives of all peoples.

Hawai'i Appellate Standards of Review Revisited

I. INTRODUCTION

An important and often overlooked part of the appellate process is the identification and application of the appropriate standards of review.[1] Appellate standards of review define the boundaries in which an appellate court reviews a case on appeal.[2] They measure the amount of deference that an appellate court must give to the decisions of lower tribunals.[3] "Metaphorically, [standards of review] set the height of the hurdles over which . . . appellant[s] must leap in order to prevail on appeal."[4]

The importance of applying the correct appellate standard of review cannot be overstated.[5] The proper application could have a significant effect on the outcome of a case.[6] For instance, an appellant would have a much more difficult time overcoming a highly deferential

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[1] ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 131-32 (1985) (citing Phillips, *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 1 (1984); *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 LAW & CONTEMP. PROBS. 47-67 (1984); Childress, *Standard of Review in Federal Civil Appeals: Fifth Circuit Illustration and Analysis*, 29 LOY. L. REV. 851 (1983)).

[2] W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1048-49 (1993).

[3] Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L.J. 51, 52 (1992) (citing Martha S. Davis and Steven A. Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 465 (1986)).

[4] Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 232 (1991).

[5] RUGGERO J. ALDISERT, WINNING ON APPEAL - BETTER BRIEFS AND ORAL ARGUMENT 57 (1992).

[6] Sally Baumler, *Appellate Review Under the Bail Reform Act*, 1992 U. ILL. L. REV. 483, 486 (1992).

standard of review than a lesser deferential standard; thus the latter would be preferable to the appellant.[7] Conversely, a standard which grants greater deference to the lower court's decision would be more favorable to the appellee.[8] The proper application of the standard of review to an issue should therefore be a major consideration in an appellant's determination of whether or not to appeal.[9]

Identifying and applying the correct standard of review is required by the rules of several courts. Rule 28(b)(5) of the Hawaii Rules of Appellate Procedure (HRAP) requires that a "Standard of Review" section be included in an appellant's opening brief.[10] In contrast, HRAP Rule 28(c) does not require the appellee to include a standard of review section in his or her brief unless the appellee is disputing the appellant's application of a standard of review.[11] Rule 28-2.5 of the Ninth Circuit Court of Appeals includes a provision similar to HRAP 28(b)(5).[12] The Ninth Circuit requires an appellant to identify in its opening brief the applicable standard of review for each issue raised on appeal.[13]

Determining the standard of review that applies to particular issues is not always an easy task.[14] Appellate courts sometimes fail to identify the applicable standard,[15] and different courts may apply different

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[7] *Id.*

[8] *Id.*

[9] MARTINEAU, *supra* note 1, at 132.

[10] HAW. R. APP. P. 28(b)(5). Rule 28(b)(5) of the Hawaii Rules of Appellate Procedure states: "A brief separate section entitled 'Standard of Review,' setting forth the applicable standard or standards of review to be applied in reviewing the respective orders or decisions of the trial court or agency alleged to be erroneous." *Id.*

[11] HAW. R. APP. P. 28(c). Rule 28(c) of the Hawaii Rules of Appellate Procedure states:

> *Answering Brief.* Within 40 days after service of appellant's opening brief, the appellee shall file an answering brief. The brief shall be of like character as that required of the appellant except that no statement of points shall be required, and no other section is required unless the section presented by the appellant is controverted. The answering brief shall contain a counterstatement of each section except points, unless the appellee is satisfied with the section included in the appellant's brief.

Id.

[12] 9TH CIR. R. 28-2.5. Rule 28-2.5 of the Ninth Circuit Court reads in pertinent part: "As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review." *Id.*

[13] *Id.*

[14] Hall, *supra* note 2, at 1050.

[15] *See, e.g.*, Kaeo v. Davis, 68 Haw. 447, 452-53, 719 P.2d 387, 391-92 (1986). In

standards to the same issues.[16] It can be even more confusing when the same court applies different standards to the same issue.[17]

To provide a better understanding of the identification and application of the standards of review, numerous articles, books, and treatises have been written on the subject.[18] Michael Yoshii wrote one such article in 1985, entitled "Appellate Standards of Review in Hawai'i."[19] Yoshii's article discussed the significant aspects and application of some of the more widely used standards of review,[20] and it is a valuable reference tool for law students and attorneys.[21]

This article covers some of the changes that have occurred in the application of appellate standards of review since the publication of Yoshii's article. It provides an in-depth analysis of Hawai'i appellate court decisions that have shaped the law in this area and provides some opinion as to the reasoning behind those decisions. Like Yoshii's

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Kaeo, the Hawaii Supreme Court utilized a *de novo* review, without declaring it as such, of the trial court's decision to exclude evidence under Rules 401 and 402 of the Hawaii Rules of Evidence that the defendant-driver in a personal injury action had been drinking prior to a motor vehicle accident. *Id.*

[16] *See, e.g.*, In the Matter of the Tax Appeal of Hawaiian Flour Mills, 76 Hawai'i 1, 15, 868 P.2d 419, 433 (1994). In *Hawaiian Flour Mills*, the Hawaii Supreme Court rejected the three-tiered standard of review applied by the Hawaii Intermediate Court of Appeals in De Silva v. Burton, 9 Haw. App. 222, 230, 832 P.2d 284, 288 (1992), in favor of a unitary standard of review when reviewing decisions involving Rule 11 of the Hawaii Rules of Civil Procedures. *Id.*

[17] The Hawaii Supreme Court, in In the Interest of Jane Doe, Born on May 5, 1977, 77 Hawai'i 435, 438, 887 P.2d 645, 648 (1994), applied the right/wrong standard when addressing the issue of whether or not a search was lawfully conducted. The same court, in a case decided two months earlier, utilized the clearly erroneous standard in reviewing a decision which embraced the issue of whether or not a particular search was improper. State v. Propios, 76 Hawai'i 474, 481, 879 P.2d 1957, 1064 (1994) (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 267 (9th Cir. 1975)).

[18] *See generally*, Hall, *supra* note 2; Hofer, *supra* note 4; MARTHA S. DAVIS AND STEVEN A. CHILDRESS, STANDARDS OF REVIEW (1986).

[19] Michael J. Yoshii, *Appellate Standards of Review in Hawai'i*, 7 U. HAW. L. REV. 273 (1985).

[20] *Id.*

[21] *See, e.g.*, Cho Mark Oriental Food, Ltd. v. K & K International, 73 Haw. 509, 523-24, 836 P.2d 1057, 1065 (1992) (citing Michael J. Yoshii, *Appellate Standards of Review in Hawai'i*, 7 U. HAW L. REV. 273, 288-90 (1985) (footnotes omitted)); Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886-87 (1991) (citing Michael J. Yoshii, *Appellate Standards of Review in Hawai'i*, 7 U. HAW. L. REV. 273, 288-90 (1985) (footnotes omitted)).

article, it is hoped that this article will be useful to law students and legal practitioners in their research and preparation of educational and legal materials.

Part II of the article provides an overview of appellate standards of review. It includes the definitions, purposes, and applications of several of the more commonly used standards of review. Part III discusses recent decisions of the Hawai'i appellate courts which have either developed, overturned, expanded, or provided conflicting results in the application of the standards of review. The relationship between the decisions is analyzed in Part IV. Part IV also discusses the practical effect of the decisions. Part V summarizes and concludes the article.

II. Overview of Standards

The proper application of a standard of review to an issue requires two levels of analysis. First, it requires an understanding of what the standards are and when to apply them. Secondly, proper application requires being able to identify the type of trial court decision as it relates to the issue. This section covers both of these aspects.

A. Types of Standards

There are four basic standards of review: (1) clearly erroneous, (2) no substantial evidence, (3) *de novo* or right/wrong, and (4) abuse of discretion.[22] They are characterized by the identity of the decision-maker, the type of issues to which they apply, and by the amount of deference paid to the decisionmaker.[23]

The clearly erroneous standard is applied to the review of judicial findings of fact.[24] Findings of fact are found to be "clearly erroneous where the court is left with a firm and definite conviction that a mistake has been committed."[25] In a challenge to a court's findings of fact, the burden is on the appellant to identify the alleged erroneous factual

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[22] Heidi M. Westby, *Fourth Amendment Seizure: The Proper Standard for Appellate Review*, 18 Wm. Mitchell L. Rev. 829, 832 (1992).

[23] Hofer, *supra* note 4, at 233.

[24] Baumler, *supra* note 6, at 487 (citing Perryn Gazaway, *Appellate Standard of Review: Friend or Foe?*, 13 Am. J. Trial Advoc. 887, 889-99 (1989)).

[25] *Coll*, 72 Haw. at 28, 804 P.2d at 887 (citing Aiea Lani Corp. v. Hawaii Escrow & Title, Inc., 64 Haw. 638, 641, 647 P.2d 257, 259 (1982)).

finding and to overcome "the presumption of correctness which attends all lower court decisions."[26]

In applying the clearly erroneous standard, the appellate court determines if the lower court's decision is reasonable.[27] Because the reasonableness test affords trial courts a range of discretion in their decisions,[28] increased deference is given to those decisions.[29]

Findings of fact made by juries are reviewed under the no substantial evidence standard.[30] The Hawaii Supreme Court defines substantial evidence as "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion."[31] In applying this standard, the court views the evidence in the light most favorable to the appellee.[32]

The no substantial evidence standard affords even greater deference than the clearly erroneous standard.[33] Yoshii asserts that this respect for jury verdicts is "deeply rooted in American law,"[34] and is supported by the Seventh Amendment of the U.S. Constitution,[35] Article I, Section 13 of the Hawaii Constitution,[36] and by Rule 38(a) of the

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[26] Yoshii, *supra* note 19, at 281-82 (citing HAW. R. APP. P. 28(b)(4)(C); MPM Hawaiian, Inc. v. Amigos, Inc., 63 Haw. 485, 486, 630 P.2d 1075, 1076-77 (1981); Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978); Campbell v. DePonte, 57 Haw. 510, 513, 559 P.2d 739, 741, *reh'g denied*, 57 Haw. 564, 560 P.2d 1303 (1977); Rogers v. Pedro, 3 Haw. App. 136, 139, 642 P.2d 549, 552 (1982)).

[27] O'Neill, *supra* note 3, at 55 (citing MARTHA S. DAVIS AND STEVEN A. CHILDRESS, STANDARDS OF REVIEW 16 (1986)).

[28] MARTINEAU, *supra* note 1, at 137-38 (abuse of discretion standard, which allows for the exercise of a range of discretion by the trial court, is "substantially the same as the clearly erroneous standard").

[29] Baumler, *supra* note 6, at 487.

[30] Yoshii, *supra* note 19, at 277-78.

[31] Aga v. Hundahl, 78 Hawai'i 230, 237, 891 P.2d 1022, 1029 (1995) (citations, quotation marks and brackets omitted).

[32] Yoshii, *supra* note 19, at 278 (citations omitted).

[33] Baumler, *supra* note 6, at 487.

[34] Yoshii, *supra* note 19, at 280.

[35] U.S. CONST. amend. VII. The Seventh Amendment states in pertinent part: "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Id.*

[36] HAW. CONST. art. I, § 13. Article I, section 13 of the Hawaii Constitution states in pertinent part: "[I]n suits at common law . . . the right of trial by jury shall be preserved." *Id.*

Hawaii Rules of Civil Procedure (HRCP).[37] He points out that the language of the Seventh Amendment precludes judicial review of jury verdicts, and that the Hawaii Supreme Court has held that Article I, Section 13 of the Hawaii Constitution has the same effect because it is patterned after them Seventh Amendment.[38] HRCP Rule 38(a) incorporates by reference the right to a jury trial as conferred by statutory and constitutional law,[39] thus preserving such right to civil litigants.[40]

Conclusions or questions of law are reviewed *de novo*[41] under the right/wrong standard of review.[42] In a *de novo* review, "the appellate court steps into the position of the lower tribunal and re-decides the issue. If the appellate court's decision is the same, it affirms; if different, it reverses. In short, the appellate court simply decides whether the lower tribunal was right or wrong."[43]

Questions of law include the interpretation of statutes,[44] a trial court's dismissal for lack of subject matter jurisdiction,[45] sufficiency of indictments,[46] awarding or denying motions for summary judgments,[47] de-

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[37] Yoshii, *supra* note 19, at 280. HAW. R. CIV. P. 38(a) states in pertinent part: "[T]he right of trial by jury as given by the Constitution or a statute of the state or the United States shall be preserved to the parties inviolate."

[38] Yoshii, *supra* note 19, at 280 (citing Harada v. Burns, 50 Haw. 528, 532 n.1. 445 P.2d 376, 379-80 n.1 (1968)).

[39] HAW. R. CIV. P. 38(a).

[40] Yoshii, *supra* note 19, at 280 (citing Harkins v. Ikeda, 57 Haw. 378, 381, 557 P.2d 788, 791 (1976).

[41] De novo is defined as "anew; afresh; a second time." BLACK'S LAW DICTIONARY 435 (6th ed. 1990). As used in this context, de novo refers to the "method" in which an issue is reviewed by an appellate court (e.g., reviewed for the "second time"), while the right/wrong standard refers to the actual "standard or test" utilized by the appellate court (e.g., whether the lower court's decision was right or wrong).

[42] State v. Meyer, 78 Hawai'i 308, 311, 893 P.2d 159, 162 (1995) (citing Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994); State v. Miller, 4 Haw. App. 603, 606, 671 P.2d 1037, 1040 (1983)).

[43] Yoshii, *supra* note 19, at 276 (citing State v. Miller, 4 Haw. App. 603, 606, 671 P.2d 1037, 1040 (1983); Davis v. Davis, 3 Haw. App. 501, 506, 653 P.2d 1167, 1171 n.5 (1982)).

[44] State v. Delima, 78 Hawai'i 343, 346, 893 P.2d 194, 197 (1995) (citing Pacific Int'l Services Corp. v. Hurip, 76 Hawai'i 209, 216, 873 P.2d 88, 95 (1994)).

[45] Bateman Construction, Inc. v. Haitsuka Bros., 77 Hawai'i 481, 484, 889 P.2d 58, 61 (1995) (citing Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 239, 842 P.2d 634, 637 (1992), *aff'd*, 129 L. Ed. 2d 203, U.S. , 114 S. Ct. 2239 (1994)).

[46] State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995) (citing United States v. ORS, Inc., 997 F.2d 628, 629 (9th Cir. 1993)).

[47] Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992).

nials of directed verdicts,[48] and a review of the construction and legal effect of contracts.[49] When reviewing questions of law, appellate courts must not only find errors of law, but that such errors were prejudicial.[50]

The abuse of discretion standard is applied to the review of all discretionary decisions of lower courts.[51] An abuse of discretion occurs "if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant."[52] The burden of establishing abuse of discretion is on the appellant and requires a strong showing to establish it.[53] In applying the abuse of discretion standard, "different trial judges may, on the same facts, arrive at opposite rulings without any of them being reversible on appeal."[54]

Appellate courts will normally find an abuse of discretion if the lower court's decision is based upon "an erroneous view of the law, a misapplication of the law, . . . irrelevant factors, impermissible factors, or a mistaken view of the evidence."[55] In certain situations, appellate courts may find that the lower court had no discretion because the issue being decided had but one conclusion and will thus apply a different standard of review.[56] Decisions reviewed under the abuse of

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[48] Aga v. Hundahl, 78 Hawai'i 230, 236, 891 P.2d 1022, 1028 (1995) (citing Mehau v. Reed, 76 Hawai'i 101, 112, 869 P.2d 1320, 1331 (1994); Lussier v. Mau-Van Dev., Inc., 4 Haw. App. 359, 372, 667 P.2d 804, 815 (1983)).

[49] Cho Mark Oriental Food, Ltd. v. K & K International, 73 Haw. 509, 519, 836 P.2d 1057, 1063 (1992) (citing Stewart v. Brennan, 7 Haw. App. 136, 142, 748 P.2d 816, 821 (1988)).

[50] Perryn Gazaway, *Appellate Standard of Review: Friend or Foe?*, 13 AM. J. TRIAL ADVOC. 887, 898 (1990) (citing Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377, 409 (1984)).

[51] Yoshii, *supra* note 19, at 292 (citing State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961); HAW. REV. STAT. § 91-14(g)(6) (1976)).

[52] State v. Adams, 76 Hawai'i 408, 411, 879 P.2d 513, 516 (1994) (citation omitted).

[53] State v. Okumura, 78 Hawai'i 383, 399, 894 P.2d 80, 96 (1995) (citing State v. Faulkner, 1 Haw.App. 651, 654, 624 P.2d 940, 943 (1981), *cert. denied*, 71 Haw. 669, 833 P.2d 901 (1990)).

[54] State v. Rabe, 5 Haw. App. 251, 261, 687 P.2d 554, 561 (1984).

[55] Hofer, *supra* note 4, at 245 (citations omitted).

[56] *See, e.g.*, Kealoha v. County of Hawaii, 74 Haw. 308, 844 P.2d 670 (1993). In *Kealoha*, the Hawaii Supreme Court found that although an evidentiary decision made pursuant to HAW. R. EVID. 401 or 402 has been "traditionally" reviewed under the abuse of discretion standard, because the application of HAW. R. EVID. 401 or 402 has but one conclusion (whether evidence is relevant or not), it should be reviewed under the right/wrong standard. *Id.* at 313-15, 844 P.2d 673-74.

discretion standard include evidentiary rulings,[57] a court's refusal to give jury instructions,[58] motions for new trials,[59] declarations of mistrials,[60] a court's exercise of its inherent powers,[61] withdrawal of nolo contendere pleas,[62] and sentencing in criminal cases.[63]

The abuse of discretion standard affords virtually the same amount of deference to the decisions of lower tribunals as the clearly erroneous standard,[64] and these two standards have often been characterized as "indistinguishable"[65] or "substantially similar"[66] in nature. Despite such characterization, there is a difference between these standards: a

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[57] *See, e.g.*, *Kealoha*, 74 Haw. at 322-23, 844 P.2d at 677 (finding that the trial court did not abuse its discretion in refusing to admit evidence under HAW. R. EVID. 403 that plaintiff-motorcyclist in personal injury action did not possess a valid motorcycle license at the time of the accident); Kaeo v. Davis, 68 Haw. 447, 454-55, 719 P.2d 387, 392 (1986) (finding that the trial court abused its discretion in refusing to admit evidence pursuant to HRE 403 that the defendant-driver in a personal injury action had been drinking prior to a motor vehicle accident).

[58] *See, e.g.*, Richardson v. Sport Shinko, 76 Hawai'i 494, 505, 509, 880 P.2d 169, 180, 184 (1994) (finding that the trial court did not abuse its discretion in refusing to give jury instructions requested by the plaintiff in a personal injury action which related to "premises liability" and the "impact of [the defendant's] failure to produce critical evidence in discovery and at trial").

[59] *See, e.g.*, Aga v. Hundahl, 78 Hawai'i 230, 237, 891 P.2d 1022, 1029 (1995) (citing Harkins v. Ikeda, 57 Haw. 378, 380, 557 P.2d 788, 790 (1976)) (holding that both the granting and denial of a motion for new trial is within the trial court's discretion, and such a decision will not be reversed absent a clear abuse of discretion).

[60] *See, e.g.*, *id.* at 245, 891 P.2d at 1037 (citing Johnson v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 179, 664 P.2d 262, 266 (1983)) (holding that the appropriate standard of review when reviewing a trial court's ruling on a motion for a mistrial is the abuse of discretion standard).

[61] *See, e.g.*, *Richardson*, 76 Hawai'i at 505, 508, 880 P.2d at 183 (citing Kukui Nuts of Hawai'i, Inc. v. R. Baird & Co., 6 Haw. App. 431, 438, 726 P.2d 268, 272 (1986)) (stating that a court's exercise of its inherent power is reviewed under the abuse of discretion standard).

[62] *See, e.g.*, State v. Adams, 76 Hawai'i 408, 411, 415, 879 P.2d 513, 516, 520 (1994) (finding that the trial court abused its discretion by refusing to allow the defendant in a medicaid fraud case to withdraw his no contest plea after sentencing after it was found that the prosecution had breached the agreement).

[63] *See, e.g.*, State v. Okumura, 78 Hawai'i 383, 413-14, 894 P.2d 80, 110-11 (1995) (citing State v. Johnson, 68 Haw. 292, 296, 711 P.2d 1295, 1298 (1985); State v. Freitas, 61 Haw. 262, 277, 602 P.2d 914, 925 (1979)) (stating that the abuse of discretion standard should be applied to the review of a trial court's sentencing of a criminal defendant).

[64] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990).

[65] *Id.*

[66] MARTINEAU, *supra* note 1, at 138.

decision reviewed under the clearly erroneous standard is afforded slightly more deference than a decision reviewed under the abuse of discretion standard.[67] The increase in deference is justified by the belief that, because the trial court judge was in a "better position" to weigh the evidence presented at trial, the appellate court should defer to the trial court when reviewing factual findings.[68] Another justification for the increased deference to judicial findings of fact is the belief that judicial economy requires that findings of fact be left to the trial courts so that appellate courts can focus their attention on other appellate functions, such as formulating legal doctrine.[69] Regardless of the justifications for the differences between the clearly erroneous standard and the abuse of discretion standard, or the argument that they are substantially the same standard, Hawai'i appellate courts have, in most cases,[70] treated these standards as distinct and separate.[71]

B. Identification of Decisions

Trial courts can make four types of decisions: (1) discretionary, (2) factual, (3) legal, and (4) mixed factual and legal.[72] There is no clear line separating the types of decisions that a trial court makes, and courts have not devised rules or principles which absolutely distinguish one from another.[73] However, there are certain characterisitics that are attributable to each type of decision, and in most cases, identifying the characteristics of a decision will provide sufficient guidance as to the identity of the type of issue.

Discretion is afforded to trial courts in certain matters by virtue of statutes, rules or judicial decisions.[74] Discretion has been described as

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[67] ALDISERT, *supra* note 5, at 72; APPELLATE PRACTICE MANUAL 19-20 (Priscilla Anne Schwab ed., 1992).

[68] O'Neill, *supra* note 3, at 55 (citing FED. R. CIV. P. 52(a); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, (1969)).

[69] *Id.* at 54.

[70] *But see* In the Matter of the Tax Appeal of Hawaiian Flour Mills, 76 Hawai'i 1, 868 P.2d 419 (1994) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). The Hawaii Supreme Court characterized the clearly erroneous and abuse of discretion standards as being one and the same. *Id.* at 15, 868 P.2d at 433.

[71] *See, e.g.*, State v. Adams, 76 Hawai'i 408, 879 P.2d 513 (1994) (citations omitted). The Hawaii Supreme Court identified and applied the abuse of discretion and clearly erroneous standards of review to separate issues. *Id.* at 411, 879 P.2d at 516.

[72] Hofer, *supra* note 4, at 233, 243.

[73] *Id.* at 235.

[74] Gazaway, *supra* note 50, at 895 (citation omitted).

a "range of choices" in which a court can operate in making a decision.[75] As discussed above, trial courts exercise discretion in a wide variety of circumstances, and therefore the appropriate standard to review such discretionary decisions is the abuse of discretion standard.

Facts are case-specific,[76] and provide the answers to the questions of who, when, what, where and why.[77] Facts "involve the empirical - revolving around actual events, past or future, . . . relate to a person's acts, or his intent in doing such acts, . . . are descriptive rather than dispositive, and . . . call for proof rather than argument."[78] Identification of findings of fact can be problematic because the distinction between findings of fact and conclusions of law is not always clear.[79]

In Hawai'i, Rule 52(a) of the Hawaii Rules of Civil Procedure (HRCP) makes the identification of a factual issue somewhat easier, as it requires a trial court in a bench trial to set forth its findings of fact in its decision.[80] HRCP Rule 52(a), however, has no such requirement for findings of facts made by juries,[81] and does not prevent trial courts from misidentifying factual findings as conclusions of law.[82]

Laws, unlike facts, are general principles that apply to a great number of situations and cases.[83] One commentator describes a declaration of law as the formulation of "a proposition that affects not only the immediate case . . . but all others that fall within its terms."[84] Because of the widespread effects of its policy-making characteristics, law formulation has been customarily left to judges.[85] HRCP 52(a) requires a trial court to set forth its conclusions of law in its decision, but like the requirement for disclosing findings of fact, Rule 52(a) applies only to bench trials.[86]

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[75] *Id.* at 896 (citing Kern v. TXO Prod. Corp., 738 F.2d 968, 970 (8th Cir. 1984).

[76] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985) (citation omitted).

[77] *Id.*

[78] Hofer, *supra* note 4, at 236 (citations and quotation marks omitted).

[79] Baumler, *supra* note 6, at 487 (citation omitted).

[80] HAW. R. CIV. P. 52(a).

[81] *Id.*

[82] *See, e.g.*, State v. Propios, 76 Hawai'i 474, 486, 879 P.2d P.2d 1057, 1069 (1994) (finding that the trial court mislabeled findings of fact as conclusions of law).

[83] O'Neill, *supra* note 3, at 55-56 (citing HENRY HART AND ALBERT SACKS, THE LEGAL PROCESS 374 (1958).

[84] Monaghan, *supra* note 76, at 235 (citations omitted).

[85] Hofer, *supra* note 4, at 237 (citation omitted).

[86] HAW. R. CIV. P. 52(a).

A mixed fact and law issue involves the "establishment of the historical fact; the selection of the applicable rule of law; and the application of the law to the facts to determine whether or not the rule has been violated."[87] The establishment of a historical fact could either be reviewed under the no substantial evidence standard if it is made by a jury, or under the clearly erroneous standard if made by a judge. The right/wrong standard would be applied to the selection of the correct rule of law. The question then presented by a mixed fact and law issue is: What standard should ultimately be applied to the issue?

Commentators have suggested using different approaches to this problem.[88] One commentator uses a "functional approach."[89] This approach requires an appellate court to defer to a trial court any decision in which the trial court was in a better position to decide the issue, such as fact finding situations.[90] Conversely, the functional approach defers to an appellate court on issues which are not "entirely dependent upon the experience of the trial court," such as the application of law.[91]

In his article, Yoshii described the approach taken by Hawai'i appellate courts in regard to mixed questions of fact and law as focusing on the orientation or nature of the question.[92] The orientation approach requires a court to determine whether an issue is dominated by or has its basis in either fact or law.[93] If an issue has its basis or root in facts, then either the clearly erroneous or no substantial evidence standards would be applied, depending on the identity of the fact finder.[94] Conversely, appellate courts review issues based or rooted in law *de novo* under the right/wrong standard.[95]

The problematic nature of identifying and applying the proper standard of review to mixed fact and law issues is evident in recent

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[87] O'Neill, *supra* note 3, at 58 (citation omitted).

[88] *See, e.g.*, Hofer, *supra* note 4, at 243; Yoshii, *supra* note 19, at 288-90.

[89] Hofer, *supra* note 4, at 243.

[90] *Id.* Trial courts are in a better position to determine findings of fact because they are able to weigh the testimony of witnesses, determine credibility, and sift and winnow through the evidence based on their first-hand experience of a trial. *Id.* at 242.

[91] *Id.* at 243-44.

[92] Yoshii, *supra* note 19, at 288-90. Yoshii suggests that Hawai'i courts may also base the application of standards of review to mixed questions of fact and law on "policy factors." *Id.* at 289 (citation omitted).

[93] *Id.* at 288-90.

[94] *Id.*

[95] *Id.*

Hawai'i case law. Because mixed fact and law issues dominate recent standard of review case law, the remainder of this article is devoted to the discussion and analysis of these type of issues.

III. Recent Developments

This section discusses four methods that Hawai'i appellate courts have used to change the application of the standards of review to certain issues. These methods include the (1) overruling of existing standards, (2) adoption of narrower standards, (3) adoption of broader standards, and (4) the application of different standards to the same or similar issues.

A. Overruling Existing Standards

Hawai'i appellate courts can change the application of the standards of review to certain issues by overruling earlier adopted standards that are inconsistent with the perspective of the court on those issues.[96] The review of *Dan v. State*[97] by the Hawaii Supreme Court is a good illustration of this.[98] In *Dan*, the defendant filed a Hawaii Rules of Penal Procedure (HRPP) Rule 40[99] petition for post-conviction relief

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[96] *See, e.g.*, State v. Miller, 4 Haw. App. 603, 671 P.2d 1037 (1983). In Miller, the Hawaii Intermediate Court of Appeals outlined the history of the application of various standards of review to the issue of whether delays in court proceedings violated the six-month mandatory trial commencement of Hawaii Rules of Penal Procedure Rule 48. Despite finding that both the abuse of discretion and the clearly erroneous standards of review had been previously applied to this issue, the court adopted the right/wrong standard because it believed that the issue involved a question of law. *Id.* at 605-06, 671 P.2d at 1039-40 (citations omitted).

[97] 76 Hawai'i 423, 879 P.2d 528 (1994).

[98] *Id.* at 427, 879 P.2d at 532.

[99] Haw. R. Pen. P. 40(f). Rule 40(f) of the Hawaii Rules of Penal Procedure states in pertinent part:

> (f) Hearings. If a petition alleges facts that if proven would entitle the petitioner to relief, the court shall grant a hearing which may extend only to the issues raised in the petition or answer. However, the court may deny a hearing if the petitioner's claim is patently frivolous and is without trace of support either in the record or from other evidence submitted by the petitioner. The court may also deny a hearing on a specific question of fact when a full and fair evidentiary hearing upon that question was held during the course of the proceedings which led to the judgment or custody which is the subject of the petition or at any later proceeding.

Id.

after his conviction for misdemeanor assault was affirmed on appeal.[100] The defendant's petition alleged that he was denied effective assistance of trial and appellate counsel.[101] After receiving the State's answer to the defendant's petition, the trial court denied the petition without an evidentiary hearing, and the defendant appealed.[102]

The issue on appeal in *Dan* was whether the trial court erred in denying the defendant's HRPP Rule 40 petition without a hearing.[103] In determining the appropriate standard of review to apply to this issue, the Hawaii Supreme Court referred to a case that was reviewed by the Hawaii Intermediate Court of Appeals (ICA) which dealt with the same issue: *State v. Allen*.[104]

In *State v. Allen*,[105] the ICA reviewed a HRPP Rule 40 petition filed by a defendant convicted of rape and murder.[106] The defendant's petition claimed that his ability to assist in his defense was diminished by threats made by other inmates during his pre-trial detention, that news media coverage of his trial influenced the jury, and that he was not afforded effective assistance of counsel.[107] The trial court denied the defendant's petition without a hearing, finding that the defendant had not "alleged facts to show how the assaults and threats affected his physical and mental health at trial," and that his claims of "inflammatory media coverage and ineffective assistance of counsel were patently frivolous and without a trace of support in either the record or from other evidence submitted by him."[108]

On appeal, the ICA applied the abuse of discretion standard to determine whether the lower court erred in denying the defendant's HRPP Rule 40 petition without a hearing.[109] In identifying the abuse of discretion standard as the appropriate standard of review, the court recognized that a "petition for post-conviction relief is addressed to the sound discretion of the court."[110] The court noted that a HRPP

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[100] Dan v. State, 76 Hawai'i 423, 426, 879 P.2d 528, 531 (1994).

[101] *Id.*

[102] *Id.*

[103] *Id.* at 427, 879 P.2d at 532.

[104] *Id.*

[105] 7 Haw. App. 89, 744 P.2d 789 (1987).

[106] *Id.* at 90, 744 P.2d at 791.

[107] *Id.* at 90-91, 744 P.2d at 791-92.

[108] *Id.* at 91, 744 P.2d at 792.

[109] *Id.* at 92, 744 P.2d at 792 (citing State v. Schrock, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986)).

[110] *Id.*

Rule 40 hearing is required only if a petitioner's allegations can establish a "colorable claim,"[111] and absent such a showing, it is not error to deny the petition without a hearing.[112] The court found that even if it accepted the allegations in the defendant's HRPP Rule 40 petition as true, the verdict would not be changed, and accordingly the decision of the lower court must be affirmed.[113]

Allen's standard of review analysis, which created a rule to determine when a HRPP Rule 40 hearing is required, was adopted by the Hawaii Supreme Court in *Dan*.[114] The court in *Dan*, however, rejected and overruled the ICA's application of the abuse of discretion standard.[115] The court instead characterized the issue of whether a petitioner's allegations could establish a colorable claim as a question of law, and therefore applied the right/wrong standard of review.[116]

The Hawaii Supreme Court's rejection of the standard applied by the ICA in *Allen* is illustrative of how two appellate courts can apply different standards of review to the same issue based on different areas of focus. In *Allen*, the ICA focused on the lower court's decision of whether or not to grant a hearing.[117] Because the decision to grant a hearing is dependent upon the court's discretionary function, the abuse of discretion standard was applied.[118] In contrast, the court in *Dan* focused on the procedural posture of the court in reviewing the issue.[119] The Hawaii Supreme Court found that because the appellate court reviews the same record as the trial court and redecides the issue, the issue was one of law, reviewable *de novo* under the right/wrong standard.[120]

The *Dan* and *Allen* decisions demonstrate different approaches utilized to address the same problem. This difference in approaches between

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[111] *Id.* "To establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict." *Id.*

[112] *Id.*

[113] *Id.* at 93, 744 P.2d at 793.

[114] Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (citing *Allen*, 7 Haw. App. at 92-93, 744 P.2d at 792-93).

[115] *Id.*

[116] *Id.*

[117] State v. Allen, 7 Haw. App. 89, 92, 744 P.2d 789, 792 (1987) (citing State v. Schrock, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986)).

[118] *Id.*

[119] *Dan*, 76 Hawai'i at 427, 879 P.2d at 532.

[120] *Id.*

the ICA and the Hawaii Supreme Court is not unique, as the next section illustrates.

B. Adoption of Narrower Standards

Appellate courts can narrow their scope of review of an issue by focusing on certain aspects of a lower court's decision, such as a legal conclusion or the the exercise of judicial discretion. Recent case law provides an excellent example of how the Hawaii Supreme Court has narrowed the scope of appellate review of HRCP Rule 11 decisions.

Rule 11 requires a trial court to make three different types of decisions: findings of fact, conclusions of law, and discretionary decisions.[121] When a trial court is presented with a Rule 11 issue, the court must examine the facts to determine whether or not a violation has occurred.[122] The court's determination that a violation has or has not occurred is a conclusion of law.[123] If the court finds that the facts constitute a violation, then the court will use its discretion in imposing an appropriate sanction.[124]

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[121] HAW. R. CIV. P. 11 (1990). Rule 11 of the Hawaii Rules of Civil Procedure reads in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name,whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.

[122] Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).

[123] *Id.*

[124] *Id.*

The ICA in *De Silva v. Burton*[125] recognized the three different types of decisions that a trial court must make when addressing a Rule 11 issue and utilized this information in its application of the appropriate standards.[126] In *De Silva*, the court reviewed the trial court's order imposing Rule 11 sanctions against an attorney-defendant for filing an attorney malpractice complaint without any factual basis against his co-defendant.[127] The defendant in *De Silva* had, in his capacity as co-executor of an estate, drafted conveyance documents for Hawai'i property owned by the decedent prior to her death.[128] The co-defendant, an attorney appointed as the special administrator of the decedent's California estate, cross-claimed against the defendant and the purchaser of the Hawai'i property seeking indemnification from the action.[129] After the defendant admitted in correspondence to the trial court that he had allowed his "natural resentment to interfere with [his] judgment" and that there was no basis for his claim against the co-defendant because there was no existing attorney-client relationship, the court imposed Rule 11 sanctions upon him.[130]

In determining what standard of review should be applied to Rule 11 decisions, the ICA adopted the approach taken by the Ninth Circuit Court of Appeals.[131] That court, in *Zaldivar v. City of Los Angeles*,[132] reviewed a decision of the District Court for the Central District of California which imposed Federal Rules of Civil Procedure (FRCP) Rule 11 sanctions on the plaintiffs.[133] The district court found that the

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[125] 9 Haw. App. 222, 832 P.2d 284 (1992).

[126] *Id.* at 230-31, 832 P.2d at 287-88.

[127] *Id.* at 223-31, 832 P.2d at 285-88.

[128] *Id.* at 223, 832 P.2d at 285.

[129] *Id.*

[130] *Id.* at 225-226, 832 P.2d at 286.

[131] *Id.* at 233, 832 P.2d at 288.

[132] 780 F.2d 823, 827 (9th Cir. 1986).

[133] *Id.* Rule 11 of the Federal Rules of Civil Procedure Rule is virtually identical to Rule 11 of the Hawaii Rules of Civil Procedure and states in pertinent part:

> Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is

plaintiffs, whose claim asserted a violation of the Voting Rights Act, "was so without factual and legal foundation that it [could] be considered frivolous or unreasonable."[134] In reviewing the district court's decision, the court held that the three different aspects of a Rule 11 decision required the use of a three-tiered standard of review.[135] The court stated that findings of fact should be reviewed under the clearly erroneous standard, conclusions of law should be reviewed *de novo*, and the abuse of discretion standard should be applied when reviewing the court's discretion in imposing a sanction.[136]

In adopting the *Zaldivar* standard, the ICA rejected the unitary standard formulated by the U.S. Supreme Court in *Cooter & Gell v. Hartmarx Corporation*.[137] *Cooter & Gell* involved an antitrust suit in which the defendant filed a motion to dismiss the complaint and to impose Rule 11 sanctions on the plaintiff on the grounds that the complaint had no basis in fact and that the plaintiff had failed to make sufficient inquiries to support the allegations made in the complaint.[138] The District Court for the District of Columbia subsequently dismissed the complaint and imposed monetary sanctions on the plaintiff and its attorney.[139] The district court's decision was affirmed on appeal to the Court of Appeals for the District of Columbia.[140]

Because the Court of Appeals in *Cooter & Gell* did not specify the applicable standard of review, the Supreme Court was left with the task of identifying the appropriate standard.[141] In its search for an appropriate standard of review, the Court noted that the D.C. Circuit had previously applied both the abuse of discretion standard and a *de novo* review to Rule 11 decisions.[142] The Court also considered the

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signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

[134] *Zaldivar*, 780 F.2d at 827 (citation omitted).

[135] *Id.* at 828 (citations omitted).

[136] *Id.*

[137] De Silva v. Burton, 9 Haw. App. 222, 230, 832 P.2d 284, 288 (1992).

[138] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 389 (1990).

[139] *Id.* at 390.

[140] *Id.*

[141] *Id.* at 399.

[142] *Id.*

approach taken by the Ninth Circuit in *Zaldivar*—the approach that the plaintiff-petitioner urged the Court to adopt.[143] The Court eventually rejected both approaches, choosing instead to adopt the deferential (abuse of discretion) standard followed by a majority of the circuits.[144]

In support of its conclusion, the Court explained that, because the application of either an abuse of discretion or a clearly erroneous standard to the review of a district court's findings of fact is "indistinguishable,"[145] the only issue in the disagreement between the unitary abuse of discretion standard approach[146] and the three-tiered standard approach is "whether the court of appeals must defer to the district court's legal conclusions in Rule 11 decisions."[147] The Court found that deference should not be given to the legal conclusions of lower courts in Rule 11 decisions because Rule 11 "requires a court to consider issues rooted in factual determinations," and factual determinations, as noted above, can be appropriately reviewed under the abuse of discretion standard.[148] Also, the Court found that the application of a unitary abuse of discretion standard comported with the "policy goals" of Rule 11, stating:

> The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence. Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also dis-

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[143] *Id.*

[144] *Id.* at 400, 405 The Court cited decisions from the First, Third, Fourth, Fifth, Sixth, Seventh and Tenth Circuits in which a deferential standard was used in reviewing all aspects of a Rule 11 decision. *Id.* at 400.

[145] *Id.* at 401. The Supreme Court noted that a "court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous," thus the application of either standard was "indistinguishable" in this respect. *Id.*

[146] *Id.* The Court utilizes the label "unitary abuse of discretion standard" to distinguish between the application of one standard to all aspects of a Rule 11 decision as opposed to the application of multiple standards. *Id.*

[147] *Id.*

[148] *Id.*

> courage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.[149]

The ICA in *De Silva* rejected the *Cooter & Gell* unitary standard because it believed that the additional deference afforded to the decisions of lower courts was unwarranted.[150] Although the ICA recognized that trial courts are "better situated than the appellate courts to apply the fact- dependent standard mandated by Rule 11," it saw no reason to abandon the right/wrong standard of review applicable to conclusions of law.[151] Additionally, the ICA reasoned that the three-tiered approach would further the goals of Rule 11 as articulated in *Cooter & Gell*.[152]

The Hawaii Supreme Court in *In the Matter of the Tax Appeal of Hawaiian Flour Mills, Inc.*[153] rejected the ICA's three-tiered standard of review approach in favor of the *Cooter & Gell* unitary standard.[154] The court in *Hawaiian Flour Mills* determined that the tax appeal court had abused its discretion in denying sanctions requested by Hawaiian Flour Mills against the State of Hawaii Director of Taxation.[155] In reaching its decision, the court said that the Director's failure to comply with HRCP Rule 8(b)[156] caused an unnecessary delay in the proceedings at the expense of Hawaiian Flour Mills, and that reimbursing Hawaiian Flour Mills for its legal expenses was an appropriate sanction against the Director.[157]

In adopting the unitary abuse of discretion standard, the court agreed with the ICA that the difference between the unitary and three-tiered

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[149] *Id.* at 404.

[150] De Silva v. Burton, 9 Haw. App. 222, 230, 832 P.2d 284, 288 (1992).

[151] *Id.*

[152] *Id.*

[153] In the Matter of the Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 15, 868 P.2d 419, 433 (1994).

[154] *Id.*

[155] *Id.* at 17, 868 P.2d at 435.

[156] HAW. R. CIV. P. 8(b) (1990). Rule 8 of the Hawaii Rules of Civil Procedure states in relevant part:

> Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies . . . . Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder.

Id.

[157] *Hawaiian Flour Mills*, 76 Hawai'i at 17, 868 P.2d at 435.

standards was very "narrow,"[158] but disagreed in regards to the amount of deference that the appellate court must give to the lower court's determination of whether or not a Rule 11 violation has occurred.[159] In justifying its adoption of the deferential approach, the court expressed reasons along the same lines as those given by the U.S. Supreme Court in *Cooter & Gell*.[160] The court noted that the unitary standard promotes the idea that "attorneys and parties must litigate responsibly and in good faith,"[161] and that, because of the fact-dependent nature of Rule 11, the unitary abuse of discretion standard will not affect uniformity in the application of Rule 11 sanctions.[162]

In *De Silva*, the ICA emphasized the uniqueness of the three different aspects of a Rule 11 decision and chose to adopt an approach which specified a particular standard for each of the three aspects.[163] The Hawaii Supreme Court in *Hawaiian Flour Mills*, on the other hand, preferred to adopt an approach which integrated all three aspects into a single, unitary standard.[164] The *Hawaiian Flour Mills* court, following the U.S. Supreme Court's *Cooter & Gell* decision, accomplished this by first characterizing the clearly erroneous and abuse of discretion standards as being one and the same, and then by eliminating the legal aspect by focusing on the factual basis of Rule 11 decisions.[165] The *Hawaiian Flour Mills* decision thus narrows the application of the standards of review to HRCP Rule 11 decisions.

Like the decisions (*Dan* and *Allen*) discussed in the previous section, the *Hawaiian Flour Mills* and *De Silva* decisions show a conflict between the Hawaii Supreme Court and the ICA in the application of the standards of review to a particular issue. Once again, the conflict in decisions is based upon differing perspectives of the courts. As the next section indicates, the application of the standards by the courts is not always in conflict, as the decisions from both courts can be used to complement or build upon each other.

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[158] *Id.* at 15, 868 P.2d at 433.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at 16, 868 P.2d at 434 (citing Cooter & Gell v. Hartmarx, 496 U.S. 384, 404 (1990)).

[163] De Silva v. Burton, 9 Haw. App. 222, 230, 832 P.2d 284, 288 (1992).

[164] *Hawaiian Flour Mills*, 76 Hawai'i at 15, 868 P.2d at 433.

[165] *Id.* at 15-16, 868 P.2d at 433-34.

C. Adoption of Broader Standards

Appellate courts can adopt approaches that broaden the application of the standards of review to certain issues. In other words, instead of applying a single standard to an issue, an appellate court may apply different standards of review to different aspects of the same issue. The Hawaii Supreme Court took this route when it applied a dual standard to the evidentiary issues in *Kealoha v. County of Hawaii*.[166]

In *Kealoha*, the court held that "different standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue."[167] The court in *Kealoha* was faced with the issue of whether evidence which indicated that the plaintiff-motorcyclist, involved in an accident, was not wearing a helmet and did not possess a valid motorcycle license at the time of the accident was admissible.[168] In its review of the trial court's decision to exclude the proffered evidence, the court found that certain rules of evidence, such as Hawaii Rules of Evidence (HRE) Rules 401[169] and 402,[170] "can yield only one correct result;" therefore the appropriate standard of review is the right/wrong standard.[171] Other rules, such as HRE Rule 403[172] which requires the court to make a "judgment call," are reviewed under the abuse of discretion standard.[173]

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[166] Kealoha v. County of Hawaii, 74 Haw. 308, 319-20, 844 P.2d 670, 676 (1993).

[167] *Id.* at 319, 844 P.2d at 676.

[168] *Id.* at 320-24, 844 P.2d at 676-78.

[169] HAW. R. EVID. 401 (1994). Rule 401 of the Hawaii Rules of Evidence states: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

[170] HAW. R. EVID. 402 (1994). Rule 402 of the Hawaii Rules of Evidence states: "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." *Id.*

[171] Kealoha v. County of Hawaii, 74 Haw. 308, 319-20, 844 P.2d 670, 676 (1993).

[172] HAW. R. EVID. 403 (1994). Rule 403 of the Hawaii Rules of Evidence states: "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." *Id.*

[173] *Kealoha*, 74 Haw. at 319-20, 844 P.2d at 676.

In developing the dual standard, the court looked to its prior decisions as well as to those of the ICA.[174] The court found that in certain situations, both courts applied a standard other than the abuse of discretion standard to the review of evidentiary decisions.[175] In one of those decisions, *Kaeo v. Davis*,[176] the Hawaii Supreme Court reviewed the trial court's decision excluding allegedly prejudicial evidence pursuant to HRE Rule 403.[177] In *Kaeo*, the plaintiff-passenger involved in an automobile accident attempted to introduce evidence that the defendant-driver had consumed liquor prior to the accident.[178] The defendant objected, claiming that the introduction of the evidence would cause unfair prejudice and should thus be excluded pursuant to HRE Rule 403.[179] The trial court found in favor of the defendant and excluded the evidence.[180]

In its review of the trial court's decision to exclude the evidence, the court first had to consider the admissibility of the evidence under HRE Rules 401 and 402 before it could determine whether or not the evidence was properly excluded due to unfair prejudice under HRE 403.[181] Upon review, the court determined that the evidence of the defendant's consumption of liquor prior to the accident was relevant under HRE Rule 401, and was thus admissible under HRE Rule 402.[182] Although the *Kaeo* decision did not "explicitly" state that a right/wrong standard of review was being applied,[183] the court in *Kealoha* found that the review by the *Kaeo* court of the HRE Rule 401 and Rule 402 decisions had only one "correct conclusion," whether or not the evidence was admissible.[184] Accordingly, the right/wrong standard was applied in that situation.[185]

After finding that the evidence should have been admitted under HRE Rules 401 and 402, the court in *Kaeo* examined whether or not

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[174] *Id.* at 314-19, 844 P.2d at 673-76.

[175] *Id.*

[176] Kaeo v. Davis, 68 Haw. 447, 450, 719 P.2d 387, 390 (1986).

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.* at 451-55, 719 P.2d at 390-92.

[182] *Id.* at 451-53, 791 P.2d at 390-92.

[183] *Id.* at 453, 719 P.2d at 391-92. The court in *Kaeo* did not indicate what standard it was applying to the review of the trial court's HRE Rule 401/402 decision. *Id.*

[184] Kealoha v. County of Hawaii, 74 Haw. 308, 314-15, 844 P.2d 670, 674 (1993).

[185] *Id.*

the introduction of the evidence would cause unfair prejudice to the defendant under HRE Rule 403.[186] The court applied the balancing test required by HRE Rule 403, which weighs the probative value of the evidence against its prejudicial effect.[187] In doing so, the court recognized that the "responsibility for maintaining the delicate balance [required by HRE Rule 403] lies largely within the discretion of the trial court."[188] The court in *Kaeo* concluded that the evidence of the defendant's drinking was admissible, because it did not so unfairly prejudice him that the plaintiff should be denied her right to introduce relevant and material evidence.[189] Thus, the court found that the trial judge had abused his discretion by excluding the evidence, and such exclusion may have had an effect on the outcome of the trial.[190]

The court in *Kealoha* also relied upon another ICA decision to support its application of the dual standard: *State v. Rabe*.[191] In *Rabe*, the defendant-prisoner was convicted for conspiracy to promote prison contraband, and he subsequently appealed his conviction.[192] In his appeal, the defendant claimed that the trial court erred when it refused to allow at trial evidence attesting to his reputation for truthfulness.[193]

The *Rabe* court reviewed the lower court's decisions under HRE Rules 608(a),[194] 404(a)(1),[195] and 403.[196] In its analysis under HRE

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[186] *Kaeo*, 68 Haw. at 454-55, 719 P.2d at 392.

[187] *Id.* at 455, 719 P.2d at 392.

[188] *Id.* at 454, 719 P.2d at 392.

[189] *Id.* at 454-55, 719 P.2d at 392.

[190] *Id.* at 455, 719 P.2d at 392.

[191] 5 Haw. App. 251, 255, 687 P.2d 554, 558 (1984).

[192] *Id.*

[193] *Id.* at 253, 687 P.2d at 556.

[194] HAW. R. EVID. 608(a) (1994). Rule 608(a) of the Hawaii Rules of Evidence states:

> Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Id.

[195] HAW. R. EVID. 404(a)(1) (1994). Rule 404(a)(1) of the Hawaii Rules of Evidence states in pertinent part:

> Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence

Rule 608(a) regarding reputation evidence, the court found that the application of the abuse of discretion standard would be inappropriate.[197] Because HRE 608(a) sets precise limitations on who can introduce what evidence and under what circumstances the evidence is admissible, the court found that HRE Rule 608(a) called for "only one correct answer."[198] The ICA, in finding that the trial court was "right" by excluding the proffered evidence under HRE Rule 608(a), thus applied the right/wrong standard of review.[199]

In reviewing the lower court's decision to exclude evidence of the defendant's character, the court in *Rabe* recognized that under HRE Rule 404(a)(1), a criminal defendant is permitted to "introduce evidence of a pertinent trait of his character."[200] Of the eleven allegedly pertinent traits[201] introduced by the defendant, the court found that only two, his alleged traits for "law abidingness and abstinence from drugs," were relevant to the crime with which the defendant was charged.[202] Because the defendant could produce evidence of his law-abidingness only subsequent to his arrest, the court found that this violated the rule stated in *State v. Rivera*,[203] and thus found that the trial court had properly excluded the proffered evidence.[204]

The court in *Rabe* next determined whether the trial court properly excluded the defendant's offer of evidence attesting to his abstinence from drugs under HRE Rule 403.[205] In applying the abuse of discretion standard to the HRE Rule 403 review, the court found that the evidence was of limited relevance, and witnesses had testified "without contradiction or impeachment as to [the defendant's] non-involvement with

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> of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]

Id.

[196] For the text of HAW. R. EVID. Rule 403, see *supra* note 172.

[197] State v. Rabe, 5 Haw. App. 251, 261, 687 P.2d 554, 561 (1984).

[198] *Id.*

[199] *Id.* at 262, 687 P.2d at 561-62.

[200] *Id.*

[201] *Id.* at 263, 687 P.2d at 562. The nine traits excluded by the court as being not pertinent includes: reliability, dependability, diligence, amiability, reasonableness, decency, honesty, truthfulness and the abstinence from alcohol. *Id.*

[202] *Id.* at 262-64, 687 P.2d at 562-63.

[203] 62 Haw. 120, 127, 612 P.2d 526, 531 (1980) (holding that the use of reputation evidence relating to the period after the commission of an offense is not allowed).

[204] *Rabe*, 5 Haw. App. at 263-64, 687 P.2d at 563.

[205] *Id.*

drugs.''[206] In deciding that the lower court had not abused its discretion in excluding the evidence, the court found that the proffered evidence would have been ''merely cumulative and a waste of time,'' and was therefore properly excluded under HRE Rule 403.[207]

The court in *Kealoha* used the holdings from *Kaeo* and *Rabe* to illustrate that Hawai'i appellate courts had already been using a right/wrong standard when reviewing evidentiary decisions.[208] Hence, the *Kealoha* decision provided a formal recognition of the application of the dual (right/wrong and the abuse of discretion) standard of review to evidentiary decisions.[209]

The adoption of the dual standard of review in *Kealoha* is unique in two ways. First, it has diverged from the approach taken by other jurisdictions in their application of the standards of review to evidentiary decisions. Other jurisdictions, like Hawai'i has done in the past, apply the abuse of discretion standard to all aspects of a review of an evidentiary decision.[210]

Secondly, unlike the decisions discussed in the previous sections, *Kealoha* is unique in that it does not conflict with earlier Hawai'i decisions on the same issue. *Kealoha* builds upon past decisions, using them to develop its application of the dual standard of review. In this respect, *Kealoha* can be said to be in harmony with past decisions. However, the harmony of the *Kealoha* decision cannot be imputed to all standard of review applications, as is demonstrated by the following section.

D. Conflicting Applications

The Hawaii Supreme Court has rendered several decisions which have applied different standards of review to the same or similar issues. On the surface, these decisions seem confusing. A careful analysis of

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[206] *Id.* at 264, 687 P.2d at 563.

[207] *Id.*

[208] Kealoha v. County of Hawaii, 74 Haw. 308, 313-19, 844 P.2d 670, 673-76 (1993).

[209] *Id.*

[210] *See, e.g.*, Glass v. Philadelphia Elec. Co., 34 F.3d 188, 191 (3rd Cir. 1993); Gov't of the Virgin Islands v. Pinney, 967 F.2d 912, 914 (3rd Cir. 1992); United States v. Brown, 948 F.2d 1076, 1081 (8th Cir. 1991); United States v. Hays, 872 F.2d 582, 587 (5th Cir. 1989); Garraghty v. Jordan, 830 F.2d 1295, 1298 (4th Cir. 1987).

the decisions, however, indicate that subtle differences in the cases justify the application of different standards.

In September 1994, the court reviewed *State v. Propios*.[211] In *Propios*, an adult probationer became the target of a warrantless probationary search after she tested positive for cocaine.[212] The search, which was allowable under the terms and conditions of her probation, was conducted by the Adult Probation Division with the assistance of the Honolulu Police Department.[213] A search of the probationer's residence uncovered cocaine, large sums of money and other drug paraphernalia.[214] The probationer and her live-in boyfriend were subsequently charged with several drug offenses.[215] The probationer-defendant filed a motion to suppress the evidence, and the trial court granted the motion.[216] In granting the motion, the trial court found that the search was unreasonable because it appeared to be a ruse to advance law enforcement purposes and to gather evidence for criminal prosecution, rather than promoting legitimate probationary goals.[217] The prosecution appealed, claiming that the lower court had committed reversible error by basing its conclusion to exclude the evidence on erroneous findings of fact and conclusions of law.[218]

The issue on review in *Propios* was whether the probationary search conducted at the residence of the probationer-defendant was improper given the involvement of the police.[219] The court characterized this issue as a "question of fact," and thus applied the clearly erroneous standard of review.[220] In applying this standard, the court was guided by the decision of the Ninth Circuit Court of Appeals in *United States v. Consuelo-Gonzalez*.[221]

Like the probationer-defendant in *Propios*, the defendant in *Consuelo-Gonzalez* was also on probation, and as a condition of her probation,

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[211] 76 Hawai'i 474, 879 P.2d 1057 (1994).

[212] *Id.* at 476-77, 879 P.2d at 1059-60.

[213] *Id.*

[214] *Id.* at 477, 879 P.2d at 1060.

[215] *Id.*.

[216] *Id.* at 475, 879 P.2d at 1058.

[217] *Id.* at 481, 879 P.2d at 1064.

[218] *Id.* at 475-76, 879 P.2d at 1058-59.

[219] *Id.* at 480, 879 P.2d at 1063.

[220] *Id.* at 481, 879 P.2d at 1064 (citing United States v. Consuelo-Gonzalez, 521 F.2d 259, 267 (9th Cir. 1975)).

[221] 521 F.2d 259 (9th Cir. 1975).

she was also subject to a search by probation authorities.[222] After receiving information that the defendant was involved with the sale and importation of heroin, federal authorities conducted a search of the defendant's residence and discovered incriminating evidence.[223] The defendant attempted to suppress the evidence at trial, but after such efforts failed, she was convicted of possessing heroin with the intent to distribute.[224]

Upon appeal to the Ninth Circuit Court of Appeals, the court in *Consuelo-Gonzalez* reversed the defendant's conviction.[225] In regards to the search, the court found that "mutually beneficial cooperation between probation officers and other law enforcement officials is permissible, [h]owever, under no circumstances should such cooperation . . . be permitted to make the probation system a subterfuge for criminal investigations."[226] In reaching its decision, the court indicated that whether a particular search is improper is a question of fact,[227] and questions of fact are appropriately reviewed under the clearly erroneous standard.

Three months after deciding *Propios*, the court faced the same issue in *In the Interest of Jane Doe, Born on May 5, 1977*.[228] In *Jane Doe*, a female minor was adjudicated in family court for the possession of marijuana.[229] The marijuana was recovered from the minor's purse pursuant to a warrantless search conducted by the principal of her high school.[230] The search was based on observations made by other school officials,[231] namely that the minor was seen away from her high school campus during school hours and in a location known for the consumption of cigarettes and marijuana by students.[232] Prior to apprehending the minor and three other students, the vice-principal and security guard of the school detected an odor of burning marijuana in the area.[233] Based on this information, the minor was taken to the

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[222] *Id.* at 261.
[223] *Id.* at 261-62.
[224] *Id.* at 262.
[225] *Id.* at 266.
[226] *Id.* at 267 (citation omitted).
[227] *Id.*
[228] 77 Hawai'i 435, 887 P.2d 645 (1994).
[229] *Id.* at 437, 887 P.2d at 647.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*

principal's office and instructed to remove the contents of her purse.[234] A small bag of marijuana was subsequently recovered from the contents of the minor's purse.[235]

The minor moved to suppress the evidence, but the family court determined that the search was reasonable and thus denied her motion.[236] On appeal, the minor claimed that the family court erred in one of its findings of fact,[237] and that because the search was improper, the evidence should have been suppressed.[238] The court said that the issue of whether the search was properly conducted is a question of law, reviewable *de novo* under the right/wrong standard.[239] After a *de novo* review, the court concluded that the search was both "justified at its inception and reasonable in scope,"[240] thus the family court was not wrong in admitting the evidence.[241]

The issue in *Jane Doe* and *Propios*, the reasonableness of a search, presents a mixed question of fact and law. In *Propios*, the court looked beyond the legal question of whether the search had been improperly conducted and focused instead on the facts that supported that conclusion. The facts in *Propios* were important to answering the legal question because the court's answer hinged on the extent to which the police were involved with the search. Because of the court's heavy reliance on the facts of the case, the application of the clearly erroneous standard to the court's review of the issue appears to be appropriate.

Unlike *Propios*, the court in *Jane Doe* focused on the legal question presented by the issue, as opposed to the supporting facts. One reason for the court's emphasis on the legal aspect of the issue is that all but one of the factual findings of the lower court were undisputed.[242] After

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[234] *Id.*

[235] *Id.*

[236] *Id.* at 437-38, 887 P.2d at 647-48.

[237] *Id.* at 438, 887 P.2d at 648.

[238] *Id.* at 439, 887 P.2d at 649.

[239] *Id.* at 438, 887 P.2d at 648 (citing *In re* Holt, 75 Haw. 224, 232, 857 P.2d 1355, 1359 (1993)).

[240] *Id.* at 443, 887 P.2d at 653.

[241] *Id.*

[242] *Id.* at 438-39, 887 P.2d at 648-49. The only fact in dispute was whether one of the four minors apprehended by the vice principal had possessed and smoked marijuana prior to being apprehended. The court found that there was credible evidence to support this finding of fact and thus the finding was not found to be clearly erroneous. *Id.*

the court disposed of the disputed fact by finding substantial evidence to support it, there were no other facts to dispute.[243]

With no other facts in dispute, the court in *Jane Doe* concerned itself with determining the applicable substantive legal standard for schoolyard searches.[244] The court determined that the "reasonable suspicion test," as discussed by the U.S. Supreme Court in *New Jersey v. T.L.O.*,[245] was the appropriate substantive legal standard to be applied to the facts of *Jane Doe*.[246] Because the court's main function in *Jane Doe* appeared to be its determination of the appropriate substantive legal standard for schoolyard searches, which is a question of law, the court correctly applied the right/wrong standard of review.

The Hawaii Supreme Court in 1994 decided two cases which involved the issue of whether a defendant's statement had been voluntarily given.[247] In both of those cases, even though the court relied on the same precedent[248] to determine the appropriate standard of review, it appears that the court applied two different standards.[249] Without a careful analyisis of the decisions, it is difficult to understand the actions of the court in this situation.

In *State v. Kekona*,[250] the defendant, after being arrested for robbery and assault, confessed to the police his role in the crimes.[251] After being charged, the defendant filed a motion to suppress the confession claiming that the interrogation should have ceased after he invoked his right to remain silent, that his confession was coerced and involuntary, and that the police should have tape recorded the confession.[252] The trial court found that the defendant was properly informed of his rights,

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[243] *Id.*

[244] *Id.* at 439-45, 887 P.2d at 649-55.

[245] 469 U.S. 325, 341 (1985).

[246] *Jane Doe*, 77 Hawai'i at 439-42, 887 P.2d at 649-52.

[247] State v. Kekona, 77 Hawai'i 403, 405-06, 886 P.2d 740, 742-43 (1994); State v. Hoey, 77 Hawai'i 17, 32, 881 P.2d 504, 519 (1994).

[248] *Kekona*, 77 Hawai'i at 405-06, 886 P.2d at 742-43; *Hoey*, 77 Hawai'i at 32, 881 P.2d at 519. Both cases relied upon State v. Villeza, 72 Haw. 327, 330-31, 817 P.2d 1054, 1056 (1991) and State v. Kelekolio, 74 Haw. 479, 501, 849 P.2d 58, 69 (1993).

[249] *Kekona*, 77 Hawai'i at 405-06, 886 P.2d at 742-43; *Hoey*, 77 Hawai'i at 32, 881 P.2d at 519.

[250] 77 Hawai'i 403, 886 P.2d 740 (1994).

[251] *Id.* at 404-05, 886 P.2d at 741-42.

[252] *Id.* at 405, 886 P.2d at 742. The court dismissed the defendant's claim that the confession should have been tape recorded because tape recording of confessions is not a requirement. *Id.*

that he voluntarily waived those rights, and that his statement was therefore "freely and voluntarily given."[253] The defendant entered a no contest plea to the robbery offense, subject to his right to appeal the denial of the motion to suppress his confession.[254]

On appeal, the court in *Kekona* determined that the clearly erroneous standard was the applicable standard of review for determining whether the defendant voluntary gave his statement to the police.[255] In establishing this standard, the court relied upon two prior cases:[256] *State v. Villeza*[257] and *State v. Kelekolio*.[258]

In *Villeza*, the Hawaii Supreme Court seemingly "broadened" the scope of appellate review in cases addressing the issue of voluntariness of confessions.[259] In stating the appropriate standard of review, the court said:

> [O]ur review of whether Villeza's statement was in fact coerced requires a determination of whether the findings of the trial court are clearly erroneous. Moreover, we are required to examine the entire record and make an independent determination of the ultimate issue of voluntariness.[260]

The first part of the court's statement, which addresses the appropriate standard of review, apparently refers to the review of the lower court's findings of fact that relate to the voluntariness issue.[261] In that respect, the court's application of the clearly erroneous standard is appropriate.[262] In the second portion of the statement, the court's reference to the examination of the "entire record" and the making of an "independent determination," apparently applies a *de novo* review to the "ultimate issue of voluntariness."[263] By applying the *de novo* review,

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[253] *Id.*

[254] *Id.*

[255] *Id.* at 406, 886 P.2d at 743.

[256] *Id.*

[257] 72 Haw. 327, 817 P.2d 1054 (1991).

[258] 74 Haw. 479, 849 P.2d 58 (1993).

[259] *Villeza*, 72 Haw. at 330-31, 817 P.2d at 1056 (citations omitted).

[260] *Id.*

[261] *Id.*

[262] State v. Meyer, 78 Hawai'i 308, 311, 893 P.2d 159, 162 (1995) (stating that a court's findings of fact are reviewed under the clearly erroneous standard).

[263] Dan v. State, 76 Hawai'i 423, 427, 879 P.2d 528, 532 (1994) (stating that a trial court's decision is reviewed *de novo* when "the appellate court steps into the trial court's position, reviews the same trial record, and redecides the issue"). The court in *Villeza* apparently identified the "ultimate issue of voluntariness" as a question of law. State v. Villeza, 72 Haw. 327, 330-31, 817 P.2d 1054, 1056 (1991).

the court in *Villeza* evidently created a dual standard approach to the issue of voluntariness.[264]

In *Kelekolio*, the court applied only the second part (*de novo* review) of the *Villeza* dual standard.[265] By following *Kelekolio*, *Kekona* thus applied both of the *Villeza* standards in its review of the lower court's decision: the first part cited to *Villeza*, and the second to *Kelekolio*.[266] The court in *Kekona* never called the second part of the dual standard by name (*de novo* review),[267] thus without further inquiry, it appears that the court applied only the clearly erroneous standard. This illusion may have been further enhanced by the court's repeated deference to the trial court in addressing the factual dispute regarding the defendant's testimony and that of the police.[268] Notwithstanding the confusion caused by the court's failure to state that it was also applying a *de novo* review, the decision in *Kekona* hinged on the facts and therefore the application of the clearly erroneous standard was appropriate.[269]

Unlike *Kekona*, the other case decided by the court in 1994, *State v. Hoey*,[270] explicitly stated that it was applying a *de novo* review to the ultimate issue of voluntariness.[271] The defendant in *Hoey*, after his arrest for robbery and kidnapping, gave an oral confession to the police.[272] In his efforts to suppress the confession, the defendant claimed that the interrogating detective had not explained to him that he was entitled to "free counsel" during the interrogation, and he had therefore not waived his right to counsel.[273] The trial court denied the defendant's motion to suppress,[274] and the defendant was subsequently convicted of both offenses.[275]

On appeal, the facts relating to the defendant's motion to suppress were undisputed.[276] The only question was whether the defendant

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[264] *Villeza*, 72 Haw. at 331, 817 P.2d at 1056.

[265] State v. Kelekolio, 74 Haw. 479, 501, 849 P.2d 58, 69 (1993).

[266] State v. Kekona, 77 Hawai'i 403, 406, 886 P.2d 740, 743 (1994).

[267] *Id.*

[268] *Id.* at 406-07, 886 P.2d at 743-44.

[269] *Kekona*, 77 Hawai'i at 406-07, 886 P.2d at 743-44; State v. Meyer, 78 Hawai'i 308, 311, 893 P.2d 159, 162 (1995) (findings of fact are reviewed under the clearly erroneous standard).

[270] 77 Hawai'i 17, 881 P.2d 504 (1994).

[271] *Id.* at 32, 881 P.2d at 519.

[272] *Id.* at 21-22, 881 P.2d at 508-09.

[273] *Id.* at 25, 881 P.2d at 512.

[274] *Id.* at 26, 881 P.2d at 513.

[275] *Id.* at 28, 881 P.2d at 515.

[276] *Id.* at 27, 37, 881 P.2d at 513, 524 (the contents of the defendant's tape recorded confession were not an issue in this case).

waived his right to counsel.[277] The court characterized this question as one involving constitutional issues, and referred to both the *Villeza* and *Kelekolio* decisions for guidance in applying the appropriate standard of review.[278]

The court noted that *Villeza* recognized that questions concerning the waiver of rights involve the "application of constitutional principles to the facts," and it found that *Kelekolio* applied the implicit *de novo* review of the *Villeza* dual standard in accomplishing this task.[279] In its determination that the appropriate standard involved a *de novo* review, the court said "we apply a de novo standard of appellate review to the ultimate issue of the voluntariness of a confession."[280]

Although the *Hoey* decision appears to be in conflict with the *Kekona* decision on its face, a closer inspection reveals that both decisions are sending the same message, but in a different way. *Hoey* holds that when a voluntariness issue has constitutional implications, a *de novo* review should be applied.[281] When a voluntariness issue is rooted in fact, *Kekona* indicates that the application of the clearly erroneous standard is appropriate.[282] Thus both decisions actually complement each other, as they illustrate that, depending on the legal principle in dispute, it may be appropriate to apply different standards to the same issue.

IV. Analysis of Decisions

It is helpful to begin the analysis by noting that all of the controlling decisions[283] discussed above were made by the Hawaii Supreme Court,[284]

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[277] *Id.* at 33-34, 881 P.2d at 520-21.

[278] *Id.* at 32, 881 P.2d at 519 (citations omitted).

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] State v. Kekona, 77 Hawai'i 403, 406, 886 P.2d 740, 743 (1994) (citations omitted).

[283] The scope of this article is to discuss the identification and application of the standards of review to Hawai'i case law. Thus, federal decisions will not be analyzed in this section.

[284] *See generally* Dan v. State, 76 Hawai'i 423, 879 P.2d 528 (1994); In the Matter of the Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 868 P.2d 419 (1994); Kealoha v. County of Hawaii, 74 Haw. 308, 844 P.2d 670 (1993); State v. Propios, 76 Hawai'i 474, 879 P.2d 1057 (1994); In the Interest of Jane Doe, Born on May 5, 1977, 77 Hawai'i 435, 887 P.2d 645 (1994); State v. Kekona, 77 Hawai'i 403, 886 P.2d 740 (1994); State v. Hoey, 77 Hawai'i 17, 881 P.2d 504 (1994).

which had either overruled[285] or expanded upon[286] the decisions of the ICA. This section will therefore attempt to determine only the Hawaii Supreme Court's perspective on the application of the standards of review.

The common theme running through all of the decisions is that the court is focused on the nature or orientation of the question presented by the issues.[287] When determining the nature of the question, the court must ask itself whether the question is one of fact, law, mixed fact and law, or a discretionary function of the court. Mixed fact and law questions requires an appellate court to further identify which part of the fact/law mix dominates.[288]

The court in *Dan* determined that the nature of the question, whether the defendant could show a colorable claim to warrant a hearing, was one of law.[289] Because questions of law involve "formulating a proposition that affects not only the immediate case, but all others that fall within its terms,"[290] the court must have had some type of legal rule, standard, or principle on which it based its decision.[291] The court in *Dan* did indeed have a legal rule to refer to, as it quoted from *Allen*: "[t]o establish a colorable claim, the allegations of the petition must show that if taken as true the facts alleged would change the verdict . . . ."[292]

The nature of the question in *Hawaiian Flour Mills* was determined to be one of fact.[293] The court supported its determination by pointing

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[285] State v. Allen, 7 Haw. App. 89, 744 P.2d 789 (1987) *overruled in part by* Dan v. State, 76 Hawai'i 423, 879 P.2d 528 (1994); De Silva v. Burton, 9 Haw. App. 222, 832 P.2d 284 (1992) *overruled by* In the Matter of the Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 868 P.2d 419 (1994).

[286] State v. Rabe, 5 Haw. App. 251, 687 P.2d 554 (1984) (applicable standard of review expanded upon by Kealoha v. County of Hawaii, 74 Haw. 308, 844 P.2d 670 (1993)).

[287] *See generally* Dan v. State, 76 Hawai'i 423, 879 P.2d 528 (1994); In the Matter of the Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 868 P.2d 419 (1994); Kealoha v. County of Hawaii, 74 Haw. 308, 844 P.2d 670 (1993); State v. Propios, 76 Hawai'i 474, 879 P.2d 1057 (1994); In the Interest of Jane Doe, Born on May 5, 1977, 77 Hawai'i 435, 887 P.2d 645 (1994); State v. Kekona, 77 Hawai'i 403, 886 P.2d 740 (1994); State v. Hoey, 77 Hawai'i 17, 881 P.2d 504 (1994).

[288] Yoshii, *supra* note 19, at 290.

[289] *Dan*, 76 Hawai'i at 427, 879 P.2d at 532.

[290] Monaghan, *supra* note 76, at 235 (citations omitted).

[291] *Id.*

[292] *Dan*, 76 Hawai'i at 427, 879 P.2d at 532.

[293] In the Matter of the Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawai'i 1,

to the factual nature of HRCP Rule 11 decisions and the better position of the trial judge in deciding whether or not the imposition of Rule 11 sanctions are appropriate.[294] This conclusion is further justified by the fact that the legal nature of Rule 11 decisions are undisputed, as the law is established by statute or court rule, and the only role of the judge is to apply the factual circumstances to the law.

The difficulty in the *Hawaiian Flour Mills* decision arises when the court attempts to characterize the clearly erroneous and abuse of discretion standards as being one and the same when applied to judicial factual determinations.[295] Such reasoning is confusing because it would seem to obviate the need to apply the clearly erroneous standard to judicial findings of fact in other situations. The court could have taken a better approach in justifying the application of the abuse of discretion standard on the grounds that the ultimate determination of the factual question is within the discretion of the court. Further, because the discretionary label is applied to those types of situations which have so many variations that it would be impossible for the court to fashion legal rules for every possible outcome,[296] the application of the right/wrong standard could have been excluded. Notwithstanding this possible defect in the court's reasoning, the court's position in *Hawaiian Flour Mills* remains on track with the common theme in the application of the standards of review that the nature of the question determines the applicable standard.

In *Kealoha*, the court recognized that different evidentiary rules present different types of questions.[297] Certain rules were found to be discretionary in nature,[298] while others were classified as being legal in nature.[299] With the justification for the abuse of discretion standard already in place, the court in *Kealoha* needed to only concern itself with the development of some type of rule to address the legal nature of certain evidentiary rules.[300] The rule established by *Kealoha* is that

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16, 868 P.2d 419, 434 (1994) (citing Cooter & Gell v. Hartmarx, 496 U.S. 384, 404 (1990)).

[294] *Id.* at 15-16, 868 P.2d at 433-34 (citations omitted).

[295] *Id.* at 15, 868 P.2d at 433.

[296] Baumler, *supra* note 6, at 490 (citing United States v. McCoy, 517 F.2d 41, 44 (7th Cir. 1975), *cert. denied*, 423 U.S. 895 (1975)).

[297] Kealoha v. County of Hawaii, 74 Haw. 308, 319-20, 844 P.2d 670, 676 (1993).

[298] *Id.* at 317, 844 P.2d at 675.

[299] *Id.* at 319, 844 P.2d at 675.

[300] *Id.* at 319-20, 844 P.2d at 676.

"[w]hen application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard."[301] *Kealoha* comports with the proposition that the proper application of the standards of review requires a determination of the nature of the question.

The court found that the nature of the question in *Propios* was one of fact.[302] The dispute in *Propios* centered around the extent to which the police were involved in the search of the defendant's home.[303] Because this dispute is rooted in fact, it supports the court's position.[304]

Kekona also involved a dispute rooted in fact.[305] Whether the police coerced the defendant's confession in that case hinged on the credibility of the witnesses,[306] and the determination of credibility is within the province of the trier of fact.[307] The clearly erroneous standard, which affords deference to the trier of fact, was thus appropriately applied in that case.

The dispute in *Jane Doe*, unlike that in *Propios* or *Kekona*, involved the application of constitutional principles to virtually undisputed facts.[308] In fashioning a rule for the legal question of whether a search was lawfully conducted, the court said:

> [B]ecause the warrant requirement is particularly unsuited to the school environment . . . public school officials do not need search warrants or probable cause to search or seize evidence from students under their authority; . . . searches or seizures in the school context must be reasonable under all circumstances and . . . must be justified at their inception and . . . reasonably related in scope to the circumstances which justified the interference in the first place.[309]

Thus the court's characterization of the question in *Jane Doe* as being one of law[310] was not erroneous, and it follows the "nature of the question" perspective of the decisions.

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[301] *Id.* at 319, 844 P.2d at 676.

[302] State v. Propios, 76 Hawai'i 474, 479, 879 P.2d 1057, 1062 (1994).

[303] *Id.* at 480-81, 879 P.2d at 1063-64.

[304] *Id.*

[305] State v. Kekona, 77 Hawai'i 403, 406, 886 P.2d 740, 743 (1994).

[306] *Id.*

[307] *Id.*

[308] In the Interest of Jane Doe, Born May 5, 1977, 77 Hawai'i 435, 438-39, 887 P.2d 645, 648-49 (1994).

[309] *Id.* at 442, 887 P.2d at 652.

[310] *Id.* at 438, 887 P.2d at 648.

The question in *Hoey*, like *Jane Doe*, involved the application of constitutional principles to undisputed facts.[311] In determining whether the defendant invoked his right to counsel during a police interrogation, the court created a legal rule which mandated the cessation of questioning by police during a custodial interrogation if a defendant makes a request for counsel.[312] Thus the court appropriately classified the question as being legal in nature,[313] and such classification is consistent with the perspective of the other decisions.

In sum, the cases discussed in this article indicate that the application of the appropriate standard of review requires a determination of the nature of the question presented by the issue. This determination is made by identifying whether the dispute on appeal is based on fact, law or the exercise of judical discretion, and may involve the dissection of a mixed fact and law question. Upon determining the nature of the question, the applicable standard of review can be identified according to the established principles set forth in Section II of this article.[314]

The only problem which could arise in the application of a standard of review would be in a situation like *Hawaiian Flour Mills*, where the court justifies its application of a particular standard of review by characterizing it as being the same as another equally appropriate standard.[315] *Hawaiian Flour Mills* appears to be a rare situation, however, and there is virtually no way to predict such an occurrence.

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[311] State v. Hoey, 77 Hawai'i 17, 32, 881 P.2d 504, 519 (1994).

[312] *Id.* at 36, 881 P.2d at 523. The court stated the following legal rule in regards to a defendant's right to counsel during custodial interrogation situations: "[W]hen a suspect makes an ambiguous or equivocal request for counsel during custodial interrogation, the police must either cease all questioning or seek non-substantive clarification of the suspect's request, and . . . if, upon clarification, the defendant unambiguously and unequivocally invokes the right to counsel, all substantive questioning must cease until counsel is present." *Id.*

[313] *Id.* at 32, 881 P.2d at 519 (applying a *de novo* review to the ultimate issue of voluntariness). *See also* Bateman Construction v. Haitsuka Bros., 77 Hawai'i 481, 484, 889 P.2d 58, 61 (1995) (questions of law are reviewed de novo).

[314] *See, e.g.*, State v. Meyer, 78 Hawai'i 308, 311, 893 P.2d 159, 162 (1995) (holding findings of facts are reviewed under the clearly erroneous standard and conclusions of law are reviewed under the right/wrong standard); State v. Chen, 77 Hawai'i 329, 339, 884 P.2d 392, 402 (1994) (stating a jury verdict will be affirmed if there is substantial evidence to support it); Aga v. Hundahl, 78 Hawai'i 230, 241, 891 P.2d 1022, 1033 (1995) (stating a trial court's exercise of discretion will be upheld unless the reviewing court finds an abuse of discretion).

[315] In the Matter of the Tax Appeal of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 15, 868 P.2d 419, 433 (1994).

Presently, precedent appears to be the best predictor in determining what the Hawaii Supreme Court considers to be the appropriate standard of review for a particular issue. However, as the recent decisions indicate, standard of review application is not static; it is an evolving process that will continue to change as understanding and interest is generated in this area.

V. Conclusion

Application of the appropriate standard of review is an important part of the appellate process in Hawai'i. As the recent court decisons indicate, the appellate courts have given the standards much thought and attention. Because appellate standards of review set the boundaries in which the appellate courts review the decisions of lower tribunals, this increased attention is warranted. Astute and effective legal practitioners should be quick to recognize the significance that the appellate courts have placed on the standards of review, and should thus make an effort to better understand the context in which they are applied. Although the courts have shown a trend in applying the standards based on the nature or orientation of the question involved, the changing nature and an increased focus on proper application requires a vigilant effort to remain current in this area.

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Criminal Procedure Rights Under the Hawaii Constitution Since 1992

I. Introduction

This article examines certain key decisions regarding criminal procedure rights handed down by the Hawaii Supreme Court since 1992. It is not an exhaustive survey of all criminal precedents but a selective analysis focusing primarily on those decisions in which the court has interpreted the rights of the accused in criminal proceedings to be greater under the Hawaii Constitution than under the U.S. Constitution.[1] To some degree, this article supplements a recent University of Hawaii Law Review article written by Professor Jon Van Dyke, Marilyn Chung, and Teri Kondo that highlighted important decisions from 1982 to 1992 in which the Hawaii Supreme Court interpreted individual rights under the state constitution.[2] A portion of that article summarized decisions involving criminal procedure in Hawai'i.[3] Chief Justice Lum presided over the court throughout the ten-year period covered by the Van Dyke article, before retiring from the court on March 31, 1993.[4] This article includes decisions by the Lum court

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[1] Although the language describing individual rights in the Hawaii Constitution and the federal constitution may be virtually identical, the Hawaii Supreme Court is "not bound to give provisions of the Hawaii Constitution the same interpretations as those given under the United States Constitution." State v. Lessary, 75 Haw. 446, 453, 865 P.2d 150, 154 (1994) (citing Oregon v. Hass, 420 U.S. 714 (1975)). In fact, "[w]hen the United States Supreme Court's interpretation of a provision present in both the United States and Hawaii Constitutions does not adequately preserve the rights and interests sought to be protected, [the court] will not hesitate to recognize the appropriate protections as a matter of state constitutional law." *Id.*

[2] Jon M. Van Dyke, Marilyn M.L. Chung, and Teri Y. Kondo, *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. Haw. L. Rev. 311 (1992).

[3] *Id.* at 325-41.

[4] *See e.g.*, *Lessary*, 75 Haw. at 446, 865 P.2d at 150.

during its final months, as well as those by the new court led by Chief Justice Moon.

The Van Dyke article reveals that in selected cases the Lum court had taken a liberal stance in interpreting the rights afforded to the criminally accused under the Hawaii Constitution.[5] In several areas of criminal procedure, the Lum court had departed from the U.S. Supreme Court's interpretation of the U.S. Constitution to grant greater rights to Hawai'i citizens.[6] However, the court often chose to follow the federal precedent as well.[7] The Van Dyke article concluded that "[i]n the criminal procedure area, the court has been willing to go beyond the federal precedents to protect the rights of the accused, but the adjustments are incremental rather than moving in an entirely new direction."[8]

A primary focus of this article is to analyze the decisions of the Moon court in contrast to the decisions of the Lum court over the preceding ten-year period. In its brief existence, the Moon court generally has followed the Lum court in increasing the criminal procedure rights of defendants. However, several key decisions indicate the Moon court's greater willingness to follow the federal precedent or even to curtail citizens' rights. These decisions clearly suggest that the Hawaii Supreme Court may be becoming more conservative in interpreting the rights of the accused under the state constitution.

Sections II through VII of this article cover specific areas of criminal procedure rights: due process, self-incrimination, double jeopardy, unreasonable searches and seizures, trial by jury, and confrontation. Each section contains both background material, including certain cases discussed in the Van Dyke article, and a discussion of recent decisions concerning the appropriate area of law. These sections conclude with an analysis of the case law, emphasizing the trends of the Moon court.

II. Due Process

A. Background

The Due Process Clause of Article I, Section 5 of the Hawaii Constitution provides that "[n]o person shall be deprived of life, liberty,

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[5] Van Dyke, *supra* note 2, at 340.

[6] *See id.* at 340-41.

[7] *See* Van Dyke, *supra* note 2, at 340-41.

[8] *Id.* at 315.

or property without due process of law[.]"[9] Although the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, on which the Hawaii due process clause is based, contains almost identical language, "the due process protection under our state constitution is not necessarily limited to that provided by the United States Constitution."[10]

The Lum court consistently afforded additional due process protection under the Hawaii Constitution beyond the degree required by the federal precedents.[11] In *State v. Matafeo*,[12] for example, the court held that the government's destruction of physical evidence critical to a criminal defendant's defense may constitute a *per se* violation of the defendant's state right to due process.[13] In doing so, the court afforded greater protection than provided by the U.S. Supreme Court, which had held that a destruction of evidence would require a showing of government bad faith to violate a defendant's due process right under the U.S. Constitution.[14] The Van Dyke article noted other decisions in which the Lum court extended due process rights of the accused under article I, section 5.[15] These included decisions involving expert testimony,[16] jury instructions,[17] and excessive delay in indictment.[18]

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[9] HAW. CONST. art I, § 5.

[10] State v. Bowe, 77 Hawai'i 51, 58, 881 P.2d 538, 545 (1994) (citations omitted).

[11] Van Dyke, *supra* note 2, at 325-34.

[12] 71 Haw. 183, 787 P.2d 671 (1990).

[13] *Id.* at 187, 787 P.2d at 673.

[14] *Id.* at 186-87, 787 P.2d at 673 (citing Arizona v. Youngblood, 488 U.S. 51 (1988)).

[15] Van Dyke, *supra* note 2, at 327-31.

[16] State v. Batangan, 71 Haw. 552, 553, 799 P.2d 48, 49 (1990) (holding that the testimony of a clinical psychologist making conclusory statements about the truthfulness of the victim's testimony is inadmissible).

[17] State v. Fajardo, 67 Haw. 593, 699 P.2d 20 (1985). The trial judge in a homicide prosecution instructed the deadlocked jury that "[e]ach juror who finds himself to be in the minority should reconsider his views in the light of the opinion of the majority." *Id.* at 595, 699 P.2d at 21. The Hawaii Supreme Court held that the use of such an instruction (known as the Allen instruction) with deadlocked juries is prejudicial and constitutes reversible error. *Id.* at 601, 699 P.2d at 25.

[18] State v. Dunphy, 71 Haw. 537, 544, 797 P.2d 1312, 1316 (1990) (holding that a violation of the defendant's due process rights occurred when the prosecutor's office caused an unreasonable 25-month delay in the defendant's indictment, during which time tapes upon which the defendant's defense of entrapment depended were destroyed).

B. Recent Decisions

In *State v. Kekona*,[19] the Moon court decided not to increase citizens' due process rights under article I, section 5 of the Hawaii Constitution.[20] The defendant Kekona was arrested in connection with a robbery and interrogated by police.[21] During the interrogation, Kekona confessed to a robbery and assault.[22] Although Kekona testified to the contrary, the circuit court found that he was properly advised of his *Miranda* rights, that he did not invoke his right to remain silent, that the police did not coerce him into confessing, and that he voluntarily and intelligently waived his *Miranda* rights before confessing.[23] The interrogation was not tape recorded, so no record of the session existed.[24] Accordingly, the court was forced to make its findings on the basis of the testimony of Kekona and the interrogating officers.[25]

On appeal, Kekona argued that the State, in failing to tape record his custodial interrogation, did not meet its burden of proving that he had made a valid waiver of his *Miranda* rights.[26] Relying on the Alaska Supreme Court decision of *Stephan v. State*,[27] Kekona urged the Hawaii

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[19] 77 Hawai'i 403, 886 P.2d 740 (1994).

[20] *Id.* at 409, 886 P.2d at 746.

[21] *Id.* at 404, 886 P.2d at 741.

[22] *Id.* at 404, 886 P.2d at 741-42.

[23] *Id.* Kekona and the interrogating police officers gave conflicting versions of events. Kekona testified that after he explained his involvement in the robbery, the officers accused him of lying. He claimed that he told the officers, "I no like talk," and that they both left the interrogation room. They returned and, without giving Kekona new *Miranda* warnings, began to question him again. After one of the officers urged Kekona to tell the truth, Kekona gave a false account of the robbery in which he implicated himself. *Id.* at 404-05, 886 P.2d at 741-42.

The officers' version of the interrogation was dramatically different. They testified that Kekona never invoked his right to remain silent or requested an attorney. Kekona gave one version of the robbery and then took a break for five to ten minutes. After the break, an officer continued the interrogation because Kekona's story was full of inconsistencies. According to the officer, Kekona admitted that his initial account was a lie and then gave a different version of the robbery. *Id.* at 405, 886 P.2d at 742.

[24] *Id.* The police failed to tape record the interrogation, even though the necessary equipment was readily available. In addition, Kekona did not provide a written statement at the time. *Id.*

[25] *Id.* at 409, 886 P.2d at 746.

[26] *Id.* at 407, 886 P.2d at 744.

[27] 711 P.2d 1156 (Alaska 1985). The facts of *Stephan* almost mirror those of *Kekona*. The defendants in *Stephan* moved to suppress confessions they had made during an

Supreme Court to rule on state constitutional grounds that the government's failure to record violated his due process rights.[28]

The Hawaii Supreme Court rejected Kekona's argument and "decline[d] to hold that the State must tape record a custodial interrogation in order to establish a valid waiver of a criminal defendant's constitutional rights."[29] Although the court admitted that an electronic recording would definitely help the trier of fact resolve factual disputes, it held that the absence of a recording would not violate the due process clause of the Hawaii Constitution.[30] It declined to find that "the failure of the police to manufacture a tape recording of Kekona's station house interrogation was so detrimental to his defense that it necessarily resulted in a unfair trial."[31] The court explained that the trier of fact could still assess all significant evidence, including the credibility of witness testimony, at trial.[32] The fact that police failed to tape record an interrogation might still help the defense by undermining the credibility of government testimony regarding the interrogation.[33]

Justice Levinson, concurring and dissenting, vilified the majority for declining to adopt the Alaska Supreme Court rule of *Stephan v. State*.[34] Levinson saw absolutely no reason not to require tape recording when feasible, especially since the majority acknowledged its benefit to the fact-finding process.[35] According to Levinson, due process under the

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interrogation by police. The defendants testified that the police did not inform them of their *Miranda* rights. Moreover, the defendants alleged that the police questioned them even after they had requested attorneys and asserted their right to remain silent. The police denied these claims. However, they had failed to tape record the relevant portions of the interrogation. *Id.* at 1158.

The Alaska Supreme Court held that the police's failure to tape the interrogation rendered the defendants' confessions inadmissible under the due process clause of the Alaska State Constitution. The court formulated the rule that all custodial interrogations must be recorded when feasible. *Id.* at 1159.

[28] *Kekona*, 77 Hawai'i at 408, 886 P.2d at 745 (1994).

[29] *Id.* at 409, 886 P.2d at 746.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* However, the court conceded that "whether the failure of the police to create a record of the defendant's confession undermines its accuracy and detracts from the credibility of later testimony is an issue uniquely left to the sound discretion of the trier of fact." *Id.*

[34] *Id.* at 415, 886 P.2d at 752 (Levinson, J., concurring and dissenting).

[35] *Id.* The majority admitted that a recording of a custodial interrogation would help to resolve the very sort of factual dispute which occurred between the accused

Hawaii Constitution mandates that all custodial police interrogations of criminal suspects be electronically recorded when feasible.[36] He reasoned that such recording "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination, and ultimately, his right to a fair trial."[37]

Levinson was particularly distressed by the majority's reluctance to provide additional state due process protection because the Hawaii Supreme Court "has historically been in the forefront of extending the rights and liberties of persons subject to local law on independent state constitutional grounds, and we should be proud of that fact."[38] To

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and the police in *Kekona*. *Id.* at 409, 886 P.2d at 746. A recording would also help to determine the voluntariness of a confession by providing the actual content of such a statement in its proper context. *Id.* In fact, the majority saw fit to "stress the importance of utilizing tape recordings during custodial interrogations when feasible." *Id.*

[36] *Id.* at 413, 886 P.2d at 750.

[37] *Id.* at 411, 886 P.2d at 748 (citing Stephan v. State, 711 P.2d 1156, 1159-62 (Alaska 1985)).

[38] *Id.* at 413-14, 886 P.2d at 750-51. Levinson implied that the majority declined to adopt the *Stephan* rule because it was reluctant to expand individual rights on state constitutional grounds. *Id.* He found significant the majority's express recognition that the Alaska Supreme Court decided *Stephan* by interpreting the Alaska State Constitution, as opposed to the U.S. Constitution. Levinson argued that "[t]here is nothing outlandish about the Alaska Supreme Court's reliance upon its state's constitution in order to expand the parameters of due process beyond those perceived in the United States Constitution." *Id.* at 413, 886 P.2d at 750.

To support his position, Levinson launched into a defense of the expansion of individual rights through state constitutional interpretation. He quoted a treatise by Professor Friesen, which seems indicative of Levinson's views on the role of the court:

> Since 1970, state supreme courts have handed down hundreds of opinions that grant protection for civil rights and liberties, based on provisions in their state constitutions, that is greater than or equivalent to the protection given these rights under parallel provisions of the United States Constitution as interpreted by the [United States] Supreme Court. Independently reasoned opinions sometimes express a desire to grant "more" than an unwelcome Supreme Court decision, but independent state courts are not merely reactive. Some use an independent approach as a matter of course, without regard to what happens to be the current trend in the Supreme Court. Some state decisions have upheld or denied a right asserted under state law that federal law has not clearly addressed, and some have even found that the state provision did not protect a right that federal law would grant. In addition to these holdings that uncouple state Bills of Rights from their federal counterparts, state courts enforcing state charters have been steadily developing protections for rights that are uniquely or primarily guaranteed by state rather than federal law.

support his contention he cited a number of decisions, spanning almost the last 30 years, in which the Hawaii Supreme Court had increased individual rights through its interpretation of the state constitution.[39]

. . .

The state constitutional revival sometimes goes under the name of "new federalism" or "judicial federalism" to signify the growing importance of "states' rights" for individuals. Like other state laws, these rights co-exist with, and often exceed, national constitutional rights. Renewed interest in state law is in part a response to the perception that national rights are no longer interpreted as generously as in previous decades. It is a mischaracterization, however, to view state constitutional law merely as serving particular ideological ends. Many independent state rights decisions do serve "liberal" goals, if liberal is defined as "more expansive than the current Supreme Court." But others would be equally welcomed by political "conservatives."

Id. at 413, 886 P.2d at 750 (citing J. FRIESEN, STATE CONSTITUTIONAL LAW § 1.01 (1993)).

[39] *Kekona*, 77 Hawai'i at 414-15, 886 P.2d at 751-52. Levinson's list, as it appears in his concurring and dissenting opinion, appears as follows:

See, e.g., *State v. Texeira*, 50 Haw. 138, 142 n.2, 433 P.2d 593, 597 n.2 (1967) (enunciating general principle); *State v. Grahovac*, 52 Haw. 527, 531, 533, 480 P.2d 148, 151-52 (1971) (portions of vagrancy statute violate state constitutional right against self-incrimination); *State v. Santiago*, 53 Haw. 254, 265-66, 492 P.2d 657, 664 (1971) (use of illegally obtained confession inadmissible under state constitution for impeachment purposes); *State v. Kaluna*, 55 Haw. 361, 367-69, 372-75, 520 P.2d 51, 57-58, 60-62 (1974) (limiting, on state constitutional grounds, scope of (1) warrantless searches incident to valid custodial arrest and (2) pre-incarceration 'inventory' searches); *State v. Miyasaki*, 62 Haw. 269, 280-82, 614 P.2d 915, 921-23 (1980) (use, as opposed to transactional immunity violates state constitutional right against self-incrimination); *Huihui v. Shimoda*, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982) (restricting, on state constitutional grounds, warrantless searches of probationers); *State v. Tanaka*, 67 Haw. 658, 661-62, 701 P.2d 1274, 1276 (1985) (reasonable expectation of privacy in trash bags precludes, on state constitutional grounds, warrantless seizure of them in absence of exigent circumstances); *State v. Kim*, 68 Haw. 286, 289-90, 711 P.2d 1291, 1293-94 (1985) (state constitutional privacy rights limit prerogative of police to order persons out of cars after traffic stops); *State v. Kam*, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (statute prohibiting promotion of pornographic adult magazines violated purchasers' right under state constitution to use those items in privacy of their homes); *State v. Quino*, 74 Haw. 161, 171-73, 175-76, 840 P.2d 358, 363-65 (1992) (defendant 'seized' under state constitution when approached by police officers in airport and officers' questions turned from general to inquisitive; police officers cannot randomly encounter individuals without any objective basis for suspecting them of misconduct and then place them in coercive environment in order to develop reasonable suspicion to justify detention); . . . *State v. Lessary*, 75 Haw. 446, 457-59, 865 P.2d 150, 155-56

A number of these decisions appear in greater detail throughout this article.

C. Analysis

Although Levinson may have been a bit excessive in taking the *Kekona* majority to task, he did raise a valid point. The majority's choice not to adopt the *Stephan* rule does seem to be a departure, considering the Lum court's record of affording greater due process protection under the Hawaii Constitution. The decision seems especially at odds with the *Matafeo* decision of the Lum court. In citing past decisions, Levinson seems to declare a challenge to the Hawaii Supreme Court to continue following the historical trend of extending rights of the accused under the state constitution. While he does address the case on its individual merits, he also seems to imply that it is the court's duty to continually extend the individual rights of defendants under the state constitution. The sentiments expressed in Levinson's dissent serve as a backdrop for the rest of this article: Does the *Kekona* decision reflect a change in the Hawaii Supreme Court? Is the court in fact becoming more conservative in interpreting the rights of the accused under the state constitution?

(1994) (double jeopardy clause of state constitution requires application of 'same conduct' test); *State v. Kearns*, 75 Haw. 558, 567, 571, 867 P.2d 903, 907, 909 (1994) (under state constitution, (1) person 'seized' when police officer approaches for express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information, and (2) investigative encounter only 'consensual' if (a) prior to start of questioning, person is informed of right to decline participation and to leave at any time, and (b) person thereafter voluntarily participates in encounter); *State v. Hoey*, 77 Hawai'i 17, 35-36, 881 P.2d 504, 522-23 (1994) (rejecting *Davis v. United States*, ___ U.S. ___, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) court held that, under state constitution, (1) when suspect makes ambiguous or equivocal request for counsel during custodial interrogation, police must either cease all questioning or seek non-substantive clarification of suspect's request, and (2) if, upon clarification, defendant unambiguously and unequivocally invokes right of counsel, all substantive questioning must cease until counsel present); *State v. Bowe*, 77 Hawai'i 51, 57, 881 P.2d 538, 544 (1994) (rejecting *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), court held that, under state constitution, coercive conduct of private person may be sufficient to render defendant's confession involuntary).

Kekona, 77 Hawai'i at 414-15, 886 P.2d at 751-52.

III. Right Against Self-Incrimination

A. Background

The Hawaii Supreme Court has "consistently provided criminal defendants with greater protection under Hawai'i's version of the privilege against self-incrimination (article I, section 10 of the Hawaii Constitution) than is otherwise ensured by the federal courts under *Miranda* and its progeny."[40] The 1971 decision of the Hawaii Supreme Court in *State v. Santiago*[41] is one such example. The U.S. Supreme Court had held in *Harris v. New York*[42] that although a statement by a criminal defendant obtained in violation of his or her *Miranda* rights was inadmissible for use in the prosecution's case in chief, it could be used to impeach the defendant's trial testimony during rebuttal or cross-examination.[43] The Hawaii Supreme Court in *Santiago* rejected *Harris* by holding that no statement obtained in violation of a defendant's *Miranda* rights could be used by the prosecution either as direct evidence in its case in chief or during rebuttal or cross-examination.[44]

B. Recent Decisions

In 1993, the Lum court extended the *Santiago* rule in *State v. Valera* to include the sentencing stage of the criminal process.[45] It reasoned that "information contained in a defendant's suppressed statements, which were not considered at trial by the jury when reaching a verdict, should be strictly prohibited from use by a sentencing judge when considering and formulating that defendant's sentence."[46] Therefore,

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[40] State v. Valera, 74 Haw. 424, 434, 848 P.2d 376, 377 (1993).

[41] 53 Haw. 254, 492 P.2d 657 (1971).

[42] 401 U.S. 222 (1971).

[43] *Id.* at 224.

[44] *Santiago*, 53 Haw. at 266, 492 P.2d at 664.

[45] *Valera*, 74 Haw. at 438, 848 P.2d at 377.

[46] *Id.* at 437-38, 848 P.2d at 377. In this case, defendant Valera shot and killed his wife and her alleged lover. He was arrested but received inadequate *Miranda* warnings. *Id.* at 428, 848 P.2d at 377. While in custody, Valera stated that he had suspected his wife of adultery and followed her car to a parking lot. After discovering his wife and her alleged lover in the car, Valera fired his gun into the car, then chased down and shot both victims. *Id.* at 428 n.2, 848 P.2d at 377 n.2. Valera also told police how he had acquired the gun. *Id.* at 429, 848 P.2d at 377. Because Valera received inadequate *Miranda* warnings, the circuit court suppressed his statements for

the court held that statements obtained in violation of a defendant's right against self-incrimination could not be used by a judge in sentencing that defendant; the use of such a statement would violate the defendant's right against self-incrimination as provided by article I, section 10 of the Hawaii Constitution.[47]

In *State v. Hoey*,[48] the Moon court also expanded a defendant's protection against self-incrimination under article I, section 10.[49] The defendant Hoey was arrested in connection with a robbery and kidnapping.[50] After apprising Hoey of his *Miranda* rights, the police asked whether he wanted an attorney.[51] Hoey replied, "I don't have the money to buy one,"[52] a statement which the Hawaii Supreme Court

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use at trial. *Id.* at 430, 848 P.2d at 377.

After Valera was convicted, however, the sentencing judge considered the suppressed statements in determining Valera's sentence. The judge stated:

> [T]here are [sic] certain evidence, which the jury could not hear but which is in the minds of all those who sat through the trial including defense counsel and prosecutor, I cannot dismiss from my mind . . . . I think if the jury had heard the evidence which had to be barred because of the way the police questioned Mr. Valera, a different result would have occurred. I think in sentencing, the Court can consider that [sic] those items which had to be barred. I think in this case, Mr. Valera acted as an executioner. He stalked his victim [sic] and shot them one after the other.

Id. at 431, 848 P.2d at 377.

[47] *Id.* at 438, 848 P.2d at 377.

[48] 77 Hawai'i 17, 881 P.2d 504 (1994).

[49] *Id.* at 36, 881 P.2d at 523.

[50] *Id.* at 21-22, 881 P.2d at 508-09.

[51] *Id.* at 22, 881 P.2d at 509.

[52] *Id.* A more complete account of the interrogation is as follows:

> Q. [by Detective Nobriga]: Before I ask you any questions, you must understand your rights. You have the right to remain silent. You don't have to say anything to me or answer any of my questions. Anything you say may be used against you at your trial. You have a right to counsel of your choice or talk to anyone else you may want to. If you cannot afford an attorney— well, you also have a right, I should say, to have an attorney present while I talk to you. If you cannot afford an attorney, the court will appoint one for you. You think you'll need an attorney now?
>
> A. [by Hoey]: I don't have the money to buy one.
>
> Q. No, well, I'm just saying do you think you'll need an attorney?
>
> A. Right now, I don't think so.
>
> Q. Okay. If you decide to answer my questions without an attorney being present you still have the right to stop answering at any time. [Coughs] Excuse me. In other words, if you don't want to answer a question, you don't have to. Do you understand what I've told you?

found to be ambiguous with regard to whether Hoey was waiving his right to counsel.[53] According to the court, one could reasonably conclude that Hoey did not understand that he was entitled to a free lawyer, but would have requested one if he had known.[54] The court also found that the police failed to clarify what Hoey meant by the ambiguous statement,[55] after which Hoey proceeded to sign a standard form containing a waiver of his right to counsel.[56]

The Hawaii Supreme Court held that the failure of the police to clarify Hoey's ambiguous request for counsel meant that "Hoey did not voluntarily, knowingly, and intelligently waive the right to counsel during interrogation."[57] In so holding, the court departed from the minimum protection granted to the accused under the U.S. Constitution in *Davis v. United States*.[58] In *Davis*, the U.S. Supreme Court held that when a suspect makes an ambiguous request for counsel during an interrogation, the police do not need to stop questioning the suspect or clarify the ambiguous request.[59] That would be necessary only when a suspect makes a clear and unambiguous request for counsel.[60]

The Moon court chose to grant broader protection against self-incrimination under article I, section 10 of the Hawaii Constitution than the U.S. Supreme Court recognized under the U.S. Constitution in *Davis*.[61] The Hawaii Supreme Court held:

> (1) when a suspect makes an ambiguous or equivocal request for counsel during custodial interrogation, the police must either cease all questioning or seek non-substantive clarification of the suspect's request, and (2) if, upon clarification, the defendant unambiguously and unequivocally in-

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A. Yes.

Id.

[53] *Id.* at 37, 881 P.2d at 524. The Hawaii Supreme Court commented that Hoey's statement, "I don't have the money to buy [an attorney]," was "demonstrably inconsistent" with Detective Nobriga's explanation of his *Miranda* rights. *Id.*

[54] *Id.* Hoey in fact gave testimony supporting this claim. According to his testimony, Hoey assumed that he would have to pay for court-appointed counsel. He claimed that he would have requested counsel if he had known the truth. *Id.* at 26, 881 P.2d at 513.

[55] *Id.* at 37, 881 P.2d at 524.

[56] *Id.* at 22, 881 P.2d at 509.

[57] *Id.* at 33, 881 P.2d at 520.

[58] 114 S. Ct. 2350 (1994).

[59] *Id.* at 2355-56.

[60] *Id.*

[61] *Hoey*, 77 Hawai'i at 36, 881 P.2d at 523.

> vokes the right to counsel, all substantive questioning must cease until counsel is present. Conversely, we hold that if, upon clarification, the defendant voluntarily, knowingly, and intelligently waives the presence of counsel, substantive questioning may continue.[62]

The Moon court further increased a defendant's right against self-incrimination in *State v. Bowe*,[63] a decision with extremely significant implications for Hawai'i citizens. Troy Bowe, a member of the University of Hawai'i men's basketball team, turned himself in to the police and incriminated himself in an assault, at the prompting of his head coach, Riley Wallace.[64] The circuit court granted Bowe's motion

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[62] *Id.*

[63] 77 Hawai'i 51, 881 P.2d 538 (1994).

[64] *Id.* at 60, 881 P.2d at 547. The circuit court entered the following findings of fact:

> 1. In [sic] or about January or February of 1990, Sergeant John Pinero (hereinafter "Sargeant Pinero") was an employee of the [HPD], who was at that time working on an investigation of an assault which allegedly involved Defendant TROY BOWE.
>
> 2. In his capacity as a police officer with the [HPD], Sergeant Pinero called Riley Wallace (hereinafter "Wallace"), at that time basketball coach of the University of Hawaii at Manoa Basketball Team (hereinafter "Basketball Team"), and gave Wallace a list of suspects who were on the Basketball Team that Sergeant Pinero wanted Wallace to bring down to the [HPD] (hereinafter "List").
>
> 3. Wallace, as head basketball coach, had the authority to suspend athletes or remove them from the Basketball Team and, in the case of scholarship-athletes, to initiate procedures to withdraw their athletic-scholarships.
>
> 4. Defendant TROY BOWE was a scholarship-athlete on the Basketball Team.
>
> 5. Defendant TROY BOWE was on said List.
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> 6. Sergeant Pinero specifically asked Wallace to locate the individuals on the List and have them meet with Sergeant Pinero.
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> 7. Sergeant Pinero, however, did not request that Wallace use force or coercion while attempting to have individuals on the List meet with Sergeant Pinero.
>
> 8. Wallace then contacted Defendant TROY BOWE and informed him that he had to go down to the [HPD] to meet with Sergeant Pinero.
>
> 9. Wallace informed Defendant TROY BOWE that Wallace would accompany him to the [HPD] in place of an attorney and instructed Defendant TROY BOWE to make a statement to Sargeant Pinero.
>
> 10. Wallace did not inform Defendant TROY BOWE that he could or should have an attorney present with him when he went to be interviewed by Sargeant Pinero.
>
> 11. Defendant TROY BOWE believed that he could not refuse to follow Wallace's directions because if he did so Wallace could suspend him from the Basketball Team or institute procedures to revoke Defendant TROY BOWE's athletic-scholarship.

Id. at 60, 881 P.2d at 547.

to suppress his incriminating statement, finding that it was coerced by Wallace and thus was involuntary.[65]

The U.S. Supreme Court in *Colorado v. Connelly*[66] held that the Due Process Clause of the Fourteenth Amendment unequivocally requires coercive police activity to support a finding that a confession is involuntary.[67] Therefore, the prosecution argued that under the *Connelly* federal standard, Wallace's coercive influence would be insufficient since he acted as a private person.[68]

The Hawaii Supreme Court explicitly rejected the *Connelly* standard because it was too narrow to protect adequately the rights granted to defendants under the state constitution.[69] Namely, the U.S. Supreme Court's interpretation of the right against self-incrimination under the Fifth Amendment and the right of due process under the Fourteenth Amendment did not adequately protect the analogous rights found in article I, sections 10 and 5, respectively, of the Hawaii Constitution.[70]

The *Connelly* court noted that the prevention of governmental coercion was the only value underlying the Fifth Amendment right against self-incrimination.[71] By contrast, the Hawaii Supreme Court stated that "the considerations underlying the right against self-incrimination under the Hawaii Constitution are not limited to deterring government coercion, but are broader."[72] Chief among these additional considerations is the recognition that an "involuntary confession is inherently untrustworthy because the free will of an individual is overborne by the external influence exerted in obtaining it."[73] The right against self-incrimination under the Hawaii Constitution also enforces the reliability of an accusatorial system of justice, as opposed to a less favorable inquisitorial system.[74] Premised on these additional concerns, article I, section 10 was interpreted by the Hawaii Supreme Court as mandating

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[65] *Id.* at 54, 881 P.2d at 541. Because the circuit court suppressed Bowe's statement without determining whether Coach Wallace was exercising "state police power," it implicitly concluded that Wallace's actions as a private person could render a confession involuntary. *Id.*

[66] 479 U.S. 157 (1986).

[67] *Id.* at 167.

[68] *Bowe*, 77 Hawai'i at 54, 881 P.2d at 541.

[69] *Id.* at 57, 881 P.2d at 544.

[70] *Id.* at 58-59, 881 P.2d at 545-46.

[71] *Connelly*, 479 U.S. at 165.

[72] *Bowe*, 77 Hawai'i at 57, 881 P.2d at 544.

[73] *Id.*

[74] *Id.* at 58, 881 P.2d at 545.

that coercive conduct by a private person renders a confession involuntary.[75]

With regard to the right to due process, the Moon court stated that the values underlying due process protection under article I, section 5 are broader than those underlying the Fourteenth Amendment protection.[76] The *Connelly* court explicitly required a finding of governmental coercion as a prerequisite to a due process violation in the context of an involuntary confession.[77] The primary value underlying due process protection under the state constitution is also "protection of the individual against arbitrary action of the government."[78] In addition, however, the Hawaii Supreme Court has recognized that the due process clause serves to preserve a defendant's right to a fair trial.[79] Included in this right to a fair trial is the right of a defendant to confess or remain silent.[80] Since "an individual's capacity to make a rational and free choice between confessing and remaining silent may be overborne as much by the coercive conduct of a private individual as by the coercive conduct of the police,"[81] such private conduct may violate a defendant's due process rights. As such, the coercive activity of a private individual may render a confession involuntary under article I, section 5 of the Hawaii Constitution.[82]

C. Analysis

Some of the most liberal decisions in the short history of the Moon court have come in the area of self-incrimination. In particular, the *Bowe* decision dramatically increases Hawai'i defendants' right against self-incrimination by protecting them from the coercive conduct of private individuals. *Valera* and *Hoey* also expand the right against self-incrimination, but in more limited contexts. Equally significant is the court's emphasis in *Bowe* that the values underlying the right against self-incrimination and the right to due process are broader under the

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[75] *Id.* at 60, 881 P.2d at 547.

[76] *Id.* at 59, 881 P.2d at 547.

[77] *Id.* at 58-59, 881 P.2d at 545-46.

[78] *Id.* at 59, 881 P.2d at 546 (quoting State v. Bernades, 71 Haw. 485, 487, 795 P.2d 842, 843 (1990)).

[79] *Id.* (citations omitted).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 60, 881 P.2d at 547.

Hawaii Constitution than under the U.S. Constitution. This emphasis, in conjunction with the actual holdings of the *Valera*, *Hoey*, and *Bowe* decisions, indicates that the Moon court will continue to interpret the state constitution to afford greater protection against self-incrimination to Hawai'i citizens.

IV. Double Jeopardy

A. Background

In the 1932 decision of *Blockburger v. United States*,[83] the U.S. Supreme Court defined double jeopardy protection under the U.S. Constitution with the "same elements" test.[84] The test provided that a single act or transaction can constitute two different criminal offenses only when each offense "requires proof of a fact which the other does not."[85] In *Blockburger*, a statute created two drug-related offenses: selling a forbidden drug not in or from the original stamped package, and selling a forbidden drug not in pursuance of a written order of the purchaser.[86] The government charged the defendant Blockburger with both offenses for his commission of a single act, the sale of morphine hydrochloride.[87] The U.S. Supreme Court held that Blockburger's single sale constituted two separate offenses, since each offense required proof of different elements.[88] In such a case, the government could prosecute a defendant for separate offenses in separate prosecutions.[89] Conversely, the double jeopardy clause as defined by the *Blockburger* test protected defendants from receiving multiple punishments for a single offense.[90]

In 1990, the U.S. Supreme Court formulated the "same conduct" test in *Grady v. Corbin*.[91] That test expanded the double jeopardy protections of the U.S. Constitution by barring "any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been pros-

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[83] 284 U.S. 299 (1932).
[84] *Id.* at 304.
[85] *Id.*
[86] *Id.* at 303-04.
[87] *Id.* at 301.
[88] *Id.* at 304.
[89] *Id.*
[90] *Id.*
[91] 495 U.S. 508 (1990).

ecuted."[92] For example, in *Grady*, the defendant Corbin struck two vehicles with his car, injuring two people, one fatally.[93] In connection with this incident, Corbin was prosecuted for the misdemeanor offenses of driving while intoxicated and failing to keep to the right of the median.[94] Two months later, the state charged him with, *inter alia*, reckless manslaughter, criminally negligent homicide, and third-degree reckless assault, all stemming from his fatal accident.[95] The U.S. Supreme Court found that the state would have to prove the conduct for which Corbin already had been prosecuted—driving while intoxicated and failing to keep to the right of the median—in order to prove certain essential elements of the reckless manslaughter, criminally negligent homicide, and third-degree reckless assault charges.[96] Therefore, the double jeopardy clause barred a second prosecution of Corbin.[97] The new *Grady* test protected individuals from being subjected to multiple prosecutions for a single act, a problem which the *Blockburger* test failed to address.[98]

At the time of the writing of the Van Dyke article, the Hawaii Supreme Court followed the federal precedent of *Grady*.[99] The article stated that the Lum court had "not significantly expanded double jeopardy protection."[100]

However, the U.S. Supreme Court subsequently overruled *Grady* in the 1993 decision of *United States v. Dixon*.[101] It reinstated the "same elements" test of *Blockburger* as the sole protection against double jeopardy under the U.S. Constitution.[102]

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[92] *Id.* at 521.

[93] *Id.* at 511.

[94] *Id.* at 511-13.

[95] *Id.* at 513.

[96] *Id.* at 523.

[97] *Id.*

[98] *Id.* The U.S. Supreme Court in *Grady* was concerned that multiple prosecutions allowed the state to unfairly burden a defendant, "subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity[.]" *Id.* at 518 (citing Green v. United States, 355 U.S. 184, 187 (1957)). The court also felt that multiple prosecutions gave the state an unfair advantage in perfecting its trial presentation and strategies, thus increasing the possibility of an erroneous conviction. *Id.*

[99] *See* State v. Kipi, 72 Haw. 164, 811 P.2d 815 (1991).

[100] Van Dyke, *supra* note 2, at 334-36 (citing State v. Kipi, 72 Haw. 164, 811 P.2d 815 (1991)).

[101] 113 S. Ct. 2849 (1993).

[102] *Id.* at 2864.

B. Recent Decisions

In *State v. Lessary*,[103] the Lum Court significantly clarified the double jeopardy rights afforded to defendants under article I, section 10 of the Hawaii Constitution.[104] In doing so, the court refused to follow the U.S. Supreme Court's lead in expanding the government's power to prosecute defendants.

Faced with the opportunity to define the double jeopardy protection afforded by the Hawaii Constitution, the Lum Court chose to maintain the *Grady* "same conduct" test.[105] The court rejected the minimum federal standard of the *Blockburger/Dixon* "same elements" test because it did not adequately protect individuals from multiple prosecutions for a single act.[106] On the other hand, the court also rejected the more expansive "same episode" test, which bars an individual who has been prosecuted for one offense from subsequently being "prosecuted for any other offense committed during the same episode, even if the offenses were committed by distinct acts."[107] The "same conduct" test provided a happy medium; it afforded the level of double jeopardy protection the court felt was necessary under the Hawaii Constitution without interfering with the state's ability to prosecute individuals separately for separate acts.[108]

C. Analysis

Although the Lum court simply maintained the same level of double jeopardy protection that it already had been affording under the Hawaii Constitution, its decision in *Lessary* is still significant. The court resisted the national trend to restrict the rights of the accused. In doing so, the Lum court departed from the current federal standard and sent

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[103] 75 Haw. 446, 865 P.2d 150 (1994).

[104] *Id.*

[105] *Id.* at 459, 865 P.2d at 156.

[106] *Id.* at 457, 865 P.2d at 155. The court emphasized "a defendant's 'paramount' interest in being free from vexatious multiple prosecutions." *Id.* at 456-57, 865 P.2d at 155.

[107] *Id.* at 458-59, 865 P.2d at 156. The court stated: "We do not believe this is the result intended by the double jeopardy clause. The double jeopardy clause should protect an individual from being twice put in jeopardy for a single act; it should not protect an individual from separate prosecutions for separate acts." *Id.* at 458, 865 P.2d at 156.

[108] *Id.* at 459, 865 P.2d at 156.

the message that it would continue to provide Hawai'i citizens with liberal double jeopardy protection. The Moon court has not yet decided any cases providing the opportunity to interpret double jeopardy rights under the state constitution.

V. Unreasonable Searches and Seizures

A. Background

The Lum court granted additional protection from unreasonable searches and seizures under the Hawaii Constitution in certain decisions, but it limited the protection in others. For example, the court increased the right of motorists to be free from unreasonable searches and seizures during traffic stops.[109] However, it limited the right in other ways, such as permitting police to conduct a warrantless, limited pat-down search of arrestees.[110]

B. Recent Decisions

In *State v. Quino*,[111] the Lum court departed from the minimum federal standard in interpreting when an unconstitutional seizure occurs under article I, section 7 of the Hawaii Constitution.[112] The U.S. Supreme Court in *California v. Hodari D.*[113] held that "a seizure within the meaning of the Fourth Amendment requires either physical force or submission to an assertion of authority."[114] In *Quino*, the Hawaii Supreme Court explicitly rejected the *Hodari D.* standard and chose to

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[109] State v. Kim, 68 Haw. 286, 711 P.2d 1291 (1985) (holding that under article I, section 7 of the Hawaii Constitution, the police, after stopping a motorist for a traffic violation, may order the motorist out of a car only when there is at least a reasonable basis of specific articulable facts to believe a crime has been committed). *Compare* Pennsylvania v. Mimms, 434 U.S. 106 (1977) (holding that police may order a motorist out of a car after stopping the motorist for a traffic violation, without more).

[110] State v. Reed, 70 Haw. 107, 762 P.2d 803 (1988) (holding that it is *per se* reasonable for an arresting police officer to conduct a warrantless, limited pat-down search of an arrestee for weapons, escape instrumentalities, or contraband).

[111] 74 Haw. 161, 840 P.2d 358, *recons. denied*, 74 Haw. 650, 843 P.2d 144 (1992), *cert. denied*, 507 U.S. 1031 (1993).

[112] *Id.* at 173, 840 P.2d at 364.

[113] 499 U.S. 621 (1991).

[114] *Quino*, 74 Haw. at 169-70, 840 P.2d at 362 (citing *Hodari D.*, 499 U.S. at 626-28).

maintain the principle established in *United States v. Mendenhall*:[115] the seizure of an individual occurs when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[116] The Hawaii Constitution thus grants more protection in the area of seizures than is required by the U.S. Supreme Court's analogous interpretation of the U.S. Constitution in *Hodari D.*[117]

Accordingly, the Hawaii Supreme Court in *Quino* held that the Honolulu Police Department's "walk and talk" drug interdiction program violated defendant Quino's right to be free from unreasonable seizures under article I, section 7 of the Hawaii Constitution.[118] Police officers involved in the "walk and talk" program would approach airline passengers, question them, and request that they consent to a search of their luggage or their person.[119] The officers used their own discretion in choosing the individuals to approach, without having to compare them to any "drug courier profile."[120] Moreover, the police were allowed to approach the passengers without reasonable suspicion that they were in possession of drugs or engaged in criminal activity.[121] The Hawaii Supreme Court held that a reasonable person approached by the police in a "walk and talk" encounter would not feel free to leave when asked inquisitive questions.[122] It noted that the police actually maintained control over the encounter, as "[t]he course of the questioning and the insinuative nature of the questions [were] left entirely to the discretion of the officer."[123] A person in that situation would be seized within the meaning of article I, section 7, according to the *Mendenhall* standard.[124]

The court explained that the "walk and talk" procedure illegally "allow[ed] the police to randomly 'encounter' individuals without any objective basis for suspecting them of misconduct and then place[d] them in a coercive environment in order to develop reasonable suspicion

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[115] 446 U.S. 544 (1980).
[116] *Id.* at 554.
[117] *Quino*, 74 Haw. at 170, 840 P.2d at 362.
[118] *Id.* at 176, 840 P.2d at 365.
[119] *Id.* at 163-64, 840 P.2d at 360.
[120] *Id.* at 164, 840 P.2d at 360.
[121] *Id.*
[122] *Id.* at 173, 840 P.2d at 364.
[123] *Id.* at 172, 840 P.2d at 363.
[124] *Id.* at 173, 840 P.2d at 364.

to justify their detention."[125] The court condemned such practice as "anathema to our constitutional freedoms."[126]

In *Quino*, a police officer approached Quino in a staged "walk and talk" encounter and seized him when she began asking inquisitive questions. The State argued that Quino consented to the police questioning, so it was not an unconstitutional seizure.[127] However, the court noted the officer's nondisclosure of her intent to investigate drug trafficking, and her failure to inform Quino that he could leave at any time.[128] Considering these factors, the court held that the State failed to meet its burden of proof that Quino consented to the seizure.[129] Since Quino did not consent voluntarily, the police seized him in violation of article I, section 7 of the Hawaii Constitution. In so holding, the Hawaii Supreme Court ran counter to *Florida v. Royer*[130] and *Florida v. Bostick*,[131] in which the U.S. Supreme Court upheld similar staged police encounters. In his concurrence, Justice Levinson stridently denounced those two decisions and *Hodari D.* as "surreal and Orwellian" cases "in which the fourth amendment to the United States Constitution seems to have atrophied to the condition of a vestigial organ."[132]

In the 1994 decision of *State v. Kearns*,[133] the Moon court clarified the "consensual encounter" analysis as set forth by the Lum court in *Quino*.[134] The first step of the analysis entails determining whether a seizure occurs during an encounter.[135] The court held that a person is seized within the meaning of article I, section 7 "when a police officer approaches that person for the express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information."[136] In essence, the court decided that a reasonable person subjected to the type of police behavior described above would always feel that he or she was not free to leave, thus creating a seizure under

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[125] *Id.* at 175, 840 P.2d at 365.
[126] *Id.* at 175-76, 840 P.2d at 365.
[127] *Id.* at 174, 840 P.2d at 364.
[128] *Id.* at 175, 840 P.2d at 364.
[129] *Id.* at 175, 840 P.2d at 364-65.
[130] 460 U.S. 491 (1983).
[131] 501 U.S. 429 (1991).
[132] *Quino*, 74 Haw. at 176-77, 840 P.2d at 365 (Levinson, J., concurring).
[133] 75 Haw. 558, 867 P.2d 903 (1994).
[134] *Id.*
[135] *Id.* at 566, 867 P.2d at 907.
[136] *Id.* at 567, 867 P.2d at 907.

the *Quino/Mendenhall* standard. The holding seems to create a bright-line rule that expands the right against unreasonable seizures. Instead of having to look at the individual facts of an encounter to determine whether a reasonable person would have believed that he or she was free to leave, a defendant may simply show that an officer's conduct fit the *Kearns* pattern in order to prove a seizure.

The court stated that a second step of the analysis is necessary if a warrantless seizure has occurred.[137] If an individual consents to a police investigative encounter which amounts to a warrantless seizure, that encounter would not violate the Hawaii Constitution.[138] However, a person would rarely consent to a seizure voluntarily because the police would have to obtain consent before the seizure actually occurs.[139] In fact, the court specified the only context in which an individual may consent to a seizure by holding that:

> an investigative encounter can only be deemed "consensual" if (1) prior to the start of questioning, the person encountered was informed that he or she had the right to decline to participate in the encounter and could leave at any time, and (2) the person thereafter voluntarily participated in the encounter.[140]

In the 1995 decision of *State v. Lopez*,[141] the Moon court departed from the federal standard in determining the constitutionality of a warrantless police search of a defendant's premises conducted pursuant to the consent of a third party.[142] The U.S. Supreme Court pronounced the federal standard in *Illinois v. Rodriguez*.[143] In that case, police conducted a warrantless search of Rodriguez's apartment after an acquaintance accused him of assault.[144] The acquaintance led the police to the apartment and let them in by unlocking the door with her key.[145] Believing that the acquaintance resided in the apartment, the police entered and found drugs and drug paraphernalia in plain view.[146]

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[137] *Id.* at 568, 867 P.2d at 908.

[138] *Id.* at 569, 867 P.2d at 908 (citing *Quino*, 74 Haw. at 173-75, 840 P.2d at 364-65).

[139] *Id.* at 569 n.5, 867 P.2d at 908 n.5.

[140] *Id.* at 571, 867 P.2d at 909.

[141] 78 Hawai'i 433, 896 P.2d 889 (1995).

[142] *Id.*

[143] 497 U.S. 177 (1990).

[144] *Id.* at 179.

[145] *Id.* at 180.

[146] *Id.*

Rodriguez subsequently argued that the search was unconstitutional because his acquaintance did not live in the apartment and did not possess the "actual authority" over the apartment to consent to a warrantless entry.[147] However, the U.S. Supreme Court held that the search of Rodriguez's apartment would be constitutional if the facts available to the police would have led a reasonable person to conclude that the third party consenting to the search possessed the authority to do so.[148] Therefore, the federal doctrine of "apparent authority" upholds the validity of a third party's consent to search even if that party otherwise lacks the actual authority to consent.[149]

The Moon court decisively rejected the "apparent authority" doctrine in *State v. Lopez*.[150] Instead, it held that under article I, section 7 of the Hawaii Constitution, a person must actually possess the authority to consent to a search in order for that consent to be valid.[151] The court explained that the greater degree of protection granted to Hawai'i citizens in this area stems from the mandate that article I, section 7 safeguards against "invasions of privacy."[152] The Fourth Amendment to the U.S. Constitution lacks such specific language.[153] The Hawaii Supreme Court further distinguished itself from the U.S. Supreme Court by defining the purpose of the exclusionary rule under the state constitution. While the U.S. Supreme Court has interpreted the primary purpose of the exclusionary rule to be the deterrence of illegal police conduct, the Hawaii Supreme Court pronounced that "an equally valuable purpose of the exclusionary rule under article I, section 7, is to protect the privacy rights of our citizens."[154]

The court in *Lopez* also adopted the "inevitable discovery" exception to the exclusionary rule, but with a higher standard of proof than required by the federal rule.[155] The U.S. Supreme Court first posited the inevitable discovery exception in *Nix v. Williams*.[156] It held that evidence obtained in violation of the Fourth Amendment may be admitted at trial if that evidence otherwise inevitably would have been

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[147] *Id.*
[148] *Id.* at 188-89.
[149] *Id.*
[150] *Lopez*, 78 Hawai'i at 447, 896 P.2d at 903.
[151] *Id.*
[152] *Id.* at 446, 896 P.2d at 902.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 451, 896 P.2d at 907.
[156] 467 U.S. 431 (1983).

found by independent lawful means.[157] The prosecution must show by a preponderance of the evidence that a lawful discovery was inevitable.[158]

The Moon court adopted the inevitable discovery exception as formulated in *Nix v. Williams*.[159] However, because of the explicit protection of privacy rights in the Hawaii Constitution, the court felt that such an exception to article I, section 7 required a higher standard of proof.[160] Therefore, the prosecution must establish that evidence inevitably would have been found by the standard of clear and convincing evidence rather than a preponderance of the evidence.[161]

In 1994, the Moon court uncharacteristically restricted the rights of the accused in *In re Jane Doe*.[162] The court followed the federal standard in allowing public school officials to search their students without warrants and based on reasonable suspicion rather than the higher standard of probable cause.[163] In doing so, the court adopted the minimum protection required by the U.S. Supreme Court in *New Jersey v. T.L.O.*[164] In that decision, the U.S. Supreme Court made it easier for children in public schools to be searched.[165] While acknowledging that the Fourth Amendment grants school children legitimate expectations of privacy, the court balanced those expectations against the school officials' legitimate need to maintain an environment conducive to learning.[166] The court reasoned that a lesser degree of protection from searches was needed to combat the persistent and disruptive drug problem.[167] Therefore, it eliminated the need for public school officials to obtain a warrant before searching a student.[168] It also reduced the level of suspicion needed to conduct a search from the usual standard of probable cause to the less restrictive standard of reasonable suspicion.[169] The latter standard requires that a search or seizure be both

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[157] *Id.* at 444.
[158] *Id.*
[159] *Lopez*, 78 Hawai'i at 451, 896 P.2d at 907.
[160] *Id.*
[161] *Id.*
[162] 77 Hawai'i 435, 887 P.2d 645 (1994).
[163] *Id.* at 441-42, 887 P.2d at 651-52.
[164] 469 U.S. 325 (1985).
[165] *Id.*
[166] *Id.* at 340.
[167] *Id.* at 339-40.
[168] *Id.* at 340.
[169] *Id.* at 341. The court explained that probable cause "exists where 'the facts and

"justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."[170]

The Moon court explicitly adopted the *T.L.O.* standard for Hawai'i citizens.[171] In *Jane Doe*, the court held that:

> (1) children in school have legitimate expectations of privacy that are protected by article I, section 7 of the Hawai'i Constitution and the fourth amendment to the United States Constitution; (2) public school officials act as representatives of government and, consequently, must comply with article I, section 7 of the Hawai'i Constitution and the fourth amendment to the United States Constitution; (3) because the warrant requirement is particularly unsuited to the school environment, in that requiring a teacher to obtain a warrant before searching a child suspected of an infraction of the school rules or of the criminal law would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools, public school officials do not need search warrants or probable cause to search or seize evidence from students under their authority; (4) searches or seizures in the school context must be reasonable under all the circumstances and must be (a) justified at their inception and (b) reasonably related in scope to the circumstances which justified the interference in the first place.[172]

The Moon court also held that before school officials can conduct a search of a student under their authority, there must be "individualized suspicion" that the student has violated or is violating school rules or

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circumstances within [the officials'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief' that a criminal offense had occurred and the evidence would be found in the suspected place." *Id.* at 358 (alteration in original) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

[170] *Id.* at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1967)). The U.S. Supreme Court added:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 341-42 (footnotes omitted).

[171] *In re* Jane Doe, 77 Hawai'i 435, 440, 887 P.2d 645, 650 (1994).

[172] *Id.* at 442, 887 P.2d at 652.

the law.[173] This requirement of "individualized suspicion" is necessary to analyze the reasonableness of a search such as the one in *Jane Doe*, in which a school official searched the defendant's purse.[174]

Even given the added protections against invasions of privacy in article I, section 7 of the Hawaii Constitution, the court explained that the seriousness of drug use and violent crime in public schools justified its adoption of the federal *T.L.O.* standard.[175] Nevertheless, Justice Levinson's concurrence reveals severe reservations about the court's restriction of the rights of students to be free from unreasonable searches and seizures.[176] A "deeply troubled" Levinson described the court's decision as "painful and fraught with risk."[177] He concurred only because the Hawai'i court followed the U.S. Supreme Court in strictly limiting the *T.L.O.* standard "to the school context and the unique balance of interests present therein."[178]

C. Analysis

The Lum court made one of its sharpest departures from federal law in *Quino*, through which it significantly broadened the rights of the accused under the state constitution. The court distinguished itself from its federal counterpart by refusing to compromise Hawai'i citizens' constitutional freedoms, even at the cost of increasing crime. The Moon court extended *Quino* by limiting intrusive police activity to an even greater extent in *Kearns*. In addition, the *Lopez* decision extended the rights of the accused by invoking the unique privacy right of article I, section 7 of the Hawaii Constitution.

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[173] *Id.* at 445, 887 P.2d at 655. The U.S. Supreme Court in *T.L.O.* did not decide whether a finding of individualized suspicion was necessary to allow a school search of a student, because it was clear that the search in *T.L.O.* was based on individualized suspicion. *T.L.O.*, 469 U.S. at 342 n.8. However, the Court's observation that individualized suspicion is usually necessary to uphold searches in other contexts suggests that the Court would strike down a school search that was not supported by individualized suspicion. *Id.*

[174] *In re* Jane Doe, 77 Hawai'i at 445, 887 P.2d at 655.

[175] *Id.* at 443, 887 P.2d at 653. The court noted that "[d]rug use and violent crime are socially detrimental forms of behavior in general, but in light of the schools' legitimate need to maintain order in an environment where our youth may learn, their repugnance is exacerbated." *Id.* at 441, 887 P.2d at 651.

[176] *Id.* at 445, 887 P.2d 655 (Levinson, J., concurring).

[177] *Id.*

[178] *Id.* at 446, 887 P.2d at 656.

The court's recent trend makes its decision in *Jane Doe* rather surprising. While the holding is limited in its context, it does curtail the right of certain Hawai'i citizens to be free from searches and seizures, in sharp contrast to *Quino*, *Kearns*, and *Lopez*. *Jane Doe* is striking because, although the Hawaii Supreme Court may refuse to adopt an expansion of the rights of the accused, it will rarely restrict an established right. Even Justice Levinson, the court's most fervent guardian of defendants' rights, agreed that limiting certain constitutional rights was necessary. *Jane Doe* seems to signal a greater willingness on the part of the Moon court to restrict the rights of certain classes of defendants.

VI. Right to Trial by Jury

A. Background

In the 1985 decision of *State v. O'Brien*,[179] the Lum court expanded the right to a jury trial under article I, section 14 of the Hawaii Constitution beyond what was required by the U.S. Constitution.[180] Under both the state constitution and the U.S. Constitution, the right to a jury trial attaches to a serious offense but not a petty one.[181] In *O'Brien*, the court recognized three factors traditionally analyzed to determine whether a particular offense is constitutionally petty or serious: "(1) treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty."[182]

In analyzing the first factor, the court determines how the specific offense traditionally was treated at common law: "whether [the] offense was indictable at common law, triable at common law by a jury, or tried summarily without a jury."[183]

In analyzing the second factor, the gravity of the offense, the court determines whether the offense affects the public at large, reflects moral delinquency, or "carries sufficient approbrium to require its being

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[179] 68 Haw. 38, 704 P.2d 883 (1985).

[180] *Id.* at 44, 704 P.2d at 887.

[181] *Id.* at 41, 704 P.2d at 885. *Accord* State v. Shak, 51 Haw. 612, 466 P.2d 422, *cert. denied*, 400 U.S. 930 (1970); Duncan v. Louisiana, 391 U.S. 145, 159, *reh'g denied*, 392 U.S. 947 (1968).

[182] State v. Wilson, 75 Haw. 68, 74, 856 P.2d 1240, 1244, *recons. denied*, 75 Haw. 580, 861 P.2d 735 (1993) (citing *O'Brien*, 68 Haw. at 41-43, 704 P.2d at 885-87).

[183] *Id.*

labeled a serious violation of the law.''[184] The legislature's perception of the gravity of a specific offense usually mirrors the perception of society. Therefore, the court often can infer the gravity of an offense by analyzing applicable statements in the legislative history of the offense.[185]

In analyzing the third factor, the authorized penalty for the offense, the court gives greatest weight to the maximum prison term authorized for a commission of the offense.[186] In addition, the court can consider various statutory penalties, other than incarceration, that may result from a commission of the offense.[187]

The U.S. Supreme Court has held that offenses which have a maximum penalty of six months incarceration or less are presumptively petty and do not require a jury trial.[188] After applying the three-factor test, however, the Lum court held that the offense of driving under the influence of intoxicating liquor (''DUI''), pursuant to Hawaii Revised Statutes section 291-4, was a constitutionally serious offense, even though the maximum term of imprisonment was 180 days.[189] Thus, the Lum court interpreted the right to a jury trial under the Hawaii Constitution somewhat more broadly than the U.S. Supreme Court has interpreted the same right under the Sixth Amendment to the U.S. Constitution.

In assessing the first traditional factor, the court found that although DUI was not an offense at common law, its closest common law analog was the offense of reckless driving, which was indictable at common law and triable by a jury.[190]

The court determined the gravity of DUI by referring to legislative statements concerning the statutes which governed the penalties for first, second, and third-time DUI offenses. The court noted the legislature's ''unequivocal acknowledgment that drunk driving presents a social problem of vast and potentially devastating proportions'' in the

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[184] State v. O'Brien, 68 Haw. 38, 42, 704 P.2d 883, 886 (1985) (citing Callan v. Wilson, 127 U.S. 540, 556 (1888); Schick v. United States, 195 U.S. 65, 69 (1904); Baker v. City of Fairbanks, 471 P.2d 386, 389 (Alaska 1970)).

[185] *Wilson*, 75 Haw. at 75, 856 P.2d at 1245.

[186] *Id.*

[187] *Id.*

[188] United States v. Nachtigal, 507 U.S. 1 (1993).

[189] State v. O'Brien, 68 Haw. 38, 42-44, 704 P.2d 883, 886-87 (1985).

[190] *Id.* at 42, 704 P.2d at 886 (citing District of Columbia v. Colts, 282 U.S. 63, 73 (1930)).

legislative commentary to 1982 amendments to the DUI statutes.[191] The court also took note of the 1982 Commentary to additional amendments, in which the legislature repeated its belief that drunk driving was a serious problem, and stated that its purpose in revising the DUI statute was "to establish more effective sanctions" for DUI offenses.[192]

The most crucial part of the court's analysis came in its consideration of the authorized penalty for the offense of DUI. The 1982 and 1983 amendments to the DUI statute established the penalty for a first DUI offense as a duration of not less than 48 hours of imprisonment, mandatory alcohol rehabilitation, and driver's license suspension.[193] The penalty for a second DUI offense within a period of five years also included imprisonment for not less than 48 hours, and license suspension.[194] The penalty for a third DUI offense within five years included a duration of from 10 to 180 days of imprisonment, a mandatory fine of from $500 to $1000, and license revocation.[195] The amended statute reduced the maximum period of incarceration authorized for a third DUI offense to 180 days, but it did not specify the maximum period for first and second offenses.[196] However, the court reasoned that this period could not exceed the penalty for a third offense, so it found the maximum penalty for all three DUI offenses to be 180 days.[197] This maximum authorized period of incarceration, less than six months, suggested that DUI was constitutionally petty. However, the amended statute also mandated certain other penalties including community service and suspension and revocation of an offender's driver's license. These additional penalties led the court to conclude "that this framework of punishment reflects the societal belief that drunk driving is a grave and therefore constitutionally serious offense,"[198] and it held that the right to a jury trial attaches to any DUI conviction.[199]

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[191] *Id.* (citing S. STAND. COMM. REP. No. 176-82, 11th Leg., 1982 Reg. Sess., *reprinted in* 1982 HAW. SENATE J. 1011, 1011).

[192] *Id.* at 43, 704 P.2d at 886 (citing S. STAND. COMM. REP. No. 999, 12th Leg., 1983 Reg. Sess., *reprinted in* 1983 HAW. SENATE J. 1477, 1477-78).

[193] *Id.* at 43, 704 P.2d at 887.

[194] *Id.*

[195] *Id.* at 43-44, 704 P.2d at 887.

[196] Under the prior DUI law, a DUI conviction brought a maximum authorized sentence of one year of incarceration. *Id.* at 43, 704 P.2d at 887, n.4.

[197] *Id.* at 44, 704 P.2d at 887, n.5.

[198] *Id.* at 43, 704 P.2d at 887.

[199] *Id.*

The Lum court extended its expansive stance toward the state right to a jury trial in the 1992 decision of *State v. Jordan*.[200] In 1991, certain amendments reduced the maximum period of incarceration for first and second DUI offenses to 30 and 60 days, respectively.[201] At the same time, however, the amended statute authorized an additional penalty for first-time offenders, the installation of an ignition interlock system.[202] The maximum authorized sentence for a third DUI offense remained 180 days of incarceration. In addition, the court found that the legislative history of the amendments reflected the legislature's belief that DUI remained a serious crime and social problem.[203] The court rejected the argument that the reduction in punishments for first and second DUI offenses indicated that DUI was a petty offense to which the right to a jury trial did not apply.[204] Instead, it concluded that, under *O'Brien*, any DUI offense remained constitutionally serious and entitled defendants to a jury trial.[205]

B. Recent Decisions

In the 1993 decision of *State v. Wilson*,[206] the Moon court implicitly limited *O'Brien* and *Jordan*.[207] The court in *Wilson* reviewed an offense related to but distinct from DUI—the offense of driving after one's license has been suspended for DUI, under Hawaii Revised Statutes section 291-4.5.[208] Applying the three- part *O'Brien* test, the court held that offense to be constitutionally petty.[209] A major factor in the court's decision was the enactment of Act 128, which expressed the legislature's intention that a first-time DUI offense should be constitutionally petty.[210] In 1993, the legislature enacted Act 128 in direct response to the

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[200] 72 Haw. 597, 825 P.2d 1065 (1992).

[201] *Id.* at 599, 825 P.2d at 1066. "Act 188 of the 1990 Session Laws amended HRS § 291-4, in the penalty provisions thereof, provides for a maximum jail term for first offenders of 30 days and for second offenders of 60 days." *Id.*

[202] *Id.*

[203] *Id.* at 601, 825 P.2d at 1068.

[204] *Id.*

[205] *Id.*

[206] 75 Haw. 68, 856 P.2d 1240, *recons. denied*, 75 Haw. 580, 861 P.2d 735 (1993).

[207] State v. Nakata, 76 Hawai'i 360, 369-70, 878 P.2d 699, 708-09 (1994).

[208] *Wilson*, 75 Haw. at 69-70, 856 P.2d at 1242.

[209] *Id.* at 78, 856 P.2d at 1246.

[210] *Id.* at 77-78, 856 P.2d at 1245-46 (citing Act 128, § 1, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws ____, ____).

Hawaii Supreme Court's decision in *Jordan*.[211] Through Act 128, the legislature "reduce[d] the penalties for first time offenders so that there can be no question that, as to first time offenders, the offense is a 'petty offense' in the constitutional sense, to which no right to jury trial attaches."[212] In dicta, the court concluded that it previously had misinterpreted the legislature's perception of DUI, which had always been that first-time DUI offenses were petty.[213] This analysis implied that the court was limiting the holdings of *O'Brien* and *Jordan*, although it did not do so explicitly.[214]

The Moon court finally confirmed *Wilson*'s implicit holding in *State v. Nakata*.[215] It employed the *O'Brien* test to independently determine that a first-time DUI offense was constitutionally petty, while repeat offenses remained constitutionally serious.[216] The court specifically limited both *O'Brien* and *Jordan* accordingly.[217] In doing so, the court gave great weight to the legislative history of Act 128, as it had done in *Wilson*.

The Moon court continued to limit the scope of a defendant's right to a jury trial in *State v. Lindsey*,[218] a case involving prostitution. It adopted a bright-line rule that "if the maximum authorized term of imprisonment for a particular offense does not exceed thirty days, it is presumptively a petty offense to which the right to a jury trial does not attach."[219] That presumption can be overcome only when a consideration of the three *O'Brien* factors "unequivocally demonstrates that society demands that persons charged with the offense at issue be afforded the right to a jury trial."[220] Since the offense of prostitution carries a maximum authorized term of thirty days imprisonment, it is presumptively petty.[221] The applicable statute also authorizes a maximum penalty of a $500 fine.[222] However, the court found that a possible

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[211] *Id.* at 77, 856 P.2d at 1245.

[212] *Id.* (citing Act 128, § 1, 17th Leg., 1993 Reg. Sess., 1993 Haw. Sess. Laws ——, ——).

[213] *Id.* at 77-78, 856 P.2d at 1245.

[214] State v. Nakata, 76 Hawai'i 360, 369-70, 878 P.2d 699, 708-09 (1994).

[215] *Id.* at 371, 878 P.2d at 710.

[216] *Id.* at 374, 878 P.2d at 713.

[217] *Id.*

[218] 77 Hawai'i 162, 883 P.2d 83 (1994).

[219] *Id.* at 165, 883 P.2d at 86.

[220] *Id.*

[221] *Id.* at 165-66, 883 P.2d at 86-87 (citing HAW. REV. STAT. § 712-1200(4) (Comp.1993)).

[222] *Id.* at 166, 883 P.2d at 87 (citing HAW. REV. STAT. § 712-1200(4) (Comp.1993)).

$500 fine was too minor a penalty to overcome the presumption that prostitution is a petty offense.[223] The other *O'Brien* factors as analyzed by the court likewise failed to overcome the presumption.[224] The court found that at common law, prostitution was not an indictable offense that required a jury trial.[225] The court also examined the legislative history of prostitution to determine the gravity of the offense. Although some evidence indicated that the legislature considered prostitution a serious offense,[226] other legislative comments persuaded the court that society did not consider prostitution so grave an offense that it would overcome the presumption of being petty.[227] Therefore, the court held that a defendant charged with prostitution does not have the right to a jury trial.[228]

C. Analysis

Given *Wilson*, *Nakata*, and *Lindsey*, the Hawaii Supreme Court affords citizens a greater right to a jury trial than is provided by the U.S. Supreme Court. While the federal standard remains that no right to a jury trial attaches to offenses for which the maximum authorized period

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[223] *Id.*

[224] *Id.*

[225] *Id.* (citing Bailey v. United States, 98 F.2d 306 (D.C. Cir. 1938)).

[226] *Id. See* H.R. STAND. COMM. REP. No. 1169, 17th Leg., 1993 Reg. Sess., *reprinted in* 1993 HAW. HOUSE J. 1468, 1468 (noting that a conviction for prostitution may be "a devastating and humiliating stigma which will last forever").

[227] *Id.* at 166-67, 883 P.2d at 87-88. The court gave three reasons why it found that the legislature did not consider prostitution to be a serious offense: (1) at the time of the adoption of the Hawaii Penal Code, the legislature questioned the wisdom of continuing to criminalize prostitution and reduced it to a petty misdemeanor; *Id.* (citing Commentary to HAW. REV. STAT. § 712-1200 (1985)); (2) the legislature's primary purpose in enacting mandatory fines and imprisonment for prostitution was to curb its secondary effects rather than prostitution itself; *Id.* at 167, 883 P.2d at 88 (citing S. CONF. COMM. REP. No. 15, 11th Leg., 1981 Reg. Sess., *reprinted in* 1981 HAW. SENATE J. 907, 907; H.R. CONF. COMM. REP. No. 25, 11th Leg., 1981 Reg. Sess., *reprinted in* 1981 HAW. HOUSE J. 908, 908; H.R. STAND. COMM. REP. No. 631, 11th Leg., 1981 Reg. Sess., *reprinted in* 1981 HAW. HOUSE J. 1204, 1205; H.R. STAND. COMM. REP. No. 1169, 17th Leg., 1993 Reg. Sess., *reprinted in* 1993 HAW. HOUSE J. 1468, 1468.); and (3) the legislature explicitly stated that prostitution itself was less serious than other related offenses, such as promoting prostitution (*see* H.R. STAND. COMM. REP. No. 1169, 17th Leg., 1993 Reg. Sess., *reprinted in* 1993 HAW. HOUSE J. 1468, 1468) and related violent crimes and property crimes (*see* H.R. CONF. COMM. REP. No. 25, 11th Leg., Reg. Sess., *reprinted in* 1981 HAW. HOUSE J. 765, 765).

[228] *Lindsey*, 77 Hawai'i at 166-67, 883 P.2d at 87-88.

of imprisonment is six months or less, the Hawaii Supreme Court recognizes the right to a jury trial for offenses whose maximum terms of imprisonment are 60 and 180 days. The court did revoke the right to a jury trial for first-time DUI offenses, but that action was prompted by deference to legislative policy rather than a change in the attitude of the court. However, the Moon court in *Lindsey* did make a more subjective judgment in excluding prostitution from those offenses to which a jury trial attaches. The evidence of society's perception of prostitution was such that the court could have decided that prostitution was a constitutionally serious offense, but it chose not to do so. While this seems to have been the more reasonable result, it demonstrates that the Moon court may be inclined to limit its liberal treatment of the right to a jury trial in the future.

VII. Confrontation

A. Background

The Lum court protected a defendant's right of confrontation under the Hawaii Constitution in *State v. Calbero*.[229] The defendant in *Calbero* was accused of sexual assault.[230] In testifying about the alleged sexual assault, the complaining witness stated that she did not know what to do in the situation because she had "never been in that situation before."[231] The defendant attempted to cross-examine the witness regarding her statement.[232] However, the trial court denied the defendant's cross-examination, citing Hawaii Rule of Evidence 412, which prohibited any inquiry into the past sexual behavior of an alleged victim of rape or sexual assault.[233] The Hawaii Supreme Court reversed on appeal, stating that article I, sections 5 and 14 of the Hawaii Constitution guaranteed the defendant's right of confrontation.[234] This constitutional guarantee included the right to cross-examine a com-

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[229] 71 Haw. 115, 785 P.2d 157 (1989).

[230] *Id.* at 116, 785 P.2d at 157-58.

[231] *Id.* at 118, 785 P.2d at 158.

[232] *Id.* at 118, 785 P.2d at 159.

[233] *Id.* at 119-20, 785 P.2d at 159. Hawaii Rule of Evidence 412 reads in part: "Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or sexual assault . . . , reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or sexual assault is not admissible." *Id.* at 121, 785 P.2d at 160.

[234] *Id.* at 124-26, 785 P.2d at 161-62.

plaining witness, which could not be superseded by the restrictions of Hawai'i's rape shield law.[235]

B. Recent Decisions

Hearsay evidence is normally inadmissible at trial, although there are certain exceptions to that rule.[236] In *Ohio v. Roberts*,[237] the U.S. Supreme Court held that even if hearsay evidence falls within an exception to the hearsay rule, it is not admissible unless the declarant of those statements actually appears at trial, or is shown to be unavailable.[238] The Supreme Court subsequently relaxed that requirement in *United States v. Inadi*[239] by holding that "the confrontation clause does not require a showing of unavailability as a condition to the admission of an out-of-court statement of a nontestifying co- conspirator."[240] Therefore, the *Roberts* rule that conditioned the admission of all hearsay evidence on a showing of unavailability is no longer applied in its full scope.

The U.S. Supreme Court further limited the scope of *Roberts* in *White v. Illinois*.[241] It held that the confrontation clause does not require a showing of unavailability in order to admit hearsay testimony under the spontaneous declaration, or excited utterance, exception to the hearsay rule.[242] In fact, the court specifically limited *Roberts* by stating that a showing of unavailability is necessary under the confrontation clause "only when the challenged out-of-court statements were made in the course of a prior judicial proceeding."[243]

In *State v. Ortiz*, the Lum court rejected *Inadi* and *White* as models in interpreting the right to confrontation under article I, section 14 of the Hawaii Constitution.[244] Instead, because "[a] showing of the declarant's unavailability is necessary to promote the integrity of the fact

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[235] *Id.* at 124, 785 P.2d at 161.

[236] State v. Ortiz, 74 Haw. 343, 357, 845 P.2d 547, 554 (1993). *See also* HAW. R. EVID. 803 & 804.

[237] 448 U.S. 56 (1980).

[238] *Id.* at 65.

[239] 475 U.S. 387 (1986).

[240] *Ortiz*, 74 Haw. at 361, 845 P.2d at 556 (citing *Inadi*, 475 U.S. at 396-400).

[241] 502 U.S. 346 (1992).

[242] *Id.* at 355-56.

[243] *Id.* at 354.

[244] *Ortiz*, 74 Haw. at 362, 845 P.2d at 556.

finding process and to ensure fairness to defendants,"[245] the court explicitly adopted the U.S. Supreme Court test as originally formulated in *Roberts*.[246]

C. *Analysis*

The *Ortiz* decision grants considerable protection to the accused under the state constitution's right to confrontation. The *Roberts* rule holds the prosecution to a much higher standard in introducing hearsay evidence than the current federal standard requires. As such, the Lum court continued its generally liberal stance by protecting the rights of defendants at trial. The Moon court has not decided any significant cases concerning the right of confrontation under the state constitution.

VIII. Conclusion

During its final months, the Lum court continued to provide liberal rights to the accused in its interpretation of the state constitution. *State v. Quino*[247] and *State v. Kearns*[248] expanded Hawai'i citizens' protection against unreasonable searches and seizures by holding a government-led "consensual encounter" to a higher standard than required by the U.S. Constitution. The court in *State v. Valera*[249] boosted the right against self-incrimination by holding that a statement obtained in violation of a defendant's *Miranda* rights cannot be used by a judge during sentencing. Moreover, *State v. Hoey*[250] obligated the police to clarify a defendant's ambiguous request for counsel under the state constitution. The Lum court in *State v. Lessary*[251] also retained Hawai'i citizens' expanded protection against double jeopardy by adopting the "same conduct test." This general trend toward the increase in the rights of the accused seems to have been the norm throughout the years of the Lum court.

For the most part, the Moon court has followed the Lum court's lead in extending the rights of Hawai'i citizens under the Hawaii

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[245] *Id.*

[246] *Id.*

[247] 74 Haw. 161, 840 P.2d 358, *recons. denied*, 74 Haw. 650, 843 P.2d 144 (1992), *cert. denied*, 113 S. Ct. 1849 (1993).

[248] 75 Haw. 558, 867 P.2d 903 (1994).

[249] 74 Haw. 424, 848 P.2d 376 (1993).

[250] 77 Hawai'i 17, 881 P.2d 504 (1994).

[251] 75 Haw. 446, 865 P.2d 150 (1994).

Constitution. Perhaps the most important decision to fall into this category so far has been *State v. Bowe*,[252] in which the court broadened the right against self-incrimination by prohibiting coercion by private individuals. In addition, *State v. Lopez*[253] increased the right against unreasonable searches and seizures by requiring a third party to possess "actual authority" (rather than "apparent authority") before that party's consent to search is valid.

On the other hand, the Moon court has declined to extend the rights of the accused on several occasions. The court declined to expand the right to due process in *State v. Kekona*[254] by not requiring the tape recording of custodial interrogations. The court denied the right to a jury trial for first-time DUI offenses and prostitution in *State v. Wilson*[255] and *State v. Lindsey*,[256] respectively. *In re Jane Doe*[257] even restricted the right against unreasonable searches by allowing warrantless searches by school officials based on reasonable suspicion. The increased proportion of these restrictive cases—in the span of only a few years—suggests a shift away from the expansive pattern of the Lum court. The Moon court seems to possess a greater willingness to interpret citizens' rights narrowly, in conformance with the minimum federal standard. Justice Levinson, in his *Kekona* dissent, clearly perceived a change in the attitude of the court. Moreover, the *Jane Doe* case seems extremely out of place among the other search and seizure cases. It is undoubtedly true that each case turns on its own facts, but the recent decisions reflect the Moon court's willingness to restrain the expansion of defendants' rights or even to cut back on those rights. This trend in recent case law suggests that the Hawaii Supreme Court may become increasingly conservative in its interpretation of criminal procedure rights under the state constitution.

Marcus L. Kawatachi[258]

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[252] 77 Hawai'i 51, 881 P.2d 538 (1994).
[253] 78 Hawai'i 433, 896 P.2d 889 (1995).
[254] 77 Hawai'i 403, 886 P.2d 740 (1994).
[255] 75 Haw. 68, 856 P.2d 1240, *recons. denied*, 75 Haw. 580, 861 P.2d 735 (1993).
[256] 77 Hawai'i 162, 883 P.2d 83 (1994).
[257] 77 Hawai'i 435, 887 P.2d 645 (1994).
[258] Class of 1997, William S. Richardson School of Law.

A Suggested Framework for Judicial Review of Challenges to the Adequacy of an Environmental Impact Statement Prepared under the Hawaii Environmental Policy Act.

I. INTRODUCTION

The National Environmental Policy Act (NEPA)[1] was passed in 1969 and is generally considered to be one of the most important pieces of

[1] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4331 et. seq. (1995)).

environmental legislation ever adopted.[2] NEPA mandates consideration of environmental consequences by every segment of the federal government. It does this primarily by calling for the creation of an environmental impact statement (EIS). The EIS preparation process involves in-depth study and disclosure of all the environmental ramifications of projects proposed by federal agencies. Since NEPA's enactment, it has spawned a host of derivative state laws which are modeled to some extent on the national act.[3] In 1974, the Hawaii Legislature passed the Hawaii Environmental Policy Act (HEPA), which is based on NEPA.[4]

Although the Hawaii Act is based on NEPA, it is not identical.[5] After a brief introduction and overview of the EIS process,[6] this article will compare the substantive requirements of an EIS prepared under NEPA with that of HEPA.[7] Because of the paucity of Hawai'i appellate court decisions interpreting HEPA, many of the specific issues that have arisen in conjunction with NEPA have not been decisively resolved on the state level. In contrast, there is a very extensive body of caselaw involving NEPA. Where the regulatory language between the two acts is similar, the federal courts' approach provides insight into possible interpretations of HEPA's substantive requirements. However, due to the independent vitality of the state act, the federal court approaches are not binding when interpreting HEPA.

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[2] WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 9.1 (2d ed. 1994). Professor Rodgers states that "[NEPA] is the Sherman Act of Environmental Law, and the most famous statute of its kind on the planet." *Id.* DANIEL R. MANDELKER, NEPA LAW & LITIGATION § 1.01 (2d ed. 1992) (referring to NEPA as "the environmental Magna Carta"). NEPA has served as a model for other countries environmental legislation. *See* Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591 (1992). *See also* William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 LOY. L.A. L. REV. 1009 (1994) (assessing the relative importance and pervasiveness of NEPA).

[3] COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: TWENTIETH ANNUAL REPORT (1990) (listing 19 states, the District of Columbia and Puerto Rico which have enacted their own legislation modeled after NEPA).

[4] The legislation is codified as HAW. REV. STAT. §§ 343 (1995) (setting out the requirements for Environmental Impact Statements) and 344 (1995) (giving a broad declaration of the Hawai'i state environmental policy).

[5] Some of the differences regarding substantive requirements are discussed at length *infra* part III. A complete evaluation of the differences is beyond the scope of this paper, but includes timing, threshold requirements, public participation, and distribution of environmental impact statements.

[6] *See infra* part II.

[7] *See infra* part III.

An EIS can be challenged in court on the grounds that it does not adequately meet the requirements imposed by the environmental policy act and implementing regulations. This article will evaluate various specific challenges that can be brought against the adequacy of an EIS. These grounds are: 1) Failure to adequately analyze the environmental effects of a project, including indirect and cumulative effects. 2) Failure to adequately develop and disclose potential alternatives to a proposed project. 3) Failure to adequately disclose unresolved issues. 4) Failure to address possible mitigation of adverse environmental effects. 5) Failure to meet the requirement that the EIS be clearly written, in a manner able to convey the necessary information to interested parties and the agency decision-makers.[8] To evaluate each of these bases for challenge, this article will look at what standard the federal courts apply when an EIS prepared under NEPA is alleged to be inadequate. Then, after comparing the language of the National Environmental Policy Act and its implementing regulations to those of Hawai'i, this article will address whether the federal courts' approach is appropriate to be applied by Hawai'i courts.

Plaintiff's standing to bring an action challenging the adequacy of the EIS will be assumed. The question of standing in Hawai'i is a complex issue, and beyond the scope of this article.[9]

The federal courts do not rigidly adhere to the black-letter law of the regulations. Every technical violation of NEPA's requirements does not lead to a finding that the EIS is inadequate. A 'rule of reason'[10] limits how thorough the preparing agency must be in writing an EIS. The federal courts give substantial deference to agency decision-making. Both in Hawai'i and at the federal level, the EIS process has a built-in procedure for agency review and acceptance of completed statements.[11]

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[8] *See infra* part III.

[9] For a recent evaluation of the changing law in Hawai'i regarding standing *See* Robert Wachter, *An Analysis of the Standing and Jurisdiction Prerequisites for Direct Appeal of Agency Actions to the Circuit Court Under the Hawaii Administrative Procedure Act After Bush v. Hawaiian Homes Commission and Pele Defense Fund v. Puna Geothermal Venture*, 17 U. HAW. L. REV. 375 (1995).

[10] *See infra* part II.B. for a complete discussion of this standard.

[11] *See* HAW. ADMIN. R. § 11-200-4 (1995) (discussing what office or agency has authority to accept the completed EIS). *See also* HAW. ADMIN. R. § 11-200- 23 (1995) (setting out the guidelines under which the accepting agency is supposed to evaluate the acceptability of an EIS).

This article will consider various sources in an attempt to delineate the most appropriate standard for Hawai'i courts to use when considering challenges to the adequacy of an EIS prepared under HEPA. Federal court jurisprudence will be used as a starting point for analysis. However, the various federal courts have not uniformly adopted a standard for evaluating the adequacy of an EIS in the face of the specific challenges addressed by this article. This article will review various commentators' suggestions for the most appropriate standard to apply. Ideally, the standard to use is one which will balance maximal substantive protection for the environment against limited agency resources to employ in preparing EISs.[12] The independent vitality of HEPA allows room for judicial interpretations that differ from those of the federal courts. There is a very significant body of scholarly analysis regarding the lack of real environmental protection under the federal courts' standard of review in certain areas.[13] The Hawai'i courts are not strictly bound to follow this path, and certain unique circumstances in Hawai'i warrant a differing interpretation.[14] A more rigid court scrutiny is in keeping with the express legislative policy and will help effectuate the substantive environmental benefits that were intended by the legislature when enacting HEPA.[15]

II. History and Overview of NEPA and HEPA

A. The Evolution of NEPA in the Federal Courts

NEPA's crowning accomplishment has been to force all government agencies to consider the environmental effects of their actions.[16] It

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[12] *See infra* part II.C. for a discussion of how this approach is consonant with the legislative policies in passing the Environmental Policy Act, and how it justifies the expenditure of resources on the preparation of these documents.

[13] *See generally* Rodgers, *supra* note 2, § 9; Mandelker, *supra* note 2; Donald N. Zillman & Peggy Gentles, *NEPA's Evolution: The Decline of Substantive Review: Article: Perspectives on NEPA in the Courts*, 20 Envtl. L. 505 (1990). Other analyses relating to specific areas of NEPA are referenced *infra* part III under the specific areas of judicial review.

[14] These circumstances include the differing language of the implementing regulations, the Hawaii State Constitutional provisions regarding environmental issues, the statutory statement of environmental policy, and the environmental considerations unique to our island state.

[15] *See* Haw. Rev. Stat. §§ 343-1 & 344 (1995).

[16] All federal agencies are subject to NEPA's regulations. Even if the agency is taking action directed by Congress, the agency must conform to NEPA's procedures. Prior to the enactment of NEPA, most federal agencies did not consider the environmental effects of their actions. *See generally* Mandelker, *supra* note 2, § 1.02.

accomplished this through the requirement in subsection 102(2)(C) that "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" must be accompanied by a detailed environmental impact statement (now generally known as an EIS).[17] The EIS preparation process analyzes and discusses the environmental impacts of the proposed action. Agencies and the public are therefore made aware of the environmental consequences of the action before it is undertaken.[18] Perhaps even more importantly, the EIS process mandates the consideration of alternatives and ways to mitigate the project's adverse effects.

Authority to lay out the specific procedural and substantive requirements for what must be included in an EIS is delegated to the Council on Environmental Quality (CEQ). The CEQ is responsible for promulgating administrative regulations which specify the content and procedural requirements for the preparation of EISs.[19] The EIS requires detailed evaluation of the environmental effects of a proposed action.[20] The implementing agency must also consider all alternatives to the action,[21] including the alternative of no action,[22] before beginning the project.[23] Furthermore, NEPA requires that mitigation measures to counter any detrimental effects must be set forth in the EIS.[24]

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[17] 42 U.S.C § 4332(2)(C) (1995).

[18] The importance of this aspect of NEPA was recognized early in the history of NEPA litigation. In Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), the court held that:

> [t]he Atomic Energy Commission had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require agencies to *consider* environmental issues just as they consider other matters within their mandates.

Id. at 1112 (emphasis in original).

[19] The CEQ regulations implementing NEPA are found at 40 C.F.R. §§ 1500.1 - 1517.7 (1995). Originally there was some disagreement about whether these regulations were binding on federal agencies. This was dispelled by executive order of President Carter in 1977, which clarified that CEQ had the authority to issue binding regulations for the EIS procedure under NEPA § 102(2). *See* Exec. Order No. 11,991, 3 C.F.R. 123 (1971-1975), *reprinted as amended in* 42 U.S.C. § 4321 (1995).

[20] 40 C.F.R. § 1502.16 (1995).

[21] *Id.* § 1502.14.

[22] *Id.* § 1502.14(d).

[23] *Id.* § 1502.5. The statute states that "[t]he statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-

The preparation of an EIS is triggered by any proposal for a major federal action that will have a significant effect on the human environment.[25] It applies to actions taken by federal agencies, and also actions by parties that have a significant federal component.[26] HEPA's provisions triggering the requirement that an EIS be prepared are based on different criteria.[27] HEPA's scope includes actions undertaken solely by private parties in certain circumstances.[28] In this way, HEPA is more

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making process and will not be used to rationalize or justify decisions already made." *Id.*

[24] *Id.* §§ 1502.14(f) and 1502.16(h).

[25] 42 U.S.C. 4332(2)(C) (1995).

[26] *Id.* The statute says an EIS must be prepared for "major federal actions significantly affecting the quality of the human environment." *Id. See* RODGERS, *supra* note 2, § 9.5(C)(1) for a general discussion of what actions have been held to be sufficiently 'federal' to trigger the NEPA requirement for an EIS. Professor Rodgers concludes that "the distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects." *Id.*

[27] HAW. REV. STAT. § 343-5(a) (1995). The statute states that:

> [A]n environmental assessment shall be required for actions which:
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> (1) Propose the *use of state or county lands* or the *use of state or county funds* . . .;
>
> (2) Propose any use within *any land classified as conservation district* by the state land use commission . . .;
>
> (3) Propose any use *within the shoreline area* as defined in section 205A-41;
>
> (4) Propose any use *within any historic site* as designated in the National Register or Hawaii Register . . .;
>
> (5) Propose any use *within the Waikiki area of Oahu*, . . .;
>
> (6) Propose any amendments to existing county general plans where such amendment would result in designations other than agriculture, conservation, or preservation . . .;
>
> (7) Propose any reclassification of any land classified as conservation district . . . ;
>
> (8) Propose the construction of new, or the expansion or modification of existing helicopter facilities within the State which by way of their activities may affect any land classified as conservation district . . . .

Id. (emphasis added).

This environmental assessment is the first step in the EIS process; if the EA shows that the action will have significant environmental effect, then the preparation of a full EIS is required. HAW. REV. STAT. § 343-5(b) (1995).

[28] *See* Molokai Homesteaders Coop. Assoc. v. Cobb, 63 Haw. 453, 465, 629 P.2d 1134, 1143 (1981) (holding that "[The Hawaii EIS requirement] is wider in scope than the federal [requirement] . . . because it covers private actions in certain defined situations and areas"). *See also* HAW. REV. STAT. § 343- 5(a) (1995). The statute requires the preparation of an environmental assessment for *any action* involving the use of conservation district land, shoreline area, historic site, or Waikiki Special District. *Id.*

expansive than NEPA; however, HEPA is limited to only certain administrative actions or geographic areas.[29]

NEPA does not expressly allow for judicial review.[30] However, early on in NEPA litigation, it was held that judicial review of agency compliance with NEPA was appropriate.[31] Since NEPA was enacted there have been a large number of cases litigated under the statute.[32] This has created a significant body of NEPA "common law," which is an important addition to the text of the statute and accompanying regulations.[33]

In the twenty-six years since the passage of NEPA the statute's effectiveness has arguably been eroded by judicial decisions.[34] Twelve United States Supreme Court decisions, in an unbroken series, have found in favor of the government in the face of various challenges to agency decisionmaking under NEPA.[35] These have limited the effectiveness of the NEPA process by forcing the federal courts to adopt a

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[29] *See* HAW. REV. STAT. § 343-5(a) (1995). *See also* Casey Jarman, *Hawaii Environmental Law*, *in* ENVIRONMENTAL LAW PRACTICE GUIDE § 53 (Michael B. Gerrard ed., 1995).

[30] MANDELKER, *supra* note 2, § 3.01.

[31] Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971).

[32] A Westlaw search of all federal cases on 8/31/95 revealed 2391 cases citing NEPA.

[33] *See* MANDELKER, *supra* note 2, § 1.05.

[34] *See id.* § 11; Paul G. Kent & John A. Pendergrass, *Has NEPA Become a Dead Issue? Preliminary Results of a Comprehensive Study of NEPA Litigation*, 5 TEMP. ENVTL. L. & TECH. J. 11 (1986); Paul J. Culhane, *NEPA's Effect on Agency Decisionmaking: Article: NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 ENVTL. L. 681 (1990); Clay Hartmann, *NEPA: Business as Usual: The Weaknesses of the National Environmental Policy Act*, 59 J. AIR L. & COM. 709 (1994).

[35] These cases have been frequently referred to in the literature as the "Dirty Dozen". *See* RODGERS, *supra* note 2, § 9.1(C)(1). The cases are United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975); Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976); Kleppe v. Sierra Club, 427 U.S. 390 (1976); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978); Andrus v. Sierra Club 442 U.S. 347 (1979); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980); Weinberger v. Catholic Action of Haw., 454 U.S. 139 (1981); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983); Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

more deferential attitude towards agency decisionmaking.[36] In some cases, this limited judicial review has foreclosed any challenge to environmentally destructive administrative agency decisions.[37]

B. HEPA's Genesis and Evolution

HEPA[38] was passed in 1974 and, although based on NEPA, is not substantively identical.[39] In the same year, the Hawaii Legislature also passed Hawaii Revised Statutes Chapter 344, which is a broad statement of policy regarding environmental issues.[40] The legislative history of HEPA indicates that it was a compromise bill, between proponents of no action and those who desired the engrafting of the National Environmental Policy Act onto Hawai'i law in its entirety.[41] Commenting on the bill, Senator Rohlfing stated: "The EIS concept is . . . the means of obtaining compliance by multifarious government agencies with policies adopted by this Legislature. It is merely a device to assure that State and County agencies take into consideration the environmental consequences of their actions. And, it is procedural rather than substantive in nature."[42] There is an inherent contradiction between these two assertions. If the EIS is the means to obtain compliance, but is at the same time merely procedural, then what enforceable obligations does it give rise to, and what action will ensure that the legislative

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[36] RODGERS, *supra* note 2, § 9.3(A) (identifying twenty-two NEPA issues that have "been subject to judicial pruning in these cases").

[37] MANDELKER, *supra* note 2, § 1.06 (proposing that "without active judicial review, federal agency interpretations of NEPA will go unchallenged").

[38] HAW. REV. STAT. §§ 343-1 to 343-8 (1995).

[39] For a discussion of HEPA's different substantive requirements from NEPA *see infra* parts III A-E. The difference in triggering mechanisms between the two acts is discussed *supra* note 27. There are other differences which are beyond the scope of this paper however, including supplementation of an EIS, timing and public participation.

[40] *See* HAW. REV. STAT. § 344-1 (1995).

> The purpose of this chapter is to establish a state policy which will encourage productive and enjoyable harmony between man and his environment, promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and enrich the understanding of the ecological systems and natural resources important to the people of Hawaii.

Id.

[41] S.R. CONF. COMM. REP. No. 27-74, 7th Leg., Reg. Sess. (1974), *reprinted in* 1974 HAW. SEN. J. 646, 647.

[42] *Id.*

policy is complied with?[43] These questions must be addressed in judicial review of HEPA.

Senator Rohlfing went on to state that:

> I, personally, favored a much stronger bill . . . We are a distinctive state, and we have some unique economic and environmental circumstances. . . In the words of one State Court, it was 'surely intended' that NEPA's state progeny 'would fulfill as important a role and have as profound an impact as the national act'. [This Bill] is a hesitant and cautious step in that direction.[44]

HEPA exists today in substantially the same form as when originally passed in 1974.[45] The Office of Environmental Quality Control (OEQC), operating under the Department of Health, is responsible for promulgating regulations specifying the contents of an EIS prepared under HEPA.[46] These regulations were initially implemented on June 2, 1975, and most recently revised in 1995.[47]

The Hawai'i appellate courts have had few opportunities to grapple with the requirements of Hawai'i's Environmental Policy Act.[48] Several opportunities were presented soon after the passage of HEPA, but these were dismissed because the challenge did not come within the strict statute of limitations set out in HEPA.[49] In *Life of the Land v.*

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[43] Commentators have pointed out a similar contradiction in regards to NEPA. The broad policy statement and grandiose legislative history of NEPA suggests a role for the statute beyond its current interpretation. *See* Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L. J. 99 (1994); RODGERS, *supra* note 2, § 9.4(E).

[44] S.R. CONF. COMM. REP. No. 27-74, 7th Leg., Reg. Sess. (1974), *reprinted in* 1974 HAW. SEN. J. 646, 647-48.

[45] HAW. REV. STAT. chapter 343, amendments noted in 1979 Haw. Sess. Laws 197; 1980 Haw. Sess. Laws 22; 1983 Haw. Sess. Laws 140; 1984 Haw. Sess. Laws 90; 1992 Haw. Sess. Laws 241. None of the amendments change the substantive provisions of the Act.

[46] HAW. REV. STAT. § 343-6 (1995).

[47] HAW. ADMIN. R. § 11-200-1, et. seq. As of November, 1995, amendments to these administrative rules have been proposed by OEQC and public hearings on these proposals are currently being held. The proposed rules as amended are cited in this Comment on the presumption that they will be adopted as written.

[48] LEXIS search 7/15/95 revealed 13 Hawai'i appellate cases citing HAW. REV. STAT. § 343 (1995).

[49] *See* Medeiros v. Hawaii County Planning Commission, 8 Haw. App. 183, 797 P.2d 59 (1990); Waianae Coast Neighborhood Bd. v. Hawaiian Elec. Co., Inc., 64 Haw. 126, 637 P.2d 776 (1981); Waikiki Resort Hotel v. City and County of Honolulu, 63 Haw. 222, 624 P.2d 1353 (1981).

Ariyoshi,[50] currently the leading Hawai'i case on the adequacy of an EIS under HEPA, the Hawaii Supreme Court borrowed from a Federal Second Circuit case involving NEPA and stated:

> The standard of review which should govern a court's determination whether an EIS contains sufficient information to satisfy statutory requirements has been stated: 'In making such a determination a court is governed by the 'rule of reason', under which an EIS *need not be exhaustive to the point of discussing all possible details* bearing on the proposed action but will be upheld as adequate if it has been compiled in *good faith* and *sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved* and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.[51]

Life of the Land has not been cited again in Hawai'i with regards to this standard for EIS adequacy.[52] This holding thus stands as the sole precedent in Hawai'i for the standard of judicial review.

Life of the Land expressly adopts for HEPA a reasonableness standard that has been used by the federal courts interpreting NEPA. However, the "good faith" element of the standard has since been explicitly rejected by the federal courts.[53] This standard, without the good faith requirement, is still generally used by the federal courts. The standard is vague, and doesn't give much specific guidance to the judiciary. How much information will be deemed "sufficient" is a matter of opinion. Over the course of time, more specific guidelines for each particular area in which the adequacy of an EIS is frequently challenged, have been developed by the federal courts in regards to NEPA.[54] For the purposes of this article, this general standard will be the basis for evaluation of all more specific challenges.

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[50] 59 Haw. 156, 577 P.2d 1116 (1978).

[51] *Id.* at 164-65, 577 P.2d at 1121 (quoting County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978)) (emphasis added).

[52] As of publication, the author could find no further references to this case, except in relation to the test for whether to grant injunctive relief.

[53] *See* Oregon Envtl. Council v. Kunzman, 817 F.2d 484 (9th Cir. 1987). The court held that "this court has rejected a test of subjective good faith in favor of . . . a 'rule of reason' that asks whether an EIS contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Id.* at 493.

[54] *See infra* part III.

The Hawaii Supreme Court has explicitly recognized that HEPA is not identical to NEPA. In *Molokai Homesteaders Coop. Assoc. v. Cobb*,[55] the Hawaii Supreme Court held that,

> [T]he Hawaii EIS requirement calls for a *broader range of information than NEPA* . . . It is wider in scope than the federal or the typical state analog because it covers private actions in certain defined situations and areas. Nevertheless, the prescribed role of the EIS in the state environmental protection scheme is informational.[56]

In *Molokai Homesteaders* no EIS had been prepared because the project predated the effective date of the legislation.[57] Therefore, unfortunately, the court's statement regarding the EIS requirements is dicta. The other Hawai'i cases which reference Hawaii Revised Statutes chapters 343 and 344 relate to threshold requirements for the preparation of an EIS on conservation land[58] and administrative procedures.[59] These cases are not relevant to substantive interpretation of HEPA's EIS requirements.

Hawaii Revised Statutes chapter 344 is a broad statement of Environmental policy, enacted concurrently with Hawaii Revised Statutes chapter 343 in 1974. The substantive effect of chapter 344 is unclear, since it has largely been ignored in appellate litigation.[60] At the minimum, this policy statement should guide the court's interpretation of Hawaii Revised Statutes chapter 343.[61] Although the Hawaii Su-

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[55] 63 Haw. 453, 629 P.2d 1134 (1981).

[56] *Id.* at 465, 629 P.2d at 1143 (emphasis added).

[57] *Id.* at 453, 629 P.2d at 1134.

[58] McGlone v. Inaba, 64 Haw. 27, 636 P.2d 158 (1981).

[59] Mauna Kea Power Co. v. Board of Land and Natural Resources, 76 Haw. 259, 874 P.2d 1084 (1994) (addressing the agency's consideration of sources outside the record); Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981) (addressing standing to sue).

[60] The only appellate case to cite HAW. REV. STAT. § 344 (1995) is Molokai Homesteaders Coop. v. Cobb, 63 Haw. 453, 629 P.2d 1134 (1981). This case involved the transport of water to the west end of Moloka'i for resort development. *Id.* Plaintiffs argued that Chapter 344 mandated that state agencies adopt guidelines on population growth, and the Board of Land and Natural Resources failure to do so invalidated the agreement regarding the water. *Id.*

[61] It is a general principle of statutory construction in Hawai'i that any statute be interpreted in a manner consonant with the expressed policy of the legislature. *See* Franks v. Dillingham Construction Pacific, Ltd., 74 Haw. 328, 334, 843 P.2d 668, 671 (1993) ("When construing a statute, [the court's] foremost obligation is to ascertain and give effect to the intention of legislature" (citation omitted)).

preme Court has found otherwise,[62] the language of Hawaii Revised Statutes chapter 344 clearly indicates that the legislature intended it to be a substantive mandate rather than a mere statement of policy.[63] However, this effect is currently foreclosed by the Hawaii Supreme Court's analysis in *Molokai Homesteaders*.[64] The court in that case held that Hawaii Revised Statutes chapter 344 did not carry a mandate for the adoption of guidelines by agencies, and that the section is a hortatory policy statement.[65] The court came to this conclusion based on the "lack of specificity in the statement" and the "absence of sanctions for possible non-observance."[66] The effect of this decision is to relegate this policy statement to the status of rhetoric, with no enforceable substantive effect if agencies choose to ignore it. A similar attitude has been adopted by the federal courts in relation to the policy declaration in NEPA.[67] This lack of substantive effect has been severely criticized by commentators on the grounds that this interpretation fails to effectuate the clear legislative intent of Congress in passing NEPA.[68] It is indeed an interesting question to look at the clear declaration of

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[62] *See Molokai Homesteaders*, 63 Haw. at 462, 629 P.2d at 1141.

[63] HAW. REV. STAT. § 344-4(1)-(10) (1995). The statute reads "all agencies, in the development of programs, *shall*, insofar as is practicable, consider the following guidelines" *Id.* § 344-4 (emphasis added). The statute goes on to enunciate specific guidelines in 10 areas ranging from Population to Citizen Participation. *Id.*

[64] 63 Haw. at 462, 629 P.2d at 1141.

[65] *Id.*

[66] *Id.*

[67] *See* 42 U.S.C. 4331(a) (1995). This section states:

> [I]t is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id.

[68] *See* Philip Weinberg, *It's Time to put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99 (1994); Clay Hartmann, *NEPA: Business as Usual: The Weaknesses of the National Environmental Policy Act*, 59 J. AIR L. & COM. 709 (1994); Timothy P. Brady, Comment, *But Most of it Belongs to Those Yet to be Born: The Public Trust Doctrine, NEPA and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621 (1990); William H. Rodgers, Jr., *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act: Keynote: NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485 (1990).

purpose in Hawaii Revised Statutes chapters 341,[69] 343,[70] and 344[71] and consider how, in the absence of substantive review, these policies are to be effectuated.

C. Policies Furthered by the EIS Process

Although NEPA and HEPA are process-oriented and not results-oriented, there are important policies furthered by compliance with their procedural regulations.[72] Hawaii Revised Statutes chapter 344's

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[69] HAW. REV. STAT. § 341-1 (1995). The statute states in the findings and purpose section that: "The legislature finds that the quality of the environment is as important to the welfare of the people of Hawai'i as is the economy of the State." *Id.*

[70] *Id.* § 343-1. The statute states in the findings and purpose section that: "The legislature finds that the quality of humanity's environment is critical to humanity's well-being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment . . . ." *Id.*

[71] *Id.* § 344-3 states that:

> It shall be the policy of the State, through its programs, authorities and resources to:
>
> (1) *Conserve the natural resources*, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of the people of Hawaii.
>
> (2) *Enhance the quality of life* by: (A) Setting population limits so that the interaction between the natural and manmade environments and the population is mutually beneficial; (B) Creating opportunities for the residents of Hawaii to improve their quality of life through diverse economic activities which are stable and in balance with the physical and social environments; (C) Establishing communities which provide a sense of identity, wise use of land, efficient transportation, and aesthetic and social satisfaction in harmony with the natural environment which is uniquely Hawaiian; and (D) Establishing a commitment on the part of each person to protect and enhance Hawaii's environment and reduce the drain on nonrenewable resources.

Id.

[72] *Id.* § 343-1:

> [A]n environmental review process will *integrate the review of environmental concerns* with existing planning processes of the State and counties and *alert decision makers to significant environmental effects* which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation

statement of environmental policy incorporates specific, substantial goals—to set population limits for Hawai'i, diversify economic activities, and establish communities which provide 'aesthetic and social satisfaction in harmony with the natural environment.'[73] The EIS process under HEPA is one way in which the legislature intended these substantive goals to be met.[74] The Hawaii Supreme Court has stated that a court's primary duty in interpreting statutes is to ascertain and give effect to the legislature's intention and to implement that intention to the fullest possible degree.[75]

Twenty-six years of experience[76] with the EIS process has shown that the proper completion of the procedures can lead to substantial environmental benefits. The EIS process means that agencies reviewing proposed projects will be aware of the environmental consequences before the project is approved.[77] It provides important information regarding permit conditions that should be imposed in order to limit a project's adverse effects.[78] It forces consideration of alternatives to

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during the review process benefits all parties involved and society as a whole. *Id.* (emphasis added).

See also 40 C.F.R. § 1502.1 (1995):

> The primary purpose of an environmental impact statement is *to serve as an action-forcing device* to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.

Id. (emphasis added).

[73] HAW. REV. STAT. § 344(2)(A-C) (1995).

[74] In the legislative history, Senator Rohlfing specifically stated that "The EIS concept is . . . the means of obtaining compliance by multifarious government agencies with policies adopted by this Legislature." S.R. CONF. COMM. REP. No. 27-74, 7th Leg., Reg. Sess. (1974), *reprinted in* 1974 HAW. SEN. J. 646, 647. The courts are obligated to give effect to the intention of the legislature when construing statutes. Franks v. Dillingham Construction Pacific, Ltd., 74 Haw. 328, 334, 843 P.2d 668, 671 (1993).

[75] State of Hawaii v. Briones, 71 Haw. 86, 92, 784 P.2d 860, 863 (1989); Franks v. Dillingham Construction Pacific, Ltd., 74 Haw. 328, 334 843 P.2d 668, 671 (1993).

[76] From 1969, the date of passage of NEPA, to the present year, 1995.

[77] *See infra* note 80.

[78] *See* RODGERS, *supra* note 2, § 9.3 (B)(2)(a). Professor Rodgers states "NEPA has been recognized as an 'environmental full disclosure law' . . . the President, the Congress, the Council on Environmental Quality, and the Environmental Protection Agency need to know because they have authority to review and redirect environmentally damaging activities." *Id.* (citation omitted).

the proposed project that otherwise might not be thought of.[79] Moreover, the evaluation of adverse consequences may cause voluntary abandonment of ill-advised projects.[80] Finally, it allows for public awareness of impending projects and creates the opportunity for public input prior to finalization of the project specifics.[81]

The courts have a duty to review EISs in order to effectuate substantial environmental protection under the Hawai'i state constitutional right to a healthy environment.[82] The plain language of the constitution states that "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality . . ."[83] HEPA is a law related to environmental quality, and premier consideration must be given to this constitutional mandate.[84] It is a fundamental tenet of constitutional law that the letter and the spirit of a state's constitution be given effect by the courts.[85]

All of these considerations, in addition to those contained in Hawaii Revised Statutes chapter 344, are important to take into account when

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[79] 40 C.F.R. § 1502.14 (1995). Alternatives including the proposed action states "[t]his section is the heart of the environmental impact statement . . . it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.*

[80] *See Despite Costs, DOE Believes Money Spent on NEPA is Good Investment*, INSIDE ENERGY/WITH FEDERAL LANDS, June 12, 1995, at 4. "[DOE counsel Robert Nordhaus] said the law eventually saves money by helping the department 'make better decisions and . . . avoid costly mistakes.' Further, he said DOE's efforts to 'improve the effectiveness and accessibility of its NEPA process have produced dividends in the form of better decisions, and a higher level of public confidence in these decisions.'" *Id.*

[81] 40 C.F.R. § 1503.1(a) (1995). The statute requires that "after preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall . . . (4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected." *Id.* The agency is required to respond to all comments received and enclose their response in the final EIS. *Id.* § 1503.4 (1995).

[82] HAW. CONST. art. XI, § 9.

[83] *Id.*

[84] *See* Robert A. MacLaren, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 152 (1990) ("America's need for environmental protection is clear. . . Neither judicial restraint nor political restraint is appropriate in face of the present crisis, for the future of the planet is put in jeopardy by such timidity.").

[85] *See generally* 16 C.J.S. *Constitution* § 18 (1986).

evaluating any individual EIS.[86] As specifically recognized in the OEQC regulations, "[a]n EIS is meaningless without the conscientious application of the EIS process as a whole, and shall not merely be a self-serving recitation of benefits and a rationalization of the proposed action."[87] Any review of an EIS must ask whether it meets the goals of the process as a whole. The expenditure of funds on an EIS is useless if it does not help to prevent substantial harm to the environment.

III. Grounds for Challenging the Adequacy of an EIS

The implementing regulations for both HEPA and NEPA specifically require analysis and disclosure of the proposed project's effects in a number of different areas.[88] The EIS must fully discuss a project's direct, indirect, socioeconomic and cumulative effects.[89] The EIS must look at all reasonable alternatives to the proposed project, and assess possible mitigation measures to reduce negative environmental impacts.[90] The EIS must be readable and disclose all sources consulted in its preparation, in addition to all remaining uncertainty regarding the analyses in the document.[91]

An EIS may be challenged as inadequate for not meeting one or more of these requirements.[92] The court must first rule on the merits

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[86] This gives recognition to the broad policy objectives spelled out in the legislative enactments of HEPA and NEPA. *See* 40 C.F.R. § 1500.1(c) (1995) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment.").

[87] Haw. Admin. R. § 11-200-14 (1995).

[88] These include a discussion of direct, indirect and cumulative effects, alternatives to the proposed project, disclosure of remaining uncertainty in the available information, analysis of possible mitigation measures to reduce adverse environmental effects, and overall the EIS must be written in a clear, succinct manner. *See infra* part III.A-E.

[89] *See infra* part III.A.1-3.

[90] *See infra* parts III.B and III.D.

[91] *See infra* parts III.C and III.E.

[92] The challenge to the adequacy of an EIS must be based on some specific claim that a part of the EIS is inadequate. The following sections will survey the main grounds on which plaintiffs have challenged various EISs throughout years of federal court litigation. These challenges track the main requirements of the CEQ regulations. It is not meant to say that these are the only possible grounds for saying that an EIS is inadequate; resourceful plaintiffs always hold the potential for coming up with novel theories never before contemplated. *See generally* Mandelker, *supra* note 2, § 10.1, et seq.

of the challenge, determining whether the EIS actually fails to meet the statutory requirements.[93] Upon a finding that the EIS does not meet the statutory requirements mandated by either act, the reviewing court is faced with a difficult decision. The court must decide whether to strike down the EIS as inadequate and order that the process be redone to correct the deficiencies. This will most likely include an injunction halting the project while the EIS is brought into compliance.[94] This remedy is a lengthy and expensive proposition. The court's alternative is to allow the EIS to stand and thus let the project continue even though it was approved on the basis of information that has been proven to be incomplete. This risks a decision with environmentally unsound consequences. Balancing these considerations is a difficult job, and the plaintiff's burden is to persuade the court that the deficiencies in the EIS are of sufficient magnitude to warrant intervention. The circuit court's determination of whether an EIS is inadequate will then be subject to de novo review by the appellate courts as a question of law.[95]

Plaintiffs challenging the adequacy of an EIS face a heavy burden. Timing of the challenge is crucial. In Hawai'i there is a strict statute of limitations that governs when a challenge may be brought.[96] Pragmatically, if the challenge is not resolved before the project is underway, then the courts are unlikely to require that the EIS process be redone. A new EIS is unlikely to change the outcome of the decision if there is already a significant investment in the project. Plaintiffs in this situation may be more successful arguing for the addition of mitigation measures, rather than trying to show a totally different alternative to the project, or asking for a more complete analysis of the environmental effects.

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[93] Given the broad language of the implementing regulations, this is likely to be the easier requirement for the plaintiffs. *See, e.g.*, HAW. ADMIN. R. § 11-200-17(i) (1995) (requiring that "all consequences on the environment" be included).

[94] *See* MANDELKER, *supra* note 2, § 1.02. This is the usual remedy after finding an EIS inadequate. The EIS process is intended to take place prior to starting action, so if an EIS is so inadequate it must be redone the court will order a halt to the commencement of the project until the EIS is satisfactorily completed. Without an injunction the project may be complete, or at least too far along to change direction, by the time a new EIS is completed. *Id.*

[95] Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987).

[96] HAW. REV. STAT. § 343-7(c) (1995) (setting the statute of limitations at 60 days after the agency accepts the statement).

Federal courts have been reluctant to invalidate EISs for what they consider merely technical deficiencies.[97] The reviewing court must make an evaluation of whether proven deficiencies are of such magnitude that the EIS process fails to achieve its basic purpose—to provide adequate information for agencies' reasoned evaluation of the environmental effects of a project under consideration.[98] A reasonableness, or "rule of reason" standard, is the general standard developed by federal courts over many years of NEPA litigation.[99] The federal courts have also framed their review as questioning whether the completion of the EIS process shows that the agency has taken a "hard look" at environmental issues.[100]

The basic standard to be used is that set out by the Hawaii Supreme Court in *Life of the Land*.[101] However, the subjective good faith factor incorporated there should be jettisoned as inappropriate and outdated.[102] This basic standard balances the need for a full evaluation of environmental consequences against the temptation to simply require more paperwork compliance with regulations.[103] This basic standard will thus guide Hawai'i courts' review of specific deficiencies. The specific application of this standard to various substantive requirements will be addressed in the following sections.[104]

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[97] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[98] HAW. REV. STAT. § 343-1 (1995). The statute states "[t]he legislature finds that . . . an environmental review process will . . . alert decision makers to significant environmental effects which may result from the implementation of certain actions." *Id.*

[99] *See* RODGERS, *supra* note 2, § 9.8(C) (discussing how the "rule of reason" pronouncement has been variously used by federal courts in evaluating NEPA challenges to an EIS). *See also* discussion *supra* note 51-54 and accompanying text.

[100] Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976); Stop H-3 Ass'n. v. Dole, 740 F.2d 1442 (9th Cir. 1983). The "hard look" standard is generally applied to court's review of environmental issues and has its genesis in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the most cited decision in the history of environmental law. RODGERS, *supra* note 2, § 1.8(B).

[101] Life of the Land v. Ariyoshi, 59 Haw. 156, 164, 577 P.2d 1116, 1121 (1978).

[102] *See supra* part II.C. When looking at the underlying policies behind the EIS process it is apparent that subjective good faith by an EIS preparer cannot excuse inadequate information if the missing or incomplete sections of the EIS fail to give the decisionmaker enough information to make a reasoned decision balancing the risks of environmental harm against the benefits to be derived.

[103] Following the CEQ guidance regarding NEPA. *See* 40 C.F.R. § 1500.1 (1995) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action").

[104] *See infra* part III.A-E.

Federal courts under NEPA have characterized inadequacies in an EIS with a variety of creative words, ranging from "scientifically indefensible to utterly devoid of common sense."[105] Regardless of the vocabulary employed, these holdings essentially reflect a court's decision that an EIS fails to meet the goal of providing decision-makers with a "detailed statement by the responsible official on . . . the environmental impact of the proposed action."[106]

A. Discussion of Environmental Effects

Under HEPA, every EIS is required to contain a thorough discussion of the probable impact of the proposed action on the environment;[107] the relationship between local short term uses of humanity's environment and the maintenance and enhancement of long-term productivity;[108] irreversible and irretrievable commitments of resources that would

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[105] For a complete listing, see RODGERS, *supra* note 2, § 9.3(B)(4). Professor Rodgers compiles a listing of court pronouncements overturning EISs on the grounds that they are

> sweepingly vague, unsupported in fact, scientifically indefensible, utterly devoid of common sense, reliant upon fatuous statistics, stubbornly dogmatic, grossly misleading, studiously mum, suspiciously boilerplate, rampantly inconsistent, strikingly cursory, suggestive of tunnel vision, internally contradictory, insultingly nonspecific, openly violative of Congressional intent, bare and unsupported, bizarre and erratic, patently misleading, clearly deceitful or utterly clueless as to effects, wholly unquantified, basically flawed, obviously misleading or incomplete, excessively cryptic or perfunctory, argumentative, genuinely preposterous, dependent upon stale data or biased procedures, unaware of important topics, unresponsive to telling information, exuding arrogance, callousness or whimsy inattentive to expert criticism, or demonstrative of a reluctant, begrudging compliance.

Id. (footnotes omitted).

[106] 42 U.S.C. § 4332(2)(C) (1995).

[107] HAW. ADMIN. R. § 11-200-17(i) (1995). The rule states that:

> The draft EIS shall [include] a statement of the probable impact of the proposed action on the environment [and impacts of the natural or human environment on the project], which shall include consideration of *all phases of the action* and consideration of *all consequences on the environment*; direct and indirect effects shall be included.

Id. (emphasis added, bracketed material contains proposed 1995 revisions).

[108] *Id.* § 11-200-17(j). The rule states that:

> [The] extent to which the proposed action involves trade-offs [among] short-term and long-term gains and losses [shall be discussed]. [The] discussion [shall include] the extent to which the proposed action *forecloses future options, narrows*

be involved in the proposed action should it be implemented;[109] and probable adverse environmental effects which cannot be avoided.[110] Both direct and indirect effects of the project must be addressed.[111] This language implicates a very broad range of effects that must be considered in an EIS. It also involves what could be characterized as scientific fortunetelling, looking forwards in an attempt to see the probable future effects of this particular project. This can lead to difficult determinations regarding the interactions of this project with the myriad other existing forces affecting the environment in the project

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the range of beneficial uses of the environment, or *poses long-term risks to health or safety*. In this context, [short-term] and long-term do not necessarily refer to any fixed time periods, but shall be viewed in terms of the environmentally significant consequences of the proposed actions.

Id. (emphasis added, bracketed material contains proposed 1995 revisions).

[109] *Id.* § 11-200-17(k).

The draft EIS shall [include in a separate and distinct section a description of] *all irreversible and irretrievable commitments of resources* that would be involved in the proposed action should it be implemented. Identification of *unavoidable impacts* and the extent to which the action makes *use of non-renewable resources* during the phases of the action, or irreversibly curtails the range of potential uses of the environment shall also be included. The *possibility of environmental accidents* resulting from any phase of the action shall also be considered. Agencies shall avoid construing the term "resources" to mean only the labor and materials devoted to an action. "Resources" also means the natural and cultural resources committed to loss or destruction by the action.

Id. (emphasis added, bracketed material contains proposed 1995 revisions).

[110] *Id.* § 11-200-17(l).

The draft EIS shall address *all probable adverse environmental effects which cannot be avoided*. Any adverse effects such as water or air pollution, urban congestion, threats to public health, or other consequences adverse to environmental goals and guidelines established by [environmental response laws, coastal zone management laws, pollution control and abatement laws, and environmental policy such as that found in chapters 128D, 205A, 342 . . .] and 344, [HRS], shall be included as a brief summary, including those effects discussed in other actions of this paragraph which are adverse and unavoidable under the proposed action. Also, *[the] rationale for proceeding with a proposed action*, notwithstanding unavoidable effects, *shall be clearly set forth in this section*. The draft EIS shall indicate what other interests and considerations of governmental policies are thought to offset the adverse environmental effects of the proposed action. The statement shall also indicate the extent to which these stated countervailing benefits could be realized by following *reasonable alternatives to the proposed action that would avoid some or all of the adverse environmental effects*.

Id. (emphasis added, bracketed material contains proposed 1995 revisions).

[111] *Id.* § 11-200-17(i).

area. This is a fertile ground for challenge; given the strict language of the regulations it may be relatively easy in a project of significant size to point to areas in which the discussion of environmental effects is somehow lacking. Any showing of an environmental effect not addressed in the EIS will render the document technically inadequate. However, the complexity of the analysis involved may lead the court to be more sympathetic towards inadequacies, realizing the pragmatic limitations facing government bodies.

1. Direct effects

Under NEPA, an EIS must be prepared for all major federal actions significantly affecting the quality of the human environment.[112] As a threshold consideration, if the project is only going to have economic or social impacts, then no EIS is required.[113] However, if an EIS is prepared, NEPA requires consideration of all direct effects which are "caused by the action and occur at the same time and place."[114] "Effects" is defined broadly to include a variety of specific ecological and also socioeconomic impacts.[115] The scope of the environmental effects which need to be included in an EIS has been an issue frequently litigated in the federal courts.[116]

When compared with HEPA, the NEPA regulations consider a similar range of effects, but define them with greater particularity. Both acts require that "economic" and "social" effects be considered,[117] but the HEPA regulation uses "physical" instead of NEPA's "ecological" effect when defining "environment."[118] Both expressly implicate "historic" effects.[119] The HEPA regulation defining an "environmental

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[112] National Environmental Policy Act of 1969 § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1994).

[113] 40 C.F.R. § 1508.14 (1995).

[114] *Id.* § 1508.8(a).

[115] *Id.* § 1508.8(b). The statute states:

> Effects and impacts as used in these regulations are synonymous. Effects includes *ecological* (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), *aesthetic, historic, cultural, economic, social, or health*, whether *direct, indirect, or cumulative.*

Id. (emphasis added).

[116] RODGERS, *supra* note 2, § 9.8(A).

[117] 40 C.F.R. § 1508.8(a) (1995); HAW. ADMIN. R. § 11-200-2 (1995).

[118] 40 C.F.R. § 1508.8(a) (1995); HAW. ADMIN. R. § 11-200-2 (1995).

[119] 40 C.F.R. § 1508.8(a) (1995); HAW. ADMIN. R. § 11-200-2 (1995).

impact" employs the broad phrase, "effect of *any kind*,"[120] while the NEPA regulations only implicate the specific areas stated.[121]

Federal courts have not adopted a uniform standard for the adequacy of the discussion of environmental effects.[122] Generally, a complete failure to address a particular environmental effect is fatal to the EIS process. Such an omission means that the decisionmaker is unable to fully consider the environmental factors involved. The public evaluating the EIS will also be deprived of notice of the effect, significantly undermining the full disclosure function of the EIS.

Consider an EIS for a development project on land where there is an existing Hawaiian heiau.[123] This heiau would be a resource of "historic and archaeological significance,"[124] required in the description of the environmental setting under the Hawai'i OEQC regulations.[125] If the EIS description of the environmental setting failed to mention the existence of this heiau, then the agency deciding whether to approve the project would not have information on this archaeological resource impacted by the proposed project. This would be a clear violation of the standard for sufficiency of an EIS.[126] The court in that case should clearly hold that the EIS is inadequate and require inclusion of the heiau in the environmental setting, along with a complete discussion of how the project would affect it.[127]

2. *Indirect effects*

Indirect and socioeconomic effects pose more of a challenge to the reviewing court.[128] The CEQ regulations require that an EIS consider

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[120] HAW. ADMIN. R. § 11-200-2 (1995) (emphasis added).

[121] 40 C.F.R. § 1508.8(a) (1995).

[122] MANDELKER, *supra* note 2, § 10.10 (stating that "[courts] tend to review these discussions [of environmental effects] on an ad hoc basis").

[123] A heiau is a place of religious and archaeological significance to the indigenous inhabitants of the Hawaiian archipelago. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY: HAWAIIAN-ENGLISH AND ENGLISH-HAWAIIAN (1986).

[124] *See* HAW. ADMIN. R. § 11-200-17(g) (1995).

[125] *Id.* § 11-200-17(g).

[126] Life of the Land v. Ariyoshi, 59 Haw. 156, 164, 577 P.2d 1116, 1121 (1978). It would not set "forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action." *Id.*

[127] As required by HAW. ADMIN. R. § 11-200-17(i) (1995).

[128] RODGERS, *supra* note 2, § § 9.8(A)(2) & 9.8(B)(1).

indirect effects,[129] including cumulative effects.[130] All indirect effects which are reasonably foreseeable must be addressed.[131] Courts have had difficulty defining what is a "reasonably foreseeable" indirect effect.[132] One example, arising from Hawai'i, is the Ninth Circuit Court of Appeals' decision in *Stop H-3 Association v. Dole*.[133] Among other challenges to the project,[134] the plaintiffs challenged the adequacy of the EIS prepared for completion of the H-3 highway.[135] One alleged ground for inadequacy of the statement was its failure to adequately assess the secondary (socio-economic) effects of the proposed highway.[136] The plaintiffs alleged that the EIS discussions of secondary effects on population growth, public services and community cohesion were lack-

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[129] 40 C.F.R. § 1502.16 (1995). This statute requires that an EIS include discussions of indirect effects and their significance. *Id.* Indirect effects are defined in 40 C.F.R. § 1508.8 (1995) which states that:

> "Effects" include: . . . (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Id.

[130] 40 C.F.R. § 1508.7 (1995). Cumulative impact is defined as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id.

[131] *Id.* § 1502.16.

[132] *See* RODGERS, *supra* note 2, § 9.8(B)(1).

[133] 740 F.2d 1442 (9th Cir. 1983).

[134] *Id.* The case also addressed alleged non-compliance with the Endangered Species Act of 1973, the Department of Transportation Act of 1966 and the Federal-Aid Highway Act of 1966. *Id.*

[135] *Id.* at 1460.

[136] *Id.* The plaintiffs also alleged that the EIS inadequately analyzed whether the highway was inconsistent with local land use plans, and that the EIS should be supplemented because of new studies calling into question the need for the highway. *Id.* The court found that the EIS was in violation of the CEQ regulations requiring discussion of how the proposed project may conform or conflict with land use plans (40 C.F.R. § 1500.8(a)(2)). *Id.* However, the court did not overturn the EIS on that ground, finding that the court's role was not that of a "super-planner," and that they were not allowed to substitute their judgment for that of the agency concerning the wisdom of the proposed action. *Id.*

ing in sufficient detail and meaningful supporting data.[137] The Ninth Circuit held that the EIS was sufficient, even though the evaluation of the secondary impacts may have been "less than complete."[138] The court held that "NEPA only requires a 'reasonably thorough discussion' that fosters informed decisionmaking, not a 'complete evaluation.'"[139] The court found that the various EISs prepared for this project[140] contained this 'reasonably thorough discussion,' without expressly defining what standard they used to reach this conclusion.[141] The court does acknowledge that it may have been preferable to consider the secondary impacts in more detail, but held that the decisionmakers had enough data to take the required "hard look" at all the consequences of H-3 and reach an environmentally-informed decision.[142] This case demonstrates both the "reasonably sufficient data" and the "hard look" standards in action. The court avoids[143] directly finding the EIS in violation of the regulatory standard for considering secondary effects.[144] The decision may well be based on the court's unwillingness to require yet another EIS, and a pragmatic realization that any more in-depth analysis of secondary effects was very unlikely to change the decision on whether to construct the highway.

In *Stop H-3 Association*, the indirect effects targeted by the plaintiffs were discussed in some detail in the EIS, and the court's determination was limited to whether the discussion presented adequate detail on these effects.[145] This type of challenge is different from the case in which the EIS is completely silent on a particular indirect effect of a project. Such a situation was presented in the California case of *City*

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[137] *Id.* at 1461.

[138] *Id.* at 1462.

[139] *Id.*

[140] *Id.* At 1452. At that point there were 4 existing EISs prepared for that section of the H-3 highway, including 2 supplemental EISs prepared under court order. *Id.*

[141] *Id.* at 1462.

[142] *Id.*

[143] *Id.* at 1461. The court stated that "it *may have been* preferable to consider the secondary impacts in more detail" and "[the contradictory assertions put forth by the State] *may* reflect a less than complete evaluation of H-3's secondary impacts." *Id.* (emphasis added).

[144] *Id.* The court, later in the opinion, did expressly find that the EIS violated the standard for considering whether the project was in harmony with local land use plans. *Id. See also supra* note 136.

[145] In most cases deciding this issue, the courts have upheld the adequacy of an EIS. MANDELKER, *supra* note 2, § 10.11.

of Davis v. Coleman,[146] where the court held an EIS inadequate for failing to discuss the probable effects of a highway extension on future growth, recreation along a creek, community cohesion, and air and noise pollution.[147] When evaluating which indirect effects must be considered in an EIS under NEPA, the courts usually draw the line at effects that are considered "remote, speculative, implausible, or hypothetical."[148] This can be framed as a proximate causation analysis, analogous to that undertaken by courts in other areas of the law.[149] The United States Supreme Court in *Metropolitan Edison Co. v. People Against Nuclear Energy* limited the required scope of socioeconomic effects that had to be considered in an EIS by using a proximate causation analysis.[150] The Court held that NEPA did not require discussion of the psychological stress caused by fear of a nuclear power plant accident.[151]

The OEQC regulations under HEPA require the same range of consideration for indirect effects as for direct effects.[152] In some cases, the regulations are relatively specific regarding secondary effects to consider in certain types of projects.[153] The federal regulations under NEPA have similar language, but the wording in the NEPA regulations

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[146] 521 F.2d 661 (9th Cir. 1975).

[147] *Id.* at 661. This case is referenced in *Stop H-3 Ass'n*, 740 F.2d at 1460. The *Stop H-3 Ass'n* court distinguished these cases by stating that "in [*City of Davis v. Coleman*], the EIS was not nearly as detailed as the EIS in the case at hand." *Stop H-3 Ass'n* at 1461.

[148] RODGERS, *supra* note 2, § 9.8(B)(1).

[149] *Id.*

[150] 460 U.S. 766 (1983).

[151] *Id.* at 779 (approving the restarting of a reactor at Three Mile Island).

[152] HAW. ADMIN. R. § 11-200-17(i) (1995).

[153] *Id.* The statute states that:

> It should be realized that several actions, in particular those that involve construction of public facilities or structures (e.g. highways, airports, sewer systems, water resource projects, etc.) may well stimulate or induce secondary effects. These secondary effects may be equally important as, or more important than, primary effects, and shall be *thoroughly discussed to fully describe the probable impact of the proposed action on the environment.* The population and growth impacts of an action shall be estimated if expected to be significant, and an evaluation made of the effects of any possible change in population patterns or growth upon the resource base, including [but not limited to] land use, water and public services, of the area in question. Also, if the proposed action constitutes a direct or indirect source of pollution as [determined] by any governmental agency, necessary data shall be incorporated into the EIS.

Id. (emphasis added, bracketed material contains proposed 1995 revisions).

is permissive instead of mandatory.[154] Therefore, there is a more explicit burden under HEPA to consider the indirect effects of a project, in the various specific areas set out in the regulations. It should therefore be easier to invalidate an EIS prepared under HEPA for failure to adequately discuss indirect effects.

The language of the Hawai'i OEQC regulations states that the EIS must include consideration of "all consequences on the environment . . . direct and indirect effects shall be included."[155] However, in reviewing an individual EIS, the cost effectiveness and amount of available agency resources must be taken into account to determine what range of effects it is reasonable to require. In many cases it will be impossible for an ordinary governmental agency to comprehensively evaluate the entire range of global effects caused by a particular development action. This consideration must be balanced against the fact that the goals of the EIS process will be frustrated if an overly limited range of effects is considered. Public awareness of all the reasonably foreseeable consequences of the action will not happen, and any reviewing agencies will not have complete information on the effects of the project.[156] The general standard is that the EIS must provide the decisionmaker with sufficient information to consider fully the environmental factors involved. If there are significant areas where information is not available, this fact must be disclosed in the EIS.[157]

In sum, a proper court review of an EIS's coverage of indirect effects will follow neither the black letter law of the regulations, nor completely defer to the preparing party's decision as to what effects to include. Indirect effects not addressed in the EIS must be analyzed as to their foreseeability. Courts have experience dealing with similar difficult issues of causation[158] and will necessarily apply a similar balancing approach in EIS cases. If the effect is found to be reasonably foreseeable, then its relative importance must then be evaluated to determine whether its omission is significantly detrimental to the purposes of the

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[154] *Compare* 40 C.F.R. § 1508.8 (1995) (stating "indirect effects *may* include growth inducing effects . . .") *with* HAW. ADMIN. R. § 11-200-17(i) (1995) (stating "population and growth impacts of an action *shall* be estimated if expected to be significant" (emphasis added)).

[155] HAW. ADMIN. R. § 11-200-17(i) (1995).

[156] This balancing consideration is a factor in many cases considering the adequacy of an EIS. *See* Sierra Club v. Marsh, 976 F.2d 763 (1st Cir. 1992).

[157] *See infra* part III.C.

[158] *See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339 (1928) (a common example of proximate causation analysis).

EIS. This evaluation must take into account the size of the project, what may be a relatively insignificant effect in a small scale project will be much more important in a project of larger size. The EIS process should be ordered redone if the inadequacy of the discussion of environmental effects is sufficiently serious to raise a doubt as to whether the project would have been approved given agency and public awareness of the omitted materials.

3. Cumulative effects/impacts

The problem of cumulative impact assessment[159] presents special issues for the reviewing court. Both NEPA and HEPA require that an EIS include discussion not only of the impacts of the project under consideration, but also the cumulative impact of the project when viewed in conjunction with all related impacts from other projects in the area, even if performed by other parties.[160]

This is related to the problem of segmentation, the breaking up of one major project into individually insignificant parts and pretending that each part exists in a vacuum.[161] Segmentation can be looked at as

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[159] *See generally* MANDELKER, *supra* note 2, § 10.12.

[160] *See* 40 C.F.R. § 1508.7 (1995).

> 'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other *past, present, and reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. (emphasis added).

The 1995 proposed revisions to the Hawai'i OEQC regulations adopt this exact language. HAW. ADMIN. R. § 11-200-2 (1995).

See also HAW. ADMIN. R. § 11-200-17(g) (1995). "The draft EIS shall [include] a description of environmental setting, . . . specific reference to *related projects*, public and private, *existent or planned in the region* shall be included for purposes of examining the possible overall cumulative impacts of such actions." *Id.* (emphasis added, bracketed material contains proposed 1995 revisions).

See also HAW. ADMIN. R. § 11-200-17(i) (1995) (stating "[t]he interrelationships and cumulative environmental impacts of the proposed action and other related projects shall be discussed in the draft EIS.")

[161] In this way the preparing agency attempts to avoid preparation of an EIS. At each stage of the project the agency would issue a Negative Declaration after preparation of the Environmental Assessment, stating that the individual portion of the project (being considered alone) is not significant enough to trigger the EIS preparation requirement. *See* HAW. ADMIN. R. §§ 11-200-2 and 11-200-9 (1995).

ignoring future actions directly related to the proposed project. This view subsumes the segmentation issue under the problem of cumulative impacts, which includes related as well as unrelated actions. Segmentation is expressly prohibited by both HEPA and NEPA.[162] Despite the prohibition against segmentation, there have been problems in the past with agencies attempting to avoid the preparation of an EIS by breaking down a project into individually insignificant blocks.[163] HEPA and NEPA only require that an EIS be prepared when the project is going to have significant environmental impacts. The difference between cumulative effects and segmentation is that in one instance the EIS is prepared, and the challenge is to the adequacy of that EIS. In segmentation the challenge would be to the Finding of No Significant Impact (under NEPA) or the Negative Declaration (under HEPA). The reviewing court facing this problem must ensure that all relevant parts of a project are addressed within the document. If this is completely infeasible, then at the minimum reference must be clearly made to where the effects of these related projects will be considered.[164]

Cumulative impact assessment continues to be problematic for federal courts.[165] The CEQ regulations require that the EIS address the impact of the proposed project in light of all "past, present and reasonably foreseeable future actions"[166] affecting the same resources. *Kleppe v.*

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[162] *Id.* § 11-200-7.

> A group of actions proposed by an agency or an applicant shall be treated as a single action when: (1) The component actions are phases or increments of a larger total undertaking; (2) An individual project is a necessary precedent for a larger project; (3) An individual project represents a commitment to a larger project.

Id.

For CEQ regulations in this area pertaining to NEPA see 40 C.F.R. §§ 1502.4(a) and 1508.25 (a)(1) (1995). *See also* MANDELKER, *supra* note 2, § 9.04 (1-5).

[163] A particularly egregious example of this involved the Kahului Airport expansion project on Maui, for which 24 individual negative declarations were issued between the period of 1976 to 1989. The preparation of an EIS was finally mandated by the legislature. *See* University of Hawaii Environmental Center, THE HAWAII STATE ENVIRONMENTAL IMPACT STATEMENT SYSTEM: REVIEW AND RECOMMENDED IMPROVEMENTS (July, 1991).

[164] In some cases, proposed future projects will not be sufficiently detailed so that they can be addressed in the current EIS. In that case it is accepted practice to note the probability of these future projects, but defer to a future EIS or EA for their consideration. This is related to the discussion in the next paragraph of the *Kleppe* decision.

[165] RODGERS, *supra* note 2, § 9.8(B)(2).

[166] 40 C.F.R. § 1508.7 (1995).

Sierra Club[167] is the leading Supreme Court case on cumulative impacts. The Court in *Kleppe* held that, if several proposals that would have synergistic environmental impacts are pending concurrently, the EIS must address the cumulative impacts of all these.[168] However, only concrete proposals must be addressed. Projects that are mere future possibilities do not have to be incorporated, even if they are reasonably certain to happen.[169] Under *Kleppe* questions still remain as to what breadth of cumulative impact assessment is required with reference to future projects.[170] The interpretation of *Kleppe* most consistent with the current CEQ regulations is that it only applies to the question of whether a comprehensive EIS will be required that is applicable to a number of pending proposals.[171] *Kleppe* should not be held to apply to the discussion of the effects of a single project, all cumulative effects must still be addressed.[172] An interpretation limiting the consideration of cumulative effects to specific proposals is inconsistent with the CEQ definition of "cumulative impacts."[173] Requiring the evaluation of all reasonably foreseeable future impacts is both mandated by the clear language of the regulations and in accordance with NEPA's legislative history, which sees the EIS process as an action-forcing tool requiring comprehensive evaluation of the long-term consequences of an agency's actions.[174]

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[167] 427 U.S. 390 (1976)

[168] *Id. Kleppe* involved a programmatic EIS prepared by the Department of the Interior regarding its national coal leasing program in the Montana- Wyoming Powder River coal basin. *Id.* at 392. The plaintiffs were successful in the lower courts with the argument that the EIS should address the larger picture of coal leasing and mining in the entire Northern Great Plains region. *Id.*at 392. The United States Supreme Court disagreed, holding that EISs are only required for concrete proposals, and no specific proposal existed to grant leases for mining on the entire larger region. *Id.* at 390.

[169] *Id.*

[170] For an analysis of the *Kleppe* decision and remaining unanswered questions see Terence L. Thatcher, *Implementing NEPA: Some Specific Issues: Article: Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment under the National Environmental Policy Act*, 20 ENVTL. L. 611 (1990).

[171] *Id.* at 623.

[172] *Id.*

[173] *Id.* at 618. *Kleppe* preceded by 2 years the implementation of 40 C.F.R. § 1508.7. *Id.*

[174] *See* Thatcher, *supra* note 170, at 624. (arguing that the Ninth Circuit has realized this with its holding that the limitation of consideration to "cumulative actions" does not negate the requirement that an agency consider the cumulative impacts of the

The OEQC regulations, as amended in 1995, contain the same definition of "cumulative impacts" as the federal regulations.[175] The comprehensive language of the OEQC regulations means that the EIS is expected to address all of the environmental effects of the project.[176] An overly narrow definition of the scope of cumulative impacts required to be considered will defeat the requirement that an EIS cover all the environmental impacts of a project.[177] When faced with the challenge that certain cumulative impacts are not addressed the reviewing court must balance these considerations against whether an individual project is worthy of the expense of broadened impact analysis.[178]

For a hypothetical example,[179] consider a proposed four acre business wetland development on Blackacre, located on the West Coast of the United States, within the pintail duck migration corridor.[180] The actual impact of this development standing alone would be minimal, however the incremental effect of many such developments would have a cumulatively disastrous effect on the duck's population and breeding grounds.[181] One solution is for the court reviewing this individual EIS to require the agency in charge of wetland development permits (in this case the Army Corps of Engineers) to begin a comprehensive study of the cumulative effects of incremental wetland development.[182] This is the approach that will be most in keeping with the express language of the HEPA regulations[183] and will have the best chance of achieving

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proposed actions which supplement or aggravate the impacts of past, present and reasonably foreseeable future actions) (quoting Oregon Natural Resources Council v. Marsh, 832 F.2d 1489, 1497-98 (9th Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 1851 (1989)).

[175] HAW. ADMIN. R. § 11-200-2 (1995).

[176] *See id.* §§ 11-200-2 (definition of "environmental impact") and 11- 200-16.

[177] *Id.* § 11-200-16.

[178] Cumulative impacts may be subtle and require a great deal of study and hypothesizing about what may happen in the future.

[179] This example comes from Thatcher, *supra* note 170. He feels that "even the most extreme demands for cumulative impact review, if bolstered by facts alleging interdependence, are not only defensible but indispensable." *Id.* at 640.

[180] This is the total area of land used by the pintail ducks for rest and feeding during their yearly migration from Central America to Canada and the Arctic Circle.

[181] Thatcher, *supra* note 170, at 640.

[182] *Id.*

[183] HAW. ADMIN. R. § 11-200-2 (1995) (requiring that the EIS consider "all past, present and reasonably foreseeable future actions"). In this hypothetical, many past actions have already destroyed part of the wetlands necessary for the pintail duck migration. Ongoing and reasonably foreseeable future actions will add to the problem. Thatcher, *supra* note 171, at 640.

substantive protection of an important environmental resource.[184] The decisionmaker must have sufficient information about the impact of the project under consideration to make a reasoned decision about the relationship between the actual environmental cost of the project to its economic and social benefits.[185] This includes the project's cumulative as well as direct impacts. Creative solutions such as this may be necessary, balancing the need for complete evaluation of effects against pragmatic concerns about limited agency resources.

B. Adequate Discussion of Alternatives

1. Discussion of alternatives under HEPA

The 1995 amendments to the Hawai'i administrative regulations contain drastic revisions to the required alternatives that must be considered in an EIS.[186] The Hawai'i OEQC regulations now require that an EIS contain a discussion of any and all alternatives which could "attain the objectives of the action, regardless of cost."[187] The prior limiting words "feasibly" and "reasonable" have been omitted.[188] The OEQC regulations provide suggestions that the EIS include the no action alternative,[189] and consideration of alternatives of "a significantly different nature,"[190] in addition to different designs and alternative locations.[191] The EIS must contain a rigorous explanation and

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[184] The alternative is to deal with each request for wetland development individually. Since each small project such as this will not, on its own, have a significant effect on the thousands of miles of land being considered there would appear to be no reason to deny any individual project on these grounds. However, the incremental effect could be disastrous, with no real study of the problem until too late.

[185] Life of the Land v. Ariyoshi, 59 Haw. 156, 164-65 (1978).

[186] *See* HAW. ADMIN. R. § 11-200-17(f) (proposed rule amendments 1995).

[187] *Id.* (stating that "the draft EIS shall describe . . . alternatives which could attain the objectives of the action, regardless of cost, in sufficient detail to explain why they were rejected").

[188] *Compare* HAW. ADMIN. R. § 11-200-17(f) (1985) *with* HAW. ADMIN. R. § 11-200-17(f) (proposed amendments 1995).

[189] *See infra* part III.B.3.

[190] HAW. ADMIN. R. § 11-200-17(f)(2) (1995).

[191] *Id.* §§ 11-200-17(f)(3) and (4). The suggestion that the EIS contain proposed measures to compensate for loss of fish and wildlife has been omitted (previously codified at HAW. ADMIN. R. § 11-200-17(f)(4) (1985), deleted in 1995 amended OEQC regulations). This has been moved to the mitigation section, see HAW. ADMIN. R. § 11-200-17(m) (proposed amendments 1995).

objective evaluation of the environmental impacts of all alternative actions, sufficient detail must be given to explain why all other alternatives were rejected.[192] The analysis must be sufficiently detailed to "allow a comparative evaluation of the proposed action and each reasonable alternative."[193]

In evaluating the HEPA regulations, the main question is how to define the "objectives of the action,"[194] because this is the sole limiting factor in defining the scope of alternatives that must be included. The amended OEQC regulations require that discussion of *all* alternatives that can also meet these objectives must be included.[195] The main tension in EIS litigation of this issue has been between agencies who wish to define their goal very narrowly, and thus avoid an in-depth look at other alternatives, and plaintiffs who desire an in-depth analysis of the reason for the project, and then attempt to evaluate all potential ways of meeting this goal. A proper evaluation will look to the underlying, or central goal, of the project.[196] This can also be framed as the "need" for the project.[197] Despite the absolutist language of the amended OEQC regulations, it still appears that the rule of reason must be used to specifically define what alternatives must be considered.[198] Any feasible alternative which meets the underlying goal of the project, whether through alternate design or different course of action, must be included in the EIS. If there are a very large range of possible alternatives, the agency must acknowledge this but can limit the discussion of alternatives to a representative sample.[199]

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[192] HAW. ADMIN. R. § 11-200-17(f) (1995). The language under this section is similar to the federal regulations, but deletes the limiting term "reasonable" contained in 40 C.F.R. § 1502.14(a) (1995).

[193] HAW. ADMIN. R. § 11-200-17(f) (1995).

[194] *Id.*

[195] *Id.*

[196] National Wildlife Federation v. FERC, 912 F.2d 1471 (D.C. Cir. 1990) (evaluating whether suggested alternatives satisfy the "central goal" of the project).

[197] Owen L. Schmidt, *The Statement of Underlying Need Defines the Range of Alternatives in Environmental Documents*, 18 Envtl. L. 371 (1988).

[198] Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (1972).

[199] For discussion of this standard as applied to NEPA see MANDELKER, *supra* note 2, § 10.09(4). "[T]here must be an end to the process somewhere . . . without a rule of reason it will be technically impossible to prepare a literally correct environmental impact statement." *Id.* (quoting Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021 (4th Cir. 1975)); *See also* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (1981).

It is now significantly easier for a challenger to show that the EIS is inadequate for not containing discussion of a certain alternative. The entity challenging the EIS no longer has the burden of proving that the alternative is reasonable or cost-effective, because that does not excuse its absence from the document.[200] The HEPA regulations now only require that the alternative "could meet the objectives of the action."[201] Therefore, once the challenger has shown that the EIS does not consider a particular alternative, then it then follows inexorably that the EIS has failed to meet the statutory mandate.

How then does a court decide if the alternative is significant enough that its absence requires the invalidation of the EIS? Important language is given in the amended OEQC regulations emphasizing that "[p]articular attention should be given to alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental effects, costs and risks."[202] An alternative that does not have a significantly beneficial environmental effect does not merit reconsideration of the entire process. However, the new regulations should shift the burden of proving unreasonableness to the defendant. If the alternative is not reasonable or cost-efficient then pragmatically it is not going to be executed. The redoing of the EIS process to include consideration of this alternative is not going to have a substantive impact, since the end result is going to be the same agency decision—to go with the practically feasible alternative. However, the court should be very certain that the alternative suggested by the challenger has no chance of being actually implemented, and the burden on this matter should lie with the defendant.

2. *NEPA regulations and caselaw*

NEPA requires that every EIS contain a discussion of alternatives to the proposed action.[203] The CEQ regulations call the evaluation of alternatives the "heart of the environmental impact statement."[204]

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[200] HAW. ADMIN. R. § 11-200-17(f) (1995).

[201] *Id.*

[202] *Id.*

[203] 42 U.S.C § 4332(C)(iii) (1995). *See also id.* § 4332(2)(E) ("[A]ll federal agencies shall study, develop and describe appropriate alternatives to recommended courses of action[.]").

[204] 40 C.F.R. § 1502.14 (1995). This section states that:

[The EIS] should present the environmental impacts of the proposal and the

Recurrent litigation under NEPA has revolved around the proper scope of alternatives that must be considered.[205] Courts have considered two types of alternatives: completely different methodologies, that accomplish the same underlying goal; and changes to the basic design of the proposed project.[206] The CEQ regulations do not require that alternatives meet the specific objectives of the agency, and there is a split among the federal courts as to how closely the alternatives must conform to the project goals.[207] For example, the CEQ regulations require discussion of the no action alternative in every EIS.[208] Even if the agency has a mandate to perform a certain project, the alternative of not performing the project must be included in the EIS.[209]

The federal courts have set several limitations on what alternatives must be considered.[210] The court in *City of New Haven v. Chandler*,[211] held that the range of alternatives to be considered must be proportional

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alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

Id.

[205] RODGERS, *supra* note 2, § 9.8(C).

[206] MANDELKER, *supra* note 2, § 9.05(1). These are described as "primary" and "secondary" alternatives. *Id.*

[207] *Compare* National Resources Defense Council v. Hodel, 865 F.2d 288 (D.C. Cir. 1988) *with* City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986). *See also* Lackey, *Environmental Law: Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants*, 60 GEO. WASH. L. REV. 1232 (1992).

[208] 40 C.F.R. § 1502.14(d) (1995).

[209] *Id. See also* Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (1981). "The [CEQ] regulations require the analysis of the no action alternative even if the agency is under a court or legislative command to act." *Id.*

[210] RODGERS, *supra* note 2, § 9.8(C).

[211] 446 F. Supp. 925 (D. Conn. 1978).

to the significance of the environmental impact of the agency proposal at issue.[212] If a particular alternative is found by the agency to be unreasonable or not feasible[213], it may be eliminated with only brief discussion.[214]

Some recent federal cases have allowed agencies to limit the range of alternatives to be considered by allowing them define their project purpose narrowly, limiting their consideration of alternatives to those which will achieve this stated goal.[215]

This extreme deference to agency actions violates NEPA's purpose to force agencies to take a hard look at the environmental consequences of their actions.[216] This deference allows agencies to avoid evaluating what the real, underlying need for the project is and just accepting a narrow view of the project's purpose.[217] Especially in cases where the main impetus for the project is motivated by private economic considerations, agencies should be required to take a hard look at the underlying goal.[218] Environmental concerns are easily misplaced unless a broad perspective is taken. The EIS is meaningless unless it looks at the overall picture, instead of serving as a rationalization for projects that the preparer has already determined will be implemented.[219] Plain-

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[212] *Id.*

[213] Animal Defense Council v. Hodel, 840 F.2d 1432 (9th Cir. 1988).

[214] 40 C.F.R. § 1502.14(a) (1995).

[215] City of Angoon v. Hodel, 803 F.2d 1016, 1019-22 (9th Cir. 1986); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991). For a complete evaluation of the Citizens case see Michael E. Lackey, Jr., *Misdirecting NEPA: Leaving the Definition of Reasonable Alternatives in the EIS to the Applicants*, 60 GEO. WASH. L. REV. 1232 (1992).

[216] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 210 (D.C. Cir. 1991) (Buckley, J., dissenting). Judge Buckley stated, "the discussion of reasonable alternatives - the 'heart of the environmental impact statement' becomes an empty exercise when the only alternatives addressed are the proposed project and inaction." *Id. See also* MANDELKER, *supra* note 2, § 9.05(7).

[217] The *reductio ad absurdum* element to this argument should be obvious. If the agency is allowed to define its project as "100 unit apartment complex, located on 1.12 acres, corner of A + B streets," then no other alternatives would need to be considered. This avoids looking at what the underlying need for this project is, and so whether a smaller scale, different location, or no action whatsoever might be appropriate.

[218] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 210 (D.C. Cir. 1991), is an example of this dynamic in action.

[219] 40 C.F.R. § 1502.2(g) (1995); Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149, 168 (D. Haw., 1982). "The purpose of an EIS is to serve as the means of assessing the environmental impact of proposed agency actions, rather than as a justification for decisions already made." *Id.*

tiffs already have a heavy burden to show that an alternative exists which meets the underlying goal of the project. However, if they meet this burden, the fact that the alternative is not within the scope of the agency's initial focus is irrelevant, the alternative must still be considered.

3. HEPA and the no-action alternative

Under NEPA, the CEQ regulations mandate the inclusion of the no-action alternative in every EIS. The CEQ has expressly clarified that the no-action alternative is appropriate in every situation.[220] In contrast, under HEPA the OEQC regulations call the no-action alternative an example of what could be included, also suggested is the alternative of "postponing action pending further study."[221] Under the new OEQC regulations a discussion of *all* alternatives that could meet the objectives of the action must be included in the EIS.[222] It is unfortunate that the amended regulations did not more completely define when the no- action alternative, or the alternative of postponing action pending further study, need to be included. It is evident that the no-action alternative will never be able to "attain the objectives of the action." However, its inclusion in the regulations should not be construed to be mere surplusage. The no-action alternative has an important function in giving the reviewing agency a baseline for consideration of the environmental effects of the project.[223] The "no-action" alternative means no action on the proposed project. However, if the proposed project is not undertaken, then it is likely that something else will happen affecting the resources under consideration.

A thoughtful evaluation of alternatives is the key to an effective EIS.[224] It gives the decisionmaker the necessary information as to what else might be done instead of the proposed project. Specific information as to what are the pros and cons of each alternative is necessary to

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[220] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18027 (1981).

[221] HAW. ADMIN. R. § 11-200-17(f)(1) (1995).

[222] *Id.* § 11-200-17(f).

[223] MANDELKER, *supra* note 2, § 10.09(3). "That a no-action alternative will not meet the needs to be served by a proposed project is obvious. NEPA adds the additional requirement that the environmental consequences of project alternatives also be discussed. This requirement applies as much to the no- action alternatives as it does to any other." *Id.*

[224] RODGERS, *supra* note 2, § 9.8(C).

provide a proper balancing. Consideration of alternatives also makes the entity proposing the project stop and think about other courses of action. The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.[225] Without a consideration of what else an agency may do other than their initial proposal there is no comparison for evaluation by the reviewing agency and the public.[226] Without being unreasonable, the courts should closely scrutinize suggested alternatives to see if they have a possibility of meeting the underlying need, while reducing the adverse environmental impacts.

C. Disclosure of Uncertainty

Under HEPA, the EIS must discuss any unresolved issues and reveal how such issues will be resolved or why the project should proceed despite these issues.[227] This language is not specific, it is not clear what is an "issue" for the purposes of this regulation. Formerly, under NEPA, the CEQ regulations required a "worst-case" scenario, but in 1986 this regulation was amended and now requires that "incomplete or unavailable information be disclosed."[228] The requirements under NEPA are very strict and specific; the agency must always make clear where complete information is lacking.[229] If the costs for obtaining the information are exorbitant or the methods scientifically unknown this must be disclosed.[230]

Since the Hawai'i OEQC regulations are worded broadly, the courts have little guidance in evaluating when the lack of disclosure of unresolved issues fails to meet the statutory mandate. The EIS must at the minimum include responsible opposing views on significant environmental issues.[231] On this point, the federal courts have held that it is not the court's responsibility to resolve scientific disputes, and that

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[225] Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992).

[226] RODGERS, *supra* note 2, § 9.8(C). "Any substantive evaluation of the project is utterly dependent upon an understanding of other courses of conduct." *Id.*

[227] HAW. ADMIN. R. § 11-200-17(n) (1995). "The draft EIS shall [include a separate and distinct section that summarizes] unresolved issues and [contains] either a discussion of how such issues will be resolved prior to commencement of the action, or what overriding reasons there are for proceeding without resolving the problems." *Id.* (bracketed material contains proposed 1995 revisions).

[228] 40 C.F.R. § 1502.22 (as amended by 51 Fed. Reg. 15625, April 25, 1986).

[229] 40 C.F.R. § 1502.22 (1995).

[230] *Id.* § 1502.22(b).

[231] HAW. ADMIN. R. § 11-200-16 (1995).

the mere presence of disagreement in the scientific community is not enough to invalidate the EIS.[232] It will be very difficult for plaintiffs to mount a successful challenge to an EIS on these grounds. Unfortunately for EIS challengers, this is a scenario wherein the agencies expertise is likely to be superior to the reviewing court's and judicial deference is appropriate.

D. Mitigation Requirements

Mitigation is the reduction in adverse environmental effects by substituting alternate or including additional measures in the proposed project.[233] Under NEPA, the discussion of alternatives must include mitigation measures.[234] The OEQC regulations under HEPA contain a separate requirement that mitigation measures proposed to minimize adverse impacts be included in the EIS.[235] The amended OEQC regulations are highly specific about what mitigation measures must be included.[236] The amended OEQC regulations also add very specific language regarding the inclusion in an EIS of information showing how and when the proposed mitigation measures would actually be implemented.[237] This language has no counterpart in NEPA. NEPA has been criticized for the speculativeness of proposed mitigation re-

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[232] MANDELKER, *supra* note 2, § 10.14.

[233] 40 C.F.R. § 1508.20 (1995). This section defines mitigation by giving examples of what is included in the term:

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action. (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating , or restoring the affected environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) Compensating for the impact by replacing providing substitute resources or environments.

[234] *Id.* §§ 1502.14(f) and 1508.25(b)(3).

[235] HAW. ADMIN. R. § 11-200-17(m) (1995).

[236] *Id.* (stating that "mitigation measures proposed to [avoid], minimize, [rectify, or reduce] impact, [including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources, including the acquisition of land, waters, and interests therein.]" (bracketed material contains proposed 1995 additions)).

[237] *Id.* (language added in 1995 revisions states "Included must be specific reference to the timing of each step proposed to be taken in the mitigation process, what performance bonds, if any, may be posted, and what other provisions are proposed to assure that the mitigation measures will in fact be taken.").

quirements contained in some EISs, and the lack of enforceability of these measures.[238]

On the federal level, mitigation requirements under NEPA have been the subject of extensive litigation.[239] Environmental plaintiffs have tried to argue that NEPA mandates the actual incorporation of all reasonable mitigation measures in the final project.[240] This has been the core argument for substantive NEPA.[241] In 1987, the Ninth Circuit found such a substantive requirement.[242] However, this was later overturned by the United States Supreme Court.[243]

In *Robertson v. Methow Valley Citizens Council*[244] the Court definitively held that NEPA only mandates procedural compliance in the preparation of an EIS, and has no provision for substantive review of agency decision-making.[245] *Robertson* involved a proposal by the Forest Service to allow development of a ski resort in a virgin national forest in Washington state.[246] The EIS acknowledged a variety of adverse environmental effects that would result because of the proposed development, including air quality degradation and the reduction in population of 31 species.[247] The Methow valley is an important part of the migration route of a herd of 30,000 mule deer.[248] The EIS predicted loss of 15% of the herd, depending on future off-site development.[249] The plaintiffs challenged the adequacy of this EIS on several grounds, most importantly alleging that the mitigation proposals in the

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[238] *See* RODGERS, *supra* note 2, § 9.4(D); Jennifer R. Bartlit, *An Adequate EIS Under NEPA: Deference to CEQ: Merely Conceptual Listing of Mitigation Leads Us to a Merely Conceptual National Environmental Policy*, 31 NAT. RESOURCES J. 653 (1991).

[239] RODGERS, *supra* note 2, § 9.8(E).

[240] Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). Discussed *supra* part I.A.

[241] RODGERS, *supra* note 2, § 9.8(E). "[Mitigation] is the key to any real or imagined substantive NEPA." *Id.*

[242] Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 819 (9th Cir. 1987).

[243] *Robertson*, 490 U.S. at 332.

[244] 490 U.S. 332 (1989).

[245] *See* Donald N. Zillman & Peggy Gentles, *NEPA's Evolution: The Decline of Substantive Review: Article: Perspectives on NEPA in the Courts*, 20 ENVTL. L. 505 (1990); RODGERS, *supra* note 2, § 9.4(D).

[246] *Robertson*, 490 U.S. at 337-38.

[247] *Id.* at 342.

[248] *Id.*

[249] *Id.*

EIS failed to comply with the CEQ regulations.[250] There were mitigation measures incorporated in the EIS document, but it was expressly conceded by the preparing agency that these were "merely conceptual".[251] The Ninth Circuit held that the EIS was inadequate, holding that: 1) NEPA imposes a substantive duty on agencies to take action to mitigate the adverse effects of proposed actions; and 2) Council on Environmental Quality regulations require a detailed reporting of actions that will mitigate harm caused by the proposed project.[252] The Supreme Court reversed, holding that the EIS was adequate.[253] In a notorious portion of this opinion,[254] Justice Stevens wrote:

> [I]n this case, for example, it would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites, had decided that the benefits to be derived from downhill skiing at Sandy Butte justified the issuance of a special use permit, notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd. Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action[255]

The holding in *Robertson*, and this statement in particular, have since been criticized by commentators, mainly on the grounds that this holding contravenes NEPA's express policy and legislative history.[256]

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[250] *Id.*

[251] *Id.*

[252] Methow Valley Citizens Council v. Regional Forester, etc., et al., 833 F.2d 810, 819-20 (9th Cir. 1987).

[253] *Robertson*, 490 U.S. 332 (1989).

[254] *See* RODGERS, *supra* note 2, § 9.4(D); Jennifer R. Bartlit, *An Adequate EIS Under NEPA: Deference to CEQ: Merely Conceptual Listing of Mitigation Leads Us to a Merely Conceptual National Environmental Policy*, 31 NAT. RESOURCES J. 653 (1991); Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L.J. 99 (1994); Donald N. Zillman & Peggy Gentles, *NEPA's Evolution: The Decline of Substantive Review: Article: Perspectives on NEPA in the Courts*, 20 ENVTL. L. 505 (1990); William H. Rodgers, Jr., *Symposium on NEPA at Twenty: The Past, Present and Future of the National Environmental Policy Act: Keynote: NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485 (1990). The author was unable to find any published commentary agreeing with the Court's holding in this case.

[255] *Robertson*, 490 U.S. at 351.

[256] Jennifer R. Bartlit, *An Adequate EIS Under NEPA: Deference to CEQ: Merely Conceptual Listing of Mitigation Leads Us to a Merely Conceptual National Environmental Policy*, 31 NAT. RESOURCES J. 653 (1991); Philip Weinberg, *It's Time to Put NEPA Back on Course*, 3 N.Y.U. ENVTL. L. J. 99 (1994); Donald N. Zillman & Peggy Gentles, *NEPA's Evolution: The Decline of Substantive Review: Article: Perspectives on NEPA in the Courts*, 20 ENVTL. L. 505 (1990).

After *Robertson*, the federal courts' review of the NEPA process is restricted to determining whether the procedures for preparing an EIS have been adequately complied with.[257] The actual decision of the agency is insulated from court review, no matter how environmentally destructive and notwithstanding the existence of reasonable alternatives or mitigation procedures.[258]

Robertson is an example of how far the United States Supreme Court has gone to adopt a restrictive, deferential approach to judicial review of agency compliance with NEPA.[259] *Robertson* dramatically undercuts the potential effectiveness of NEPA in restricting substantial harm to the environment, and is contrary to the express policies NEPA was designed to serve.[260] The very different language of the administrative regulations makes the *Robertson* approach inapposite for use in Hawai'i.

NEPA requires the inclusion of "appropriate mitigation measures"[261] in the discussion of alternatives to the proposed action. It further requires that the discussion of environmental consequences include means to mitigate adverse environmental impacts.[262] Mitigation is defined to include: avoiding the impact by not taking action; limiting the scale of the action; repairing damage to the environment; reducing impact by preservation methods; and compensating for losses by providing substitute environment.[263]

The OEQC regulations promulgated under HEPA require that the EIS consider mitigation measures proposed to minimize the impact of the project.[264] They further require that the EIS include "[a] description of any mitigation measures included in the action plan to reduce significant, unavoidable, adverse impacts to insignificant levels, and the basis for considering these levels acceptable. . . ."[265] This language

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[257] MANDELKER, *supra* note 2, § 10.13(1).

[258] RODGERS, *supra* note 2, § 9.4(D).

[259] *Id.*

[260] *See infra* part I.D.

[261] 40 C.F.R. § 1502.14(f) (1995).

[262] *Id.* § 1502.16(h).

[263] *Id.* § 1508.20.

[264] HAW. ADMIN. R. § 11-200-17(m) (1995).

> Description of any mitigation measures included in the action plan to *reduce significant, unavoidable, adverse impacts to insignificant levels*, and the basis for considering these levels acceptable shall be included. Where a particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made.

Id. (emphasis added).

[265] *Id.*

of "reducing to insignificant levels" has no counterpart in NEPA, and there are no Hawai'i court cases interpreting this language.[266] However, the plain language of the regulations gives a much stronger substantive mandate than exists under NEPA.[267] An adequate EIS must include a concrete proposal for reducing adverse impacts to insignificant levels, or at the minimum a reasonably verifiable explanation of why this is impossible. If a possibility for mitigating adverse environmental impacts exists, then it is consonant with the Hawai'i State Environmental Policy[268] to require its inclusion in the EIS.[269] The amended 1995 regulations are very strict about the degree of specificity required in the EIS treatment of mitigation measures. An adequate EIS must not only discuss how adverse environmental effects will be reduced to acceptable levels, it must also give a concrete plan for when this will be accomplished and what measures will be taken to assure the decision-maker that they will actually come to pass.[270]

Many of the binding guidelines set out in Hawaii Revised Statutes chapter 344 could be read as mitigation measures that should be included by the preparing state agency in any EIS.[271] By mandating

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[266] None of the 13 cases found addressing HAW. REV. STAT. § 343 addresses the issue of mitigation proposals required under HEPA.

[267] Even under NEPA, a substantive requirement to include mitigation measures was found by the Ninth Circuit in Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987), *rev'd sub nom.* Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989).

[268] HAW. REV. STAT. § 344-1, et. seq. (1995).

[269] *Id.* § 344-3(1). This section states that it is the policy of the State to "conserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics[.]" *Id.*

[270] HAW. ADMIN. R. § 11-200-17(m) (1995). It is frustrating that the EIS may be challenged for not including a concrete plan for mitigation measures, but if the permitting agency does not require the plan to actually be implemented there is still apparently no cause of action, at least under HAW. REV. STAT. Chapter 343 (1995). It seems wasteful for the court to require that a concrete plan of action be researched and drawn up, without teeth to force it to be implemented, unless such effect can be found in another statute, the Constitutional amendments relating to a healthy environment, or HAW. REV. STAT. § 344 (1995).

[271] For example, HAW. REV. STAT. § 344-4(2) (1995), states that: "all agencies, in the development of programs, shall, insofar as practicable, consider the following guidelines: (2)(B) Promote irrigation and waste water management practices which conserve and fully utilize vital water resources; (C) Promote the recycling of waste

the inclusion of these in the EIS statement it will remind the permitting agencies of their statutory responsibility under Hawaii Revised Statutes chapter 344 to provide for the implementation of these requirements. The unreasonableness of any mitigation measure should have to be proven by the preparing agency, with a discussion of why the project should be allowed to proceed without it.

This is a stricter standard than currently exists in the federal circuits after *Robertson v. Methow*.[272] However, it is completely appropriate for HEPA given the plain language of the OEQC regulations and the clear expression of legislative policy contained in chapter 344. The reasonableness standard will prevent any ridiculous requirements for mitigation, but the legislature's expectations in this area are high.[273] Courts in this area should be most concerned about deferring to agency judgment when mitigation measures expressly called for in the guidelines of Hawaii Revised Statutes section 344-4 are not included in an EIS.

E. Clearly Written, Succinct

HEPA regulations require that an EIS be succinct and convey its information in a form easily understood by the members of the public.[274] This requirement has a similar analog in NEPA.[275] Under NEPA, the

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water." *Id.*

Consider a hypothetical golf course proposed for development on conservation land. One way to mitigate water loss might be to use recycled waste water. By the language of HAW. ADMIN. R. § 11-200-17(m) (1985), this would be a mitigation measure to reduce adverse impact. The mandate to consider this is already included in HAW. REV. STAT. § 344-4(2)(B) (1995), so it must be included in the discussion of mitigation

[272] Discussed *supra* notes 245-261 and accompanying text.

[273] As evidenced by HAW. REV. STAT. §§ 341-1, 343 and 344 (1995), policy, findings and purpose, discussed in depth *supra* notes 69-72 and accompanying text.

[274] HAW. ADMIN. R. § 11-200-19 (1995). The statute states that:

> In developing the EIS, preparers shall make every effort to convey the required information succinctly in a form easily understood, both by members of the public and by public decision- makers, giving attention to the substance of the information conveyed rather than to the particular form, or length, or detail of the statement. . . Care shall be taken to concentrate on important issues and to ensure that the statement remains an essentially self-contained document, capable of being understood by the reader without the need for undue cross-reference.

Id.

[275] 40 C.F.R. § 1500.2 (1995). The statute states that: "(b) . . . Environmental impact statements shall be concise, clear, and to the point, and shall be supported by

federal courts have occasionally invalidated EISs on the grounds that they were too technical, verbose, and not clearly readable.[276]

The EIS will not fulfill its purpose of public disclosure if it is so technical that the general public cannot understand it. This consideration must be balanced against the necessity of including accurate scientific information and a disclosure of the methodologies used. Reviewing agencies have a degree of expertise in the environmental field and need accurate information in order to fairly evaluate the underlying scientific data used in the preparation of the EIS. Unfortunately the EIS is written for two distinct audiences, the public and the reviewing agencies. It must attempt to address itself to both, but the emphasis is on the decision-makers use of the EIS. It will be a rare case in which the style of writing of the EIS is so impenetrable that the court should require the redoing of the document on these grounds.

IV. Conclusion

The United States environment is in a precarious position. Most of the nation's ecosystems are being reduced to the point of non-existence.[277] Air and water pollution continue to be national concerns. An increasing population consumes ever more resources, and requires

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evidence that agencies have made the necessary environmental analyses." *Id.* Furthermore, 40 C.F.R. § 1502.8 (1995) states that "[e]nvironmental impact statements shall be written in plain language and may use appropriate graphics *so that decisionmakers and the public can readily understand them.*" *Id.* § 1502.8 (emphasis added).

[276] Sierra Club v. Froelhke, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd on other grounds sub nom.* Sierra Club v. Calloway, 499 F.2d 982 (5th Cir. 1974); Oregon Environmental Council v. Kunzman, 614 F. Supp. 657 (D. Or. 1985), *modified,* 817 F.2d 484 (9th Cir. 1987). Citations taken from RODGERS, *supra* note 2, § 9.3(B)(2)(b)(i) n.53.

[277] *See* Ken Miller, *Report: Most U.S. ecosystems on the skids*, GANNETT NEWS SERVICE, June 28, 1995. This article contains excerpts from a report prepared for the Department of the Interior's National Biological Service. Some of the findings of this report are:

- 90% of Hawai'i's dry forests and grasslands are gone;
- 90% of the nation's old-growth forests have been lost;
- 95-98% of the virgin forests in the lower 48 states had been destroyed by 1990;
- 95% of Maryland's natural barrier island beaches are gone;
- 90% of the tallgrass prairie in the Midwest and Great Plains has disappeared;
- 99% of California's native grassland is gone.

Id.

increasingly careful management of what resources are left. The sustainable development and halt to environmental degradation envisioned in NEPA's legislative history[278] has not yet come to pass. How much more rapidly this would have happened without NEPA's existence is unknown.[279] At present, the substantive environmental preservation called for by the legislature in passing these acts is very much needed. The legislative mandate is to prevent further environmental losses.[280] The EIS process, while not perfect, can have a substantial effect if properly and conscientiously undertaken.

The EIS process becomes increasingly more important as our national environmental resources decrease. More public and governmental awareness of adverse effects, even in the absence of substantive enforcement, can lead to mitigation of these effects. The EIS process also encourages project initiators to take a hard look at the environmental consequences of their actions, and decide for themselves whether these are worth the economic benefits to accrue to them as a result of the project. Increasingly strong environmental concerns may be seen reflected in the beefed-up regulatory amendments of 1995.

Especially in Hawai'i, with its extremely fragile island environment and limited natural resources, courts should be sensitive to the underlying policies behind the EIS process. When interpreting HEPA, the Hawai'i courts are not bound by federal interpretations. What has been decided at the national level may not be the best for our unique state. HEPA is an independent statute, with its own individual vitality. Differences in the language of HEPA and its implementing regulations leave open many areas for latitude in judicial interpretation. Hawai'i's environment and the lives of its people can by enhanced by the EIS process, correctly applied.

The constraints of this article leave out many other fertile areas of comparative study; including threshold requirements of when to prepare an EIS, when a supplemental EIS is required, and what level of public input is mandated by the OEQC regulations. In all these areas the

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[278] 42 U.S.C. § 4331(b) (1995). This section states that the objectives of NEPA are to "(3) attain the widest range of beneficial uses of the environment without degradation . . . (5) achieve a balance between population and resource use which will permit high standards of living . . . (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." *Id.*

[279] For one evaluation of NEPA's effectiveness see MANDELKER, *supra* note 2, § 11.

[280] *See supra* part II.

exact language of HEPA and the OEQC implementing regulations differs from NEPA.

It is hoped that this article gives some assistance to EIS preparers, reviewing individuals and the courts confronted by difficult challenges to the adequacy of an individual EIS. Many questions remain to be answered on a case by case basis: How much information is sufficient? Was the spirit and underlying purpose of HEPA complied with? Is a finding of inadequacy and remand for further consideration likely to lead to an outcome that is more in keeping with the mandate of Hawai'i's environmental policy? These questions will continue to plague Hawai'i's courts, government agencies and developers for years to come.

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The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense

I. INTRODUCTION

Culture clashes are inevitable in a pluralistic society.[1] Some of these clashes manifest themselves in criminal proceedings in the form of the cultural defense.[2] The cultural defense takes into account a minority defendant's cultural background to excuse criminal behavior or mitigate culpability.[3] While the American legal system has yet to formally recognize this defense,[4] examples abound of cultural evidence being introduced in courts to bolster other established defenses.[5]

Three camps have emerged in the current debate surrounding the cultural defense: the first camp calls for full recognition of the cultural

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[1] *See* Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 438 (1993).

[2] *Id.*

[3] *See* Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L. J. 57 (1994).

[4] *Id.*

[5] *See, e.g.*, People v. Croy, 710 P.2d 392 (Cal. 1985). The defendant, a Native American who killed a white police officer, raised self-defense, arguing that the mistreatment of Indians, particularly the massacres of Indians by white settlers in the nineteenth century shaped the defendant's perception of danger and his distrust of white authorities. *Id.*

See also People v. Kimura, Case No. A-091133 (Cal. Super. Ct. 1985), *cited in* Renteln, *supra* note 1, at 463. A Japanese-American, after learning of her husband's infidelity, drowned her two children in an attempt at *oyako-shinju*, parent-child suicide. She was later charged with first-degree murder. Psychiatrists testified that she was suffering from temporary insanity due to her cultural upbringing which made her unable to distinguish her children's lives from her own life. *Id.*

See also Renteln's discussion on culture in the context of pre-existing defenses. Renteln, *supra* note 1, at 445-87.

defense in its own right; the second takes a diametrically opposite position, arguing against the cultural defense or its being repackaged as one of the traditionally acceptable defenses; and the last camp adopts an eclectic approach of using cultural factors to show the defendant's state of mind.[6] While arguing for or against a certain position, commentators have paid little, if any, attention to the other end of the equation in the cultural defense debate, namely, the nature of the offense.

The failure to consider the nature of the offense has created an ambivalence toward the cultural defense by minority groups whom the cultural defense is supposed to benefit. This ambivalence is best illustrated by the following example. In 1989, Dong-lu Chen, a Chinese immigrant in New York was sentenced to five years probation, the lightest sentence possible for the crime of killing his wife with a claw hammer.[7] The defense was allowed to introduce Chen's cultural background as evidence to show the absence of the requisite mens rea. The judge, agreeing with the defense, concluded that Chinese culture explained Chen's temporary insanity upon learning of his wife's adultery.[8]

Outraged by the decision in Chen's case, Asian American communities and white feminist organizations cried foul in unison.[9] However, their deep-seated philosophical differences drove a wedge into their short-lived coalition.[10] White feminists advocated "one standard of justice," opposing the cultural defense in all criminal proceedings, whereas Asian American activists, though protesting the decision with the same vehemence, insisted on retaining the cultural defense in other contexts.[11]

As yet, at least to this author's knowledge, no one has articulated or even speculated on what the "other contexts" might be, and how they differ from the scenario in the *Chen* case. This article is an attempt to fill the void by explaining how the nature of the offense should determine whether to allow the use of the cultural defense. For the purpose of this comment, the nature of the offense is delineated by whether the offense involves the use of violence. An offense can be a violent one, which is

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[6] *See* Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1095 (1994).

[7] People v. Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), *cited in* Volpp, *supra* note 3, at 64.

[8] *Id.*

[9] *See* Marianne Yen, *Refusal to Jail Immigrant Who Killed Wife Stirs Outrage*, WASH. POST, Apr. 10, 1989, at A03.

[10] *See* Volpp, *supra* note 3, at 77.

[11] *Id.*

characterized by physical force directed towards the victim, or an offense can be simply a statutory violation without posing any physical threat to other members of the public. The category under which the offense falls should play a role in determining the acceptance or rejection of the cultural defense.

In Hawai'i, courts have yet to address the issue of the cultural defense in the context of non-violent crimes. But a recent multiple murder case, *State v. Ganal*,[12] has brought the controversy surrounding the cultural defense to Hawai'i. The case highlighted the difficulty in reaching a consensus with respect to the cultural defense for violent crimes. This comment proposes a dichotomized treatment of the cultural defense: for non-violent crimes, a separate cultural defense should be recognized; whereas for violent crimes, culture should be used only as evidence to explain the defendant's state of mind at the time the crime was committed.

Part II of this comment examines current cultural defense theories and reviews justifications for each theory and its identified problems. Part III explores the possible connection between the theory to be adopted and the nature of the offense. In Part IV, the *Ganal* case is analyzed to demonstrate how the proposed approach would avoid some of the dilemmas faced by the recognition of a separate cultural defense or the exclusion of cultural evidence from the courtroom.

II. The Current Debate on the Cultural Defense

A. The Cultural Defense Defined

"Defense" in criminal proceedings refers to "[e]vidence offered by [the] accused to defeat [a] criminal charge."[13] The word "defense" as used in the "cultural defense" is misleading since its purpose may not always be to exculpate the accused.[14] The cultural defense is often invoked to show the absence of the mens rea element of a crime in an attempt to excuse criminal behavior or to mitigate culpability.[15] The key

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[12] Cr. No. 91-2273 (Haw. 1st Cir. Ct. Apr. 7, 1993).

[13] Black's Law Dictionary 290 (6th ed. 1991).

[14] *See* Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 Asian Am. Pac. Is. L. J. 49, 50 (1993).

[15] *See* Volpp, *supra* note 3, at 57. A crime is the concurrence of an evil-meaning mind with an evil-doing hand, and the term "mens rea" is often used to signify the evil-meaning mind. Andre A. Moenssens et al., Criminal Law 62 (5th ed. 1992).

premise of the cultural defense is that the defendant, usually an immigrant to the United States, acts under the imperative of his cultural belief or custom and therefore deserves leniency.[16]

However, a formalized definition of the cultural defense is elusive. Among the few people who have attempted to define the cultural defense is John Lyman, who formulated the following operative statement: "A cultural defense will negate or mitigate criminal responsibility where acts are committed under a reasonable, good-faith belief in their propriety, based upon the actor's cultural heritage or tradition."[17] Though not universally accepted, Lyman's definition has captured the essence of the cultural defense: a defendant's cultural background negates the intent required for holding him responsible for the commission of a crime.[18]

Although current debate on the cultural defense centers on immigrants in the United States, especially Asian immigrants,[19] the cultural defense is also available to non-immigrants, as exemplified by *People v. Rhines*.[20] In that case, the defendant, a black man from California, introduced testimony on the custom of the black community in a failed attempt to defend himself against a charge of rape.[21]

As mentioned earlier, commentators in the fray of the cultural defense usually align themselves with one of the three positions.[22] All three positions, when viewed separately, seem to be based on firm theoretical grounds. A brief discussion of the justifications for each position is helpful in providing bearings as to where we are in the cultural debate and clues as to where we should go from there.

B. Justifications for the Cultural Defense

The notion that ignorance of the law is no defense to criminal prosecution is "deeply rooted in the American legal system."[23] However,

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[16] *See* Volpp, *supra* note 3, at 57.

[17] John C. Lyman, *Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 88 (1986).

[18] *See* Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense,"* 99 DICK. L. REV. 141, 143 (1994).

[19] *See* Chiu, *supra* note 6, at 1096. "Roughly summarized, 'cultural defense' is the informal term used to describe how criminal defendants, predominantly Asian immigrants, present evidence of their native culture in defense to a prosecution." *Id.*

[20] 182 Cal. Rptr. 478 (Cal. Ct. App. 1982).

[21] *Id.* The defendant argued that he reasonably, but mistakenly, believed that the black female victim consented to sexual intercourse because she did not sufficiently manifest her refusal. To refute the victim's testimony showing that she submitted out of fear engendered by the defendant's "loud talking," the defendant contended that it is a common characteristic of black people to talk loudly to each other. *Id.*

[22] *See supra* note 6 and accompanying text.

[23] Cheek v. United States, 498 U.S. 192, 199 (1990).

proponents of the cultural defense intend to carve out an exception to the general rule for a defendant who was raised in a foreign culture.[24] Three arguments are frequently advanced in favor of recognizing this type of defense.

First, holding a recent immigrant to the same legal standard as other members in the society would violate the principle of individual justice.[25] The underlying premise of this argument is that current American law is the embodiment of only Anglo-American jurisprudential values.[26] Thus, the cultural defense does not promote favoritism as critics have claimed, since it seeks to achieve for immigrant defendants what defendants from the mainstream culture have had all along: a criminal law that reflects defendants' cultural values.[27] One commentator notes that the argument that the cultural defense is unfair to the majority is analagous to the argument that the insanity defense is unfair to sane defendants.[28]

Second, recognition of the cultural defense is consistent with the concept of proportionality. Proportionality requires that the punishment fit the crime and that the defendant be punished to the extent he deserves, no more nor less.[29] Proponents of the cultural defense contend that when defendants act under the dictates of their own culture, they are not as morally blameworthy as if they acted out of their own free will, thus deserving leniency from the American legal system.[30]

Third, the recognition of a cultural defense is dictated by the American society's commitment to cultural pluralism.[31] As expressed in one com-

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[24] *See* Note, *Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1299 (1986) [hereinafter *Cultural Defense*].

[25] *Id.*

[26] *See* Chiu, *supra* note 6, at 1079.

[27] *Contra* Lyman, *supra* note 18, at 116. ("A cultural defense would tend to single out aliens for preferential treatment in criminal proceedings. It would provide an excuse for illegal conduct which is not available to the majority of American Society. Such an effect might be viewed as denying equal protection of the law to members of society not belonging to an alien group or culture.").

[28] *See* Lam, *supra* note 14, at 58.

[29] *See* Renteln, *supra* note 1, at 441-42.

[30] *See* Goldstein, *supra* note 18, at 156.

[31] *See Cultural Defense*, *supra* note 24, at 1300 (stating that America should stay committed to pluralism which helps invigorate the society, and enhance the principle of equality and liberty).

"Cultural pluralism" is defined by one author as a model of American life that preserves "the communal life and significant portions of the culture of the later immigrant groups within the context of American citizenship and political and economic integration into American society." M. GORDON, ASSIMILATION IN AMERICAN LIFE 85 (1964), *quoted in Cultural Defense*, *supra* note 24, at 1300 n.37.

ment, "[i]n a nation with members drawn from diverse backgrounds, allowing people the freedom to live by their values will lead to a culturally pluralistic society."[32] The advocates of the cultural defense call for the implementation of a "permissive" assimilation model as opposed to the "exclusionist" model, which implies a thorough conformity with the cultural mainstream.[33] The permissive model allows the coexistence of a variety of ethnic cultures, and leads to the emergence of a new culture that is "dynamic and creative, continually evolving as it weaves threads of various immigrant cultures into its fabric."[34] The cultural defense which reflects the spirit of the "permissive" model "helps maintain a diversity of cultural identities by preserving important ethnic values."[35] On the other hand, a repudiation of the cultural defense would force ethnic groups to abandon their cultural values for those of the mainstream.[36]

Though appealing in theory, arguments for the cultural defense have not resonated in American courtrooms.[37] The remarks of the prosecution in *People v. Kimura*[38] put in a nutshell the root of the judicial antipathy toward the cultural defense:

> You're treading on . . . shaky ground when you decide something based on a cultural thing because our society is made up of so many different cultures. It is very hard to draw the line somewhere, but they are living in our country and people have to abide by our laws or else you have anarchy.[39]

C. The Argument Against the Cultural Defense

The words of the prosecution in *Kimura* also strike a responsive chord in many legal commentators. One major criticism of the cultural defense

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[32] *Cultural Defense*, *supra* note 24, at 1301.

[33] *See* Carlos Villarreal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193, 1196 n.8 (1991).

[34] *Cultural Defense*, *supra* note 24, at 1301.

[35] *Id.*

[36] *Id.*

[37] This is evident from the fact that the American legal system has not formally recognized a cultural defense. *See* Volpp, *supra* note 3.

[38] Case No. A-091133 (Cal. Super. Ct. 1985).

[39] Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 26, col. 1, *quoted in* Malek-Mithra Sheybani, *Cultural Defense: One Person's Culture is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751, 780 (1987).

is that it undermines the assimilation process of immigrants.[40] Proponents of this position believe that immigrants to the United States must conform their conduct to its legal norms even at the cost of relinquishing the values of their home countries.[41]

Julia Sams suggests that disallowing the cultural defense is conducive to the assimilation process:

> By rejecting the "cultural defense" and therefore not excusing the immigrants' ignorance, the courts will encourage them to adapt more quickly to the legal system of their new homeland. This hastened adaptation by the newcomers to unfamiliar laws may aid their assimilation into other aspects of life in the United States.[42]

But this assimilationist method, which ignores difference and demands conformity to the dominant norms, smacks of xenophobia.[43] The coercive assimilation may also lead to the demise of foreign cultures, many aspects of which would otherwise enrich and contribute to American life.[44] Finally, the coercive assimilation aggravates the stress that immigrants encounter when they come to a new country.[45]

The second major criticism of the cultural defense is that the cultural defense undermines the deterrence function of the law.[46] According to

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[40] One commentator is concerned that allowing the cultural defense would "remove the incentive for the foreign newcomers to learn the laws of their adopted country." Julia P. Sams, Comment, *Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335, 348 (1986).

[41] *See* Chiu, *supra* note 6, at 1104.

[42] Sams, *supra* note 40, at 348.

[43] *See, e.g.*, Sheybani, *supra* note 39 at 782-82 ("[W]e would be living in a state of anarchy if each foreigner's culture and law was the determinant factor of what is right and wrong. There is a need for uniformity in the law.").

[44] *Id.*, at 781. *Cf.* STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 55 (1967), *quoted in* Christopher Steskal, *Creating Space for Racial Difference: the Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187, 198 (1992) (commenting on the detrimental impact that forced integration has on racial progress: "'Integration'. . . means that the black people must give up their identity, [and] deny their heritage. . . . The fact is that integration, as traditionally articulated, would abolish the black community.").

[45] One scholar notes that assimilation "is a form of self-hatred and the deprecation of [one's] ethnic and racial heritage" since it takes away one's self. *See* D. ABALOS, LATINOS IN THE UNITED STATES, 15 (1986), *quoted in* Villarreal, *supra* note 33, at 1198.

It is speculated that severe cultural shock and stress led to mysterious sleeping deaths of middle-aged Hmong males. WALL ST. J., Feb. 16, 1983, at 1, col. 1.

[46] *But see Cultural Defense*, *supra* note 24, at 1303. Generally speaking, there are two

Julia Sams, the successful invocation of the cultural defense would create confusion as to the rules governing criminal conduct; the confusion, in turn, will lead to disobedience of those rules.[47] The punishment of immigrants under American law would bring the law to the attention of the immigrant community, and ultimately result in an alteration of ethnic beliefs or customs which clash with the American law.[48]

Strong opposition against the cultural defense also comes from some women's rights advocates, since many cases in which the cultural defense is asserted involve domestic violence.[49] The increasing use of the cultural defense has been attributed to the influx into the United States of immigrants, particularly Asian, whose cultures are believed by some to have different attitudes from American's regarding women, children,

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types of deterrence: specific deterrence occurs when the defendant, upon his release, is discouraged by the punishment he receives from engaging in the similar wrongdoing; general deterrence is achieved when punishing the defendant discourages others from emulating his conduct. Specific deterrence may be unnecessary when the prohibited conduct occurred under extraordinary circumstances which are unlikely to repeat themselves. Even if it is necessary to deter a similar conduct by the defendant in the future, specific deterrence can be achieved by the trial itself instead of punishment. Punishing the defendant may instruct other members of the defendant's ethnic group of the existing law in the United State, but the goal of general deterrence may be better advanced by education. *Id.*

Furthermore, allowing the cultural defense to mitigate culpability may not affect the incentive for immigrants to abide by the American law. Renteln, *supra* note 1, at 439.

[47] *See* Sams, *supra* note 40, at 348.

[48] *Id.* at 349.

[49] *See, e.g.*, People v. Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), *cited in* Volpp, *supra* note 3, at 64-84. *See supra* note 7-11 and accompanying text.

For other examples of Asian husbands seeking the cultural defense for domestic violence, see also People v. Moua, No. 315972 (Cal. Super. Ct. 1985), *cited in* Goldstein, *supra* note 18, at 145-51 (sentencing a Hmong tribesman from Laos who kidnaped and raped "fiance" to 120 days in jail and $1,000 fine after taking into account cultural factors), and *infra* notes 70-72 and accompanying text; People v. Aphaylath, 510 N.Y.S.2d 83 (N.Y. 1986), *cited in* Volpp, *supra* note 3, at 60 n.13 (finding it a reversible error for the lower court to exclude cultural information regarding a Cambodian man who stabbed his wife to death after she received phone call from another man). Mary Ann Galante, *Asian Refugee Who Shot Wife Receives 8-Year Prison Term*, NAT'L L.J., Dec. 16, 1985, at 40, *cited in* Volpp, *supra* note 3, at 60 n.13 (describing a case in which a Hmong husband shot his wife to death upon learning her plan to work with another man); Myrna Oliver, *Cultural Defense—a Legal Tactic*, L.A. TIMES, July 15, 1988, at 30 (describing a case in which two Korean youths charged with rape were acquitted after showing that "under Korean cultural standards, the women had tacitly consented to having sex by remaining silent and by assisting in disrobing").

and family interactions.[50] This viewpoint is echoed by Nilda Rimonte, who states that Pacific-Asian cultures "make violence against women acceptable and result in the 'legitimate' victimization of women."[51] But she does not subscribe to the notion of using culture as an excuse for domestic violence because human beings must accept personal responsibility for behavior which harms others.[52] She criticizes the use of the cultural defense in the context of domestic violence as condoning violence and legitimizing women as victims.[53] Cathy Young, another commentator, in the same vein, contends that the use of the cultural defense promotes sexism, which is believed to be more prevalent in non-Western cultures than in American culture.[54]

The position of opposing the cultural defense as a validation of violence against women, however, has itself been criticized for its failure to recognize that minority women are members of their ethnic groups and are not "just women."[55] Because of this dual status, unique to women belonging to minority groups, an outright repudiation of the cultural defense may not always be desirable from the perspective of protecting women. In some situations, women can be the beneficiary of the cultural defense. In *State v. Chong Sun France*,[56] for example, the defendant, an immigrant from Korea, who left her two children alone in a motel at night and returned to find one dead, was originally sentenced to twenty years imprisonment for second degree murder and felonious child abuse.[57] Korean women in the community responded by organizing a massive campaign and providing cultural information about child care in Korea.[58] The defendant was later released on parole.[59]

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[50] *See* Alice J. Gallin, *Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 732 (1994).

[51] *See* Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311, 1316 (1991). *But see* Volpp, *supra* note 3, at 94. Volpp finds it "troublesome" to explain domestic violence in Asian communities as caused or promoted by "Asian culture." *Id.*

[52] *See* Rimonte, *supra* note 51, at 1325.

[53] *Id.* at 1317.

[54] *See* Volpp, *supra* note 3, at 82 n.112 (citing Cathy Young, *Equal Cultures or Equality for Women? Why Feminism and Multiculturalism Don't Mix*, HERITAGE LECTURES No. 387 (1992)).

[55] *See* Volpp, *supra* note 3, at 81.

[56] 379 S.E.2d. 701 (N.C. Ct. App. 1989).

[57] *Id.*

[58] *Id.*

[59] *Id.*

D. Is There a Golden Mean?

Presented above are the polar positions in the cultural defense debate: the affirmative defense theory, which exculpates a criminal defendant based on culture; and the anti-defense position, which treats defendants equally regardless of their cultural background.[60] However, there is a third group of commentators who have adopted a middle-of-the-road approach. This intermediate approach strives to reconcile the two positions by allowing the use of cultural factors to show defendant's state of mind at the time the criminal act was committed without recognizing a separate cultural defense.[61]

People v. Wu[62] illustrates the debate over whether to allow the introduction of cultural factors to explain a defendant's state of mind. Helen Wu was convicted of second degree murder by a California Superior Court for strangling her son.[63] Wu requested that the trial court instruct the jurors to consider her cultural background in determining the presence or absence of the various mental states required for murder.[64] The trial court refused to give the instruction because it did not want to put the "stamp of approval on [the defendant's] actions in the United States, which would have been acceptable in China."[65] The appellate court reversed, deciding that the defendant's cultural background was relevant on the issue of premeditation and deliberation, malice aforethought and the existence of heat of passion at the time of the killing.[66]

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[60] *See* Chiu, *supra* note 6, at 1112.

[61] *Id.* The state of mind necessary to find a defendant guilty of a crime may vary with the crime. Section 2.02 of the Model Penal Code provides in part: "[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." MODEL PENAL CODE § 2.02 (1985).

Proponents of the intermediate approach argue that defendants' cultural background is entwined with their mental state at the time of the commission of the crime. *See* Sheybani, *supra* note 39, at 782. For example, a local leader of the Hmong tribe in Laos commented: "[B]eing Hmong is more than a shared culture or a collective memory of mountaintop villages, but rather a state of mind . . . ." *See* SAN FRANCISCO CHRON., Jan. 29, 1984, CAL. LIVING MAGAZINE, at 11, *quoted in* Sheybani, *supra* note 39, at 782.

[62] 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).

[63] *Id.* at 868. One expert witness testified that in the Asian Culture when the mother commits suicide and leave the children alone, usually she will be considered to be a totally irresponsible mother. *Id.* at 885.

[64] *Id.* at 879-80.

[65] *Id.* at 880.

[66] *Id.* at 883.

The crux of the intermediate approach is to use cultural factors to support traditional defenses.[67] The primary purpose of incorporating cultural information into a pre-existing defense is to ascertain a defendant's state of mind.[68] Some major traditional defenses through which cultural considerations can be raised are mistake of fact, diminished capacity, temporary insanity, and provocation.

A mistake of fact defense can only succeed if the absence of mens rea can be shown.[69] The defense counsel in *People v. Moua*[70] could have readily raised a mistake of fact defense against the rape charge on the ground that the defendant believed that the victim had consented to sexual activity.[71] The defendant's cultural background can be used to show that the defendant's belief, though mistaken, was reasonable and honest since he is a member of the Hmong tribe whose tradition requires the bride-to-be to resist her suitor even though she had genuinely consented to the act.[72]

A diminished capacity defense may also involve a cultural dimension. According to Professor Stephen Morse, one of the two variants of the "diminished capacity defense" is the mens rea variant.[73] The mens rea

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[67] *See* Renteln, *supra* note 1 (discussing culture in the context of pre-existing defenses).

[68] *See* Lyman, *supra* note 17, at 115.

[69] Mistake of fact is different from mistake of law. "Law is expressed in distinctive propositions, whereas facts are qualities or events occurring at definite places and times . . . ." Sams, *supra* note 40, at 344 n.63 (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382 (2d ed. 1960)). Under this defense, a standard for measuring the defendant's subjective state of mind determines whether or not he is held responsible for committing the crime. A mistake of fact will be a defense if it negates the state of mind when the defendant's act would have been lawful had the fact were as he supposed them to be. The defendant has to show that his mistake was an honest one and that his act was prompted by this mistake. *Id.*

[70] No. 315972-0 (Cal. Super. Ct. Feb. 7, 1985), *cited in* Goldstein, *supra* note 18, at 149-51. Moua's fiance reported to the police in Fresno, California, that Moua had raped her. Moua is a Laotian refugee and a member of the Hmong tribe which practices a form of marriage called *zij poi niam*, or marriage-by-capture. On the wedding day, according to Hmong tradition, the bride-to-be must weep and moan and protest and say, "I am not ready." If the girl seems too willing, she is not considered virtuous and chaste. The Hmong man must show his masculinity in consummating the union over her protest. *Id.*

[71] *See* Goldstein, *supra* note 18, at 150.

[72] *Id.*

[73] Stephen Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984). The other variant is the defense of "partial responsibility,"

variant uses evidence of a defendant's mental condition to show the absence of the statutorily required meas rea element of the crime.[74] The *Wu* case is an example of the defense seeking to introduce cultural information to refute the presence of mens rea via the diminished capacity defense.[75] Wu's attorney argued that the defendant "was, at the time of killing, in a highly overwrought emotional state, and that her emotional state could be explained by reference to the effect of her cultural background on her perception of the circumstances leading up to and immediately preceding the strangulation."[76] In reversing the lower court's judgment, the California Court of Appeal ruled that Wu was entitled to have the jury consider evidence of her cultural background in determining the presence or absence of relevant mental states.[77]

The defense of temporary insanity provides another peg upon which to hang cultural factors. In *People v. Metallides*[78], the defendant, a Greek immigrant who killed his daughter's rapist, invoked the defense of temporary insanity based on culture.[79] The defense attorney argued that in Greece "you do not wait for the police if your daughter has been raped."[80] The jury, apparently influenced by the argument based on Greek culture, found the defendant not guilty by reason of temporary insanity.[81]

The provocation defense is another possible avenue through which cultural factors can be introduced into courtrooms. The crux of the provocation defense, also known as the "heat of passion" rule, is that the defendant lacks the mens rea required for murder—malice afore-

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under which a defendant is held responsible for a lesser crime although he committed the proscribed act with the requisite state of mind because his mental or emotional impairment reduces his moral blameworthiness. *See id.*

[74] *Id.*

[75] *See supra* note 62-66 and accompanying text.

[76] 286 Cal. Rptr. 868, 881 (Cal. Ct. App. 1991). Dr. Chien, a transcultural psychiatrist, testified for the defense that at the time of killing her son, Wu "thought she was doing that out from the mother's love, mother's responsibility to bring a child together with her when she realized that there was no hope for her or a way for her to survive in this country or in this earth." *Id.* at 885.

[77] *Id.* at 883. The Court of Appeal also found that the essential mental states at issue were (1) premeditation and deliberation, (2) malice aforethought, and (3) specific intent to kill. *Id.*

[78] Case No. 73-5270 (Fla. Cir. Ct. 1974), *cited in* Renteln, *supra* note 1, at 464.

[79] *Id.*

[80] *Id.*

[81] *Id.*

thought.[82] The lack of meas rea reduces the defendant's culpability, making it appropriate to hold him responsible for the lesser charge of manslaughter.[83] The provocation defense employs a two-pronged test: (1) whether a reasonable person would have been provoked, and (2) whether the defendant was actually provoked.[84] The reasonable person standard can be based on a fictitious "reasonable" person from either the dominant culture or the defendant's culture.[85] Only in the latter scenario can the cultural defense be successfully raised via the provocation defense.[86]

Another aspect of the intermediate approach allows prosecutors and judges to consider cultural factors during the charging and sentencing stages of a trial.[87] In *People v. Moua*,[88] for example, the prosecutor dropped the rape and kidnapping charges and allowed the defendant to plead guilty to misdemeanor false imprisonment.[89] Also, the trial judge reduced the defendant's sentence from one hundred eighty to ninety days in prison after hearing the testimony and reviewing a doctoral dissertation on the marriage rituals of the Hmong tribe.[90]

However, when the consideration of cultural factors during trial and sentencing is at the discretion of prosecutors and judges, there may not be adequate protection of a defendant's rights to fair trial if he is from a different culture.[91] Inconsistency in the treatment of cases would be an inevitable result in the absence of procedural safeguards or guidelines to follow in deciding whether to consider cultural factors.[92]

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[82] *Id.* at 474.

[83] *Id.*

[84] *Id.* at 475-76.

[85] *Id.* at 476.

[86] *Id.*

[87] *See* Chiu, *supra* note 6, at 1113; *see also Cultural Defense*, *supra* note 24, at 1295.

[88] No. 315972-0 (Cal. Super. Ct. Feb. 7, 1985), *cited in* Goldstein, *supra* note 18, at 149-51. For a brief description of the case, see *supra* note 70.

[89] *See* Sams, *supra* note 40, at 336.

[90] *Id. See also* Oliver, *supra* note 49, at 29. Judge Gomes, who has dealt with several cultural defenses in plea bargaining for Hmong tribesmen, commented: "I am surprised there are judges around who won't allow cultural defenses at least at the time of sentencing. It appears to me to be extremely relevant." *Id. See also* State v. Rodriguez, 1995 WL 396323 (Neb. Ct. App. 1995) (holding that in "imposing a sentence a trial court should consider, *inter alia*, the defendant's age, mentality, education, experience, and social and cultural background")

[91] *See* Lam, *supra* note 14, at 57.

[92] *Id.* at 57 n.34 (quoting Judge Bruce Jackson who believes that "the combination

III. The Nature of the Offense and the Cultural Defense

Despite their differences, the above-discussed views on the cultural defense have one thing in common: they operate under the assumption that what is good for the goose is good for the gander, i.e., they invariably call for a universal application of the cultural defense theory regardless of the nature of the crime.[93] This monolithic treatment of the cultural defense causes injustice in some cases and unduly interferes with the enforcement of the law in others. The applicability of the cultural defense should be determined by balancing justice to the individual against the society's interest in enforcing the law. Society's interest in enforcing the law may increase or decrease depending on the nature of the offense, thus tipping the scales for or against the use of the culture defense. The distinction between violent crimes and non-violent crimes can provide an analytical framework in which the status of the cultural defense is linked to the nature of the crime.

In the cultural defense discussion, the distinction between violent and nonviolent crimes is justified on another aspect. The validity of the cultural defense is predicated on the acceptance in a defendant's native culture of a particular conduct deemed illegal in the United States.[94] Violent crimes that physically harm others are more likely to be regarded as unacceptable across cultures than non-violent crimes. Even if some acts that cause death or physical injury to others are tolerated in some parts of the world today, our society's interest in protecting life and bodily integrity still militates against using the cultural defense to excuse, entirely or partially, such acts.

A. Non-Violent Crimes

There are cases in which a defendant acted under the imperative of his own culture in violation of socially acceptable norms in the United

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of covertness and unfettered discretion is a particularly troubling method for dealing with cultural factors because this combination has historically presented an opportunity for officials to exercise prejudice against cultural minorities." Bruce Jackson, Law and Disorder 138 (1984)).

[93] *See, e.g.*, *Cultural Defense*, *supra* 24 (arguing for recognizing a separate cultural defense); Sams, *supra* note 40 (denouncing the use of cultural defense); Renteln, *supra* note 1 (adopting the intermediate approach). None of them made any distinction among the types of crime involved.

[94] "Recognition of the concept of a cultural defense may exonerate the foreigner of any wrongdoing if an otherwise illegal act would have been acceptable in the foreigner's homeland." Sheybani, *supra* note 39 at 752. *See also* Lyman's definition of the cultural defense, *supra* note 17 and accompanying text.

States, and his act did not pose any physical threat to others. Punishing the defendant for such an act may lead to great injustice. One commentator stated: "A law which enters into a direct contest with a fierce imperious passion, which the person who feels it does not admit to be bad, and which is not directly injurious to others, will generally do more harm than good . . . ."[95]

Implicit in the harsh reaction to immigrants' cultural practices which clash with mainstream culture is the assumption that their cultures are inferior. The practice of criminalizing cultural differences of immigrants, especially those from Asia, dates back more than one hundred years ago. San Francisco once enacted a "Cubic Air Ordinance," requiring a minimum of 500 cubic feet of air space per adult in every lodging house.[96] The violator would be punished by a fine of ten to five hundred dollars and/or imprisonment from five days to three months.[97] The ordinance was designed to crack down on the Chinese immigrants who crowded into "apartments that would be deemed small for the accommodation of a single American."[98] There was even a proposed ordinance to have the queue of all Chinese male prisoners cut off because the queue was a sign of loyalty to the Manchu emperor.[99]

Today, these ordinances may seem morally repulsive to most Americans, but culturally discriminatory legislation still exists, and sometimes it even takes an equally blatant form. For example, on January 1, 1989, California Penal Code sections 588(b) and 599(c) went into effect, making it a misdemeanor to possess, sell or give away for the sole purpose of

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[95] J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152 (R. White ed., 1967), *quoted in Cultural Defense*, *supra* note 24, at 1309 n.73.

[96] *See* Chiu, *supra* note 6, at 1076.

[97] *Id.* at 1076 n.161 (citing San Francisco Bd. of Supervisors, (order No. 939, SS1-2), S.F. Mun. Rep. 592 (1871-72)).

[98] *Id.* at 1076 (citing San Francisco Bd. of Supervisors, S.F. Mun. Rep. 233 (1870)).

[99] *Id.* at 1078. Another example of blatant discrimination against early Chinese immigrants is publicized through the famous case, Yick Wo v. Hopkins, 118 U.S. 356 (1886). Yick Wo, a Chinese citizen, was sent to jail for operating a laundry in a wood building without obtaining a required permit from the San Francisco Board of Supervisors. It was conceded that in the year of 1880, all the approxiate 200 applications from Chinese for the permit had been denied; all the approximate 80 applications except one from non-Chinese had been granted. The Supreme Court of the United States held that Yick Wo had been denied equal protection of laws because the ordinance of requiring a permit, though impartial on its face, was "applied and administered by public authority with an evil eye and an unequal hand." *Id.*

killing for food any animal commonly kept as a pet or companion.[100] Violators could be punished by a prison term of up to six months and a fine of one thousand dollars.[101] The enactment of this piece of legislation was prompted by an incident in which two Cambodian refugees in Long Beach were prosecuted for killing a German shepherd dog for food.[102] The case was dismissed on the grounds that there was no law against eating dog meat and that the dog had not been killed in an inhumane manner.[103]

The dog-eating case illustrates a head-on collision between immigrants' culture and the mainstream culture in America. According to Dr. Eric Crystal, the program coordinator for the Center for Southeast Asia Studies at the University of California at Berkeley, some breeds of dogs are raised for culinary purposes in certain parts of Indonesia and Thailand where dog meat is believed to have medicinal qualities.[104] He also said that eating dogs is not a "big issue" in Asia, but it had become a major political issue in the United States.[105]

It may not be necessary to formally recognize the cultural defense for crimes that pose no threat to public safety if other established defense theories are allowed to relieve defendants from other cultures of criminal responsibility. For example, in *Frank v. Alaska*,[106] freedom of religion could constitute a complete defense to the charge of transporting game illegally taken. In that case, Carlos Frank was arrested for hunting moose for meat to be used at funeral ceremonies after the Alaskan hunting season was over.[107] Testimony was presented showing that moose meat is favored in a funeral ritual called potlatch for the Athabascan Indians.[108] The Alaska Supreme Court apparently considered the defen-

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[100] *See* Katherine Bishop, *U.S.A.'s Culinary Rule, Hot Dogs Yes, Dogs No*, N.Y. TIMES, Oct. 5, 1989, at A22.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] 604 P.2d 1068 (Alaska 1979).

[107] *Id.* Frank was charged of violating Alaska Administrative Code, title 5, § 81.140(b), which states that "[n]o person may possess or transport any game or parts of game illegally taken." *Id.* at 1069.

[108] *Id.* The potlatch is a several-day-long ceremony culminating in a feast following burial of the deceased. *Id.* at 1069. According to Athabascans' belief, a potlatch is the last meal shared by the living and the deceased, and it helps the spirit of the deceased on its journey. *Id.* at 1072.

dant's Athabascan culture and religious beliefs in its decision that the defendant was exempted from prosecution for unlawful transportation of game illegally taken.[109]

However, many cultural practices or customs of racial minorities do not have a religious overtone. A cultural defense based on religious freedom alone may leave most cultural claims unprotected. Allowing a cultural defense under certain circumstances, on the other hand, will address the concerns of many cultural defendants.[110]

The *Frank* case is typical of non-violent crimes committed by immigrant defendants in the sense that it involves the violation of a statute. Another example occured in New York city, where immigrants from Senegal were arrested for peddling on the streets without a permit.[111] They claimed that the permits were unnecessary in their homeland, Senegal.[112] Since the immigrants also contended that they were singled out by police as "dangerous" and prosecuted criminally while other violators were only given civil citations, it is difficult to gauge what role cultural factors played in the ultimate dismissal of the case.[113]

The criminal conduct in the case of the Senegal immigants is a mere failure to act. When criminal conduct is passive, the Supreme Court of the United States has departed from the rule "ignorance of the law will not excuse." In *Lambert v. California*,[114] the Court held that a former felon may not be convicted consistently with due process where she was not aware of the duty to register with local authorities and where there was no proof of the probability of such knowledge.[115] Commenting on

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[109] *Id.* The court held that the the free exercise clause of the first amendment to the United States Constitution and the pertinent provision of the Alaska Constitution protect Frank's conduct and the state had not met its burden of demostrating a compelling government interest to justify prohibiting such a conduct. *Id.* at 1070.

[110] *Compare Cultural Defense, supra* note 24, at 1308 n.72.

> [U]nlike religious values, secular values are not explicitly protected by the Constitution. And even if cultural values were accorded constitutional protection, courts would likely hold . . . that a state's interest in protecting personal safety is so compelling as to outweigh a group's right to live according to its own values . . . . The cultural defense therefore must exist as a doctrine whose justification lies beyond the Constitution.

Id.

[111] *See* Oliver, *supra* note 49, at 28.

[112] *Id.*

[113] *Id.*

[114] 355 U.S. 225 (1957).

[115] *Id. See also* Smith v. California, 361 U.S. 147 (1959) (striking down an ordinance that permitted conviction of a bookseller who sold an obscene book without knowing its contents).

the Court's decision in *Lambert*, Professor Mueller wrote, "The Supreme Court has clearly told us that it detests the misuse of criminal sanctions in the case of a morally blameless defendant . . . . Absolute criminal liability is beginning to end in America."[116] Moral blamelessness is the very concept supporting the recognition of the cultural defense: a cultural defendant acting either out of his ignorance of the American law, or under the dictates of his native culture, is evidently not as morally blameworthy as if he had acted out of his own free will, thus deserving leniency to some degree from the American justice system.

Justifications for recognizing a separate cultural defense for non-violent crimes should carry less weight when violent crimes are concerned. The reasons for seeing violent crimes in another light are several. First, violent crimes are likely to be deemed unacceptable in a cultural defendant's native country.[117] Second, there is a heightened need for deterence against violent crimes. Third, victims' rights militate against allowing the cultural defense in the context of violent crimes. A discussion on how to treat the cultural defense when a violent crime is involved is presented in the next section.

B. Violent Crimes

Violent offenses are "crimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon."[118] In violent offenses, two major factors militate against recognition of the cultural defense. First, there is a heightened need to deter the defendant and others from engaging in similar conduct which would result in death or serious bodily injury. Second, violent crimes often violate international human rights standards which should be respected universally.[119]

Most violent crimes are not deemed "legal" in cultural defendants' native countries. The key idea of the cultural defense is that a defendant should be held blameless if his act was motivated by a good faith belief

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[116] Gerhard Mueller, *On Common Law Mens Rea*, 42 MINN. L. REV. 1043 (1958).

[117] *See infra* note 118-21 and accompanying text.

[118] BLACK'S LAW DICTIONARY 1086 (Abr. 6th. ed. 1991).

[119] *See, e.g.*, Ellen Goodman, *Violence Against Women a "Human Rights Thing,"* NEWS & OBSERVER, Mar. 8, 1993, at A8 (equating volence against women with the violation of human rights). *But see* Renteln, *supra* note 1, at 504 (the validity of international human rights standards has been questioned as being based exclusively on the value system of western nations)

in its propriety according to his cultural belief or customs.[120] Thus, allowing the cultural defense would not be justified if the practice is not tolerated in the defendant's own culture.[121] In a Texas case, for example, a Nigerian insurance salesman in Houston received only probation for beating his nephew and then placing pepper in the wounds.[122] The judge was apparently influenced by the defendant's argument that the practice was acceptable in his native Nigeria.[123] But the judge's decision in the case may not be justified since the defendant's act is probably no longer tolerated in Nigeria.[124] Another example is *People v. Chen*,[125] in which the defendant's expert witness testified that "adultery makes Chinese men more prone to violence."[126] However, several Chinese organizations claimed that adultery is not a justification for killing in modern China.[127]

In ascertaining whether a cultural claim is valid, courts must pay special attention to the dynamic nature of culture. Cultures evolve, and they "are changed constantly and every day through the simple introduction of gadgets, new food, or ideas."[128] Because cultural customs are in constant change, they may not be readily quantified or accurately presented at trial.[129]

The treatment of an offense in the defendant's own culture, however, should not be dispositive in deciding whether to allow or disallow the cultural defense. Otherwise, the cultural defense would be available for defendants in most cases of domestic violence because many cultures do not meet American legal standards in protecting women and children. For example, Vietnamese men sometimes cannot understand that they can get arrested for wife-beating.[130] In Fiji, wife beating and sexual

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[120] *See* Lyman, *supra* note 17, at 103.

[121] *See* Renteln, *supra* note 1, at 498.

[122] *See* Oliver, *supra* note 49, at 13, 28.

[123] *Id.*

[124] *See* Renteln, *supra* note 1, at 498.

[125] No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), *cited in* Volpp, *supra* note 3, at 64.

[126] *See* Goldstein, *supra* note 18, at 165.

[127] *See* Marianne Yen, *Refusal to Jail Immigrant Who Killed Wife Stirs Outrage*, WASH. POST, Apr. 10, 1989, at A03. Barbara Chang, coordinator of the Asian Women's Center in Chinatown, said: "Our culture does not give a man permission to kill his wife regardless of what the situation was at home." *Id.*

[128] Rimonte, *supra* note 55, at 1325.

[129] *Id.*

[130] *See* Oliver, *supra* note 49, at 30. Michael R. Yamaki, a criminal defense lawyer recounted his experience in dealing with some Vietnamese husbands:

A few years ago I had a whole stream of Vietnamese men accused of wife

assault are widespread, and women are "treated as little more than chattel."[131] One author attributes domestic violence against Pacific Asian women to the following factors: (1) the traditionally patriarchal system with the attendant belief in the supremacy of the male, (2) the socialization goals and processes favoring the family and community over the individual, (3) the cultural preference of silent suffering over open communication of needs and feelings, and (4) the adjustment pressures that immigrants and refugees encounter in America.[132]

Courts must be cautious in allowing the cultural defense in cases of domestic violence against women. The very concept of individualized justice which has been used to argue in favor of the recognition of a formal cultural defense may support its repudiation here.[133] Many women would be deprived of American legal protection if their abusers could get away with crimes by using the cultural argument. The cultural defense tries to portray the defendant as a victim, a victim of cultural difference.[134] But the focus on cultural difference often serves to obliterate gender oppression and gender difference.[135]

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beating, they would look incredulously at the police and say, "This is my wife," like a wife was property almost. They would look at me and say "What is the problem here? How can they put me in jail for this?"

Id.

[131] *See* Kathleen Hendrix, *World's Women Speak as One Against Abuse Strategy: From Fiji to Israel, Uganda to the U.S., Activists Raise a New Battle Cry-Treat Violence Against Women as a Violation of Basic Human Rights*, L.A. TIMES, May 27, 1991, at E1.

[132] *See* Volpp, *supra* note 3, at 94 n.159 (citing Nilda Rimonte, *Domestic Violence Amongst Pacific Asians*, *in* MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 328 (Asian Women of California United ed., 1989)).

Volpp finds it troublesome to explain domestic violence as caused or promoted by "Asian culture," noting a similar explanation is seldom given to domestic violence in the heterosexual white community. *Id.* at 94.

[133] One commentator criticizes the cultural defense as making a mockery of the concept of individual justice because "for far too many individuals the result does not provide justice," and "the victims do not receive their own justice, and they are victimized a second time through the cultural defense." Goldstein, *supra* note 18, at 163.

[134] In his effort to paint the defendant in the Chen case as a "victim," the expert witness for the defense stated: "There are victims in this case: The deceased is a victim, her suffering is over. The defendant is a victim, a victim that fell through the cracks because society didn't know where or how to respond in time." *See* Volpp, *supra* note 3, at 74 (citing People v. Chen, No. 87-7774, record at 355 (N.Y. Sup. Ct. Dec. 2, 1988)).

Compare Rimonte, *supra* note 51, at 1314 (noting "the Pacific-Asian community views abusive men as the victims, rather than the perpetrators, of domestic violence")

[135] *See* Volpp, *supra* note 3, at 93.

Successful use of the cultural defense may send the wrong message that domestic violence is condoned in the United States. In the wake of the decision in the *Chen* case, there has been an increase in domestic violence within Asian communities in New York.[136] The decision there deterred some Asian women from resorting to legal protection because they believed that their abusers eventually would get away with violence.[137]

There is a heightened need to make examples of the first few reported cases in which members of an immigrant community violate the law in light of the existence of a de facto cultural defense in domestic violence. The de facto cultural defense arises because of the "near impossibility of getting victims and witnesses to testify in court about an incident that few concerned consider a crime serves as a formidable defense against prosecution."[138] This existence of a de facto cultural defense may be caused by: (1) the fact that domestic violence is deliberately suppressed to advance the political or cultural interests of the community, and (2) that women themselves are often hesitant to subject their private lives to the scrutiny and control of the public.[139]

A new strategy that is being developed by some women's rights groups to combat domestic violence identifies women's rights as human rights, therefore treating domestic violence as human-rights violations.[140] Most

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[136] *See* Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown, Battered Asian Shocked by Husband's Probation*, NEWSDAY, Nov. 26, 1989, at 4. One battered Chinese woman told a worker at the New York Asian Women's Center: "Even thinking about that [*Chen*] case makes me afraid. My husband told me: 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney." *Id.*

See also Cathy Young, *Can Feminism, Multiculturalism Peacefully Coexist in America?*, PORTLAND OREGONIAN, Apr. 2, 1992, at C11. According to Newsday, many Asian-American battered wives told their counselors that "the threat of taking their men to court had ceased to be a deterent." *Id.*

[137] *Id.*

[138] *See* Mark Thompson, *The Cultural Defense*, 14 STUDENT LAW 25, 27 (1985).

[139] *See* Kimberle Crenshaw, *Mapping the Margins: Inter-sectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1255-77 (1993). Many immigrant women chose to suffer at the hands of their abusive husbands because of the fear of being deported; and language barriers prevent non-English speaking women from seeking outside help. *Id.* at 1249.

Compare Rimonte, *supra* note 49, at 1313 (observing that "the Pacific-Asian community in Los Angeles regards efforts to call attention to domestic violence as 'finger-pointing' or as attacks on the integrity of the community").

[140] *See* Hendrix, *supra* note 131, at E1.

domestic violence crimes probably violate human rights since the very basis of human rights includes the right not to be killed or tortured.[141] Charlotte Bunch, director of the Center for Global Issues and Women's Leadership at Rutgers University claims that "[g]ender violence is the most pervasive and insidious human-rights abuse in the world today."[142]

However, a total renouncement of the cultural defense as justifying violence against women and violation of human rights standard may be a simplistic approach and does not address the concerns of women of minority groups. In her article, Crenshaw notes:

> [W]omen of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas. The need to split one's political energies between two sometimes opposing groups is a dimension of intersectional disempowerment that men of color and white women seldom confront . . . . [R]acism as experienced by people of color who are of a particular gender—male—tends to determine the parameters of antiracist strategies, just as sexism as experienced by women who are of a particular race—white—tends to ground the women's movement . . . . Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.[143]

There is a growing body of literature using the concept of intersectionality, which emphasizes the interplay of racism and sexism, to address the relationship of the cultural defense to women of color.[144] "Intersectionality" mediates a middle ground between the extreme position of advocating a "cultureless court" and that of calling for a recognition of a separate cultural defense which may have an effect of justifying violence against women.

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[141] The convention against torture defines torture as an infliction of severe pain and suffering for the purpose of punishment. *See* Tom Snyder, *Interview: Alice Renteln of the University of Southern California and Darryl Arnold, former US ambassador to Singapore* (CNBC television broadcast, Apr. 12, 1994).

[142] *See* Hendrix, *supra* note 131, at E1.

[143] *See* Crenshaw, *supra* note 139, at 1252. *Compare* Hendrix, *supra* note 131, at E1 (quoting Alice Washinton who coordinates the Highland Hospital Sexual Assault Center in Oakland: "I am black first . . . [o]ur husbands and boyfriends may be perpetrators, but we are also concerned about what will happen to them in the racist [justice] system.").

[144] *See generally* Paulette Caldwell, *A Hair Piece: Perspective on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989); Volpp, *supra* note 3; Crenshaw, *supra* note 139.

To criminalize immigrants' actions that clash with the American legal standard of protecting women and children may not be justified under certain circumstances. For example, some Vietnamese immigrants use a folk medicine to cure headaches by rubbing the back and shoulders with the serrated edge of a coin.[145] This folk remedy is called "coining," and it leaves bruises. The bruises are temporary, but in the American legal system coining constitutes child-abuse.[146] Coining, however, with healing as its sole purpose, may not amount to violence since "violence" is defined as "the exertion of any physical force so as to injure, damage or abuse."[147] When consideration of the immigrants' benevolent cultural motive is balanced against the societal interest in protecting children, the appropriate course of action might be to discourage the practice by education, warning, or even monetary sanction instead of prosecuting the immigrants according to the strict letter of the law.[148]

From the above discussion, it is apparent that in cases of violent crime, recognizing a separate cultural defense and excluding cultural information are equally unacceptable.[149] A possible solution lies in admitting cultural evidence as relevant and then deciding on the merits of the case. Once this guideline is established, one wonders whether it should be followed universally or whether exceptions ought to be made under some circumstances.

Some suggest that a cultural defense should be allowed if the victim is from the defendant's culture and subscribes to its tenets.[150] For example, the defendant in the *Moua* case would not be able to raise cultural

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[145] *See* Oliver, *supra* note 49, at 28.

[146] *Id.*

[147] BLACK'S LAW DICTIONARY 1085 (Abr. 6th ed. 1991).

[148] Strictly speaking, motive is not relevant to legal inquiry. For example, one is culpable for robbery even if he, like Robin Hood, steals from the rich to give the poor; however, there are examples to the contrary: one who takes life in self-defense may be acquitted if he can show that his motive for killing is to preserve his own life even though he kills intentionally. *See* Renteln, *supra* note 1, at 443-44.

[149] The exclusion of cultural information from the courtroom may not be justified in light of the inherent subjectivity of legal standards. As one commentator noted:

> In determining the boundaries of what constitutes criminal conduct, each society or nation must look to the fabric of its own moral or cultural heritage to demarcate these limits. Every culture has its own notions of what constitutes right and wrong, of what is good and evil. Each society therefore must, and does, predicate its criminal laws and sanctions upon characteristics inherent to its own cultural norms.

Lyman, *supra* note 17, at 87.

[150] *See Cultural Defense*, *supra* note 234 at 1309.

considerations through a mistake of fact defense had the victim not been a Hmong, since it would not have been reasonable for the defendant to interpret the victim's refusal as part of the marriage ritual.[151] Another reason for inquiry into the victim's background is to insulate the rest of society from harm and to minimize the loss of general deterrence resulting from judicial leniency towards defendants.[152]

Another proposal attempts to make a distinction between the legal rights of persons who come to this country voluntarily as opposed to those who are here involuntarily.[153] Under this proposal, indigenous peoples, such as "American Indians, who are forced to live under the domination of an alien culture," should be able to invoke the cultural defense, whereas a "when in Rome" philosophy should apply to those who choose to come to "somebody else's culture."[154] This proposal may be logically unsound because it implies that Native American law should govern in the United States instead of current American law based on the jurisprudential values of Anglo-Americans who chose to come to North America from the other side of the Atlantic.

Admitting cultural evidence and then deciding on the merits of the case must be subject to one caveat. Any attempt to mitigate a defendant's culpability by using cultural background may subject the defendant's culture itself to close scrutiny at trial.[155] This scrutiny may lead to a trial focusing on the "validity of the cultural or moral precepts of the individual's native society."[156] Theoretically, the ultimate inquiry at trial when a cultural defense is invoked concerns the defendant's state of mind. But confronted with expert testimony on the general characteristics

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[151] *See supra* notes 70-72 and accompanying text.

[152] *See Cultural Defense*, *supra* note 24, at 1309. The victim's racial background may indeed be a factor in sentencing the defendant in today's courts, as Bruce Jackson points out in LAW AND DISORDER:

> [If] black defendants commit[] offenses against other blacks, their sentences are generally lower than what white defendants would receive. But if the black crime crosses racial lines, and is committed against whites, the sentences are much higher than for any other group. This pattern indicates that race is almost always a factor in sentencing and that the 'indulgence' granted in intraracial crime may itself be prejudicial: it does not show sympathy for the black defendant but contempt for the black victim.

Lam, *supra* note 14, at 67 (quoting BRUCE JACKSON, LAW AND ORDER 162 (1984)).

[153] *See U.S. Justice System Called Ambivalent on Use of "Cultural Defense" by Immigrants*, L.A. TIMES, Dec. 13, 1987, at 6.

[154] *Id.*

[155] *See* Lyman, *supra* note 17, at 92 n.24.

[156] *Id.*

of a culture, a jury may be able to determine only the culture's collective psyche instead of the defendant's state of mind,[157] and then try to fit the defendant's behavior into characterizations about group behavior.[158] Furthermore, many descriptions of defendants' cultures are based on anecdotes, reflecting expert witnesses' bias and reinforcing social stereotypes.

Still, members of the same culture do share many characteristics. The effort to prevent prejudice stemming from the courtroom stereotyping should not lead to the unjust treatment of individual defendants. A remedy to the problem may lie in increasing ethnic groups' input through amicus curiae briefs[159] instead of excluding cultural evidence altogether.

In a recent Hawai'i murder case, the defense was allowed to present cultural evidence to explain a diminished state of mind.[160] The case illustrates many of the analyses presented above. It is discussed in detail in the next section to show why we should adopt the intermediate approach where a violent crime is involved, given our other options of recognizing a separate cultural defense and excluding cultural evidence from the court.

IV. *STATE v. GANAL*[161]

In April 1993, Orlando Ganal was convicted of first degree murder[162] and first degree attempted murder[163] for killing five people and injuring

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[157] *See* Goldstein, *supra* note 18, at 166.

[158] *See* Volpp, *supra* note 3, at 58.

[159] Amicus briefs are usually filed in appeals regarding matters of a broad public interest. *See* BLACK'S LAW DICTIONARY 54 (Abr. 6th ed. 1991). A person who files such a brief is not a party to the action, but has a strong interest in or views on the subject matter of the action. *Id.*

[160] *See* discussion *infra* part IV.

[161] Cr. No. 91-2273 (Haw. 1st Cir. Ct. Apr. 7, 1993).

[162] The Hawaii Penal Code provides in part: "A person commits the offense of murder in the first degree if the person intentionally or knowingly caused the death of: (a) more than one person in the same or separate incident . . . ." HAW. REV. STAT. § 707-701 (1993).

[163] The Hawaii Penal Code defines criminal attempt as follows:

> § 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; or
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime."

HAW. REV. STAT. § 705-500 (1993).

three others during an August 1991 rampage in Honolulu.[164] Ganal's attorney sought to demonstrate that Ganal was under extreme emotional distress and should be convicted of the lesser offenses of manslaughter and attempted manslaughter.[165] At trial, the defense also presented what has become known as "the amok defense," claiming Ganal's cultural upbringing in the Philippines explained why he went on a killing frenzy.[166]

According to Anthony Marsella, professor of psychopathology at the University of Hawai'i at Manoa, who testified as an expert witness for the defense, "amok" is a term used to describe a pattern of explosive and sudden mass assault behavior.[167] Richardo Trimillos, chairman of the Asian Studies Program at the School of Hawaiian, Asian, and Pacific Studies of the University of Hawaii at Manoa also testified for the defense as an expert witness. He defined "amok" as a temporary transient suspension of rational behavior, although it does not necessarily mean that the person is unconscious of his behavior.[168] Trimillos said "amok" falls under two categories: the first type involves a certain degree of planning and preparation, exemplified by Filipino Muslims' suicidal ritual of wrapping themselves tightly in cloth, then wielding a large machete down the street where American Christians were likely to appear and slashing everyone in sight; the second type refers to the behavior of a person who "simply goes off the edge" and engages in a killing frenzy.[169]

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[164] *See Ganal: Portraits of a Murder*, HONOLULU ADVERTISER, Apr. 8, 1993, at A1-2.

[165] The Hawaii Penal Code defines manslaughter as follows:

§ 707-702 Manslaughter. (1) A person commits the offense of manslaughter if:

(a) He recklessly causes the death of another person; or

(b) He intentionally causes another person to commit suicide.

(2) In a prosecution for murder it is a defense, which reduces the offense to manslaughter, that the defendant was, at the time he caused death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.

HAW. REV. STAT. § 707-702 (1993). For the definition of criminal attempt, see HAW. REV. STAT. § 705-500 (1993); *supra* note 163.

[166] *See* Benjamin Seto, *Professors Call Amok a Killing Frenzy*, HONOLULU STAR BULLETIN, Apr. 2, 1993, at A8.

[167] Transcript of Proceedings, State v. Ganal, Cr. No. 91-2273 (Haw. 1st Cir. Ct. Apr. 7, 1993). "Amok" was historically associated with people from the Philippines and other southeast Asian countries. In fact, the word "amok" originated in the nineteenth century when the Malay warriors would run into battle, yelling "amok, amok." *Id.*

[168] *Id.*

[169] *Id.*

Trimillos claimed that the second type of amok behavior is often triggered by domestic problems.[170] This viewpoint was echoed by Marsella who testified that "acting 'amok' can be one reaction to overwhelming stress."[171]

In an effort to show how Ganal's behavior was typical of someone acting "amok," the defense emphasized a series of distressing events that Ganal had gone through, including learning of his wife's affair, his experience with chronic back pain, the termination of his employment, financial difficulties and problems with his son.[172] Ganal came to Hawai'i from the Philippines when he was 17 years old, and married his wife in 1974.[173] Apparently, he had had a happy marriage until he hurt his back at his job at a laundry in Honolulu and his wife reportedly started having an affair.[174] According to Ganal's testimony, he was tormented by his wife's affair with David Touchette, a white man, whom she met at a part-time job.[175] Ganal claimed that he was extremely humiliated when he had sex with his wife and she would talk about Touchette; and he felt "like a dog" when she allegedly forced him to make love to her, and at the same time talked about how she and Touchette made love.[176]

The defense team's strategy was to match the experts' testimony with Ganal's own words of humiliation.[177] Trimillos elaborated on the concept of *amor propio* (self-esteem or self-respect), which in the Philippines is defined as how one is looked upon by one's *barkada*—the group one associates with.[178] Trimillos also hypothesized that if a Filipino man's wife had an affair, people from his *barkada* would question his ability to control his wife, since it is acceptable for a Filipino man to have mistresses but not so for a Filipino women to sleep with other men.[179] Trimillos added, "the husband is the structural head of the household . . . and if he can't control his family there is [perceived to be] something wrong

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[170] *Id.*

[171] Ken Kobayashi, *Ganal's Jury Learns of Filipino Culture*, HONOLULU ADVERTISER, Apr. 2, 1993, at A3.

[172] Ken Kobayashi, *Jury Begins Deliberations in Ganal Case*, HONOLULU ADVERTISER, Apr. 6, 1993, at A2.

[173] *See* Transcript of Proceedings, *Ganal*, Cr. No. 91-2273.

[174] *Id.*

[175] Benjamin Seto, *Can't Recall Day of Killings, Ganal Says*, HONOLULU STAR-BULLETIN, Apr. 1, 1993, at A3.

[176] *Id.*

[177] Seto, *supra* note 166.

[178] *See* Transcript of Proceedings, *Ganal*, Cr. No. 91-2273.

[179] *Id.*

with his maleness.''[180] The humiliation is intense when one's *paglalaki* (maleness) is challenged by someone close in presence of *barkada*, according to Trimillos.[181] Marsella testified about a recognized test developed to quantify the amount of stress from major changes in a person's life.[182] Marsella said that Ganal's score as measured by the changes in his life indicated that he had more than an eighty percent chance of suffering from a severe physical or mental disorder.[183]

The prosecutor, on the other hand, portrayed Ganal as a jealous husband who delivered a ''well-planned, well-executed raid.''[184] During his closing arguments to a Circuit Court jury, Maurice Arrisgado, the Assistant Prosecuting Attorney, contrasted Ganal's action with typical ''amok'' behavior. One who ran amok would ''be out randomly shooting everybody.'' However, Ganal had targets in mind—his in-laws (because they did not persuade their daughter to go back to him), Michael Touchette, Michael's wife, and their two children (because Ganal believed the couple had aided Michael's brother, David Touchette, in David's affair with Ganal's wife).[185] Explaining why he did not strenuously object to the introduction into the courtroom of the amok defense, Arrisgado said that Ganal was entitled to every defense, and he believed that the jury would reject the ethnic cultural defense anyway.[186] ''I really didn't think amok in this day and age would have any legal bearing on this case,'' he said, ''there was no indication of amok in this case. It was a calculated, stealthy, cowardly attack against innocent defenseless people at night.''[187]

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[180] *Id.*

[181] *Id.*

[182] *See* Kobayashi, *supra* note 171.

[183] *Id.*

[184] *See* Benjamin Seto, *Ganal Murder Trial Comes to an End*, HONOLULU STAR-BULLETIN, Apr. 6, 1993, at A6. According to the prosecutor, on August 25, 1991, Ganal burst into his in-laws' home, shooting at people inside, killing his parents-in-law, and wounding his wife and his teenager son. Ganal then drove across the island to the home of Michael Touchette who was David Touchette's brother, and set the house on fire while the family slept inside, killing Michael Touchette and his two children. Finally, Ganal burned down a Young's Laundry office, where he used to work, in revenge for the dispute with his former employer over a worker's compensation claim. *Id.*

[185] Benjamin Seto, *Prosecutor: No Excuse for ''Amok'' Ganal*, HONOLULU STAR-BULLETIN, Apr. 5, 1993, at A3.

[186] *Id.*

[187] *Id.*

The Ganal case highlights one of the major problems of recognizing a separate cultural defense in most violent crimes: the crimes are not condoned in the defendant's native countries. The cultural defense, in its strictest sense, operates to negate or mitigate culpability when one commits an act under a reasonable, good-faith belief in its propriety pursuant to a cultural heritage or tradition.[188] It is the defendant's reasonable belief in the "propriety" of his act which reduces his moral blameworthiness, thereby justifying judicial leniency. The fact that the act is also condemned in the defendant's native culture eliminates the very reason for which the cultural defense exists.

Overwhelming evidence indicates that "amok" behavior is not tolerated in the Philippines. Virginia Miralao, a visiting professor of sociology at the University of Hawai'i at Manoa, who is from the Philippines, said that "['amok'] is a condemned or deviant behavior."[189] Belinda Aquino, director of the Center for Philippine Studies at the University of Hawai'i at Manoa, said that "there is nothing in Philippine culture which condones, supports or accepts this particular behavior."[190] To rebut Trimillos' claim that "amok" is "institutionalized in Philippine culture," Aquino contended:

> Institutionalization connotes relative prevalence and acceptability and a sense of a social act being established either as a statistical or cultural norm. The amok cases in the Philippines and in other countries have been so infrequent they cannot be considered "institutionalized" in any society.[191]

Even Trimillos himself admitted that "amok" behavior is strongly condemned and punished in the Philippines.[192] "They just have a name for it," he testified at trial, "they don't condone it."[193]

Ganal also has a dimension of domestic violence. The macho-inspired killing of or infliction of physical injury on unfaithful wives is a recurring theme in many highly publicized cases in which the cultural defense was

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[188] *See supra* note 17 and accompanying text.

[189] Shannon Tangonan, *Filipinos Skeptical of Ganal's "Amok" Defense*, HONOLULU STAR-BULLETIN, Mar. 27, 1993, at A1.

[190] Pat Omandam, *"Amok" Defense Strains Philippines Culture Experts*, HONOLULU STAR-BULLETIN, Apr. 1, 1993, at A3.

[191] Belinda Aquino & Virginia Miralao, *Philippine Culture Used as Scapegoat in Ganal Trial*, HONOLULU STAR-BULLETIN, Apr. 9, 1993, at A11.

[192] *See* Transcript of Proceedings, State v. Ganal, Cr. No. 91-2273 (Haw. 1st Cir. Ct. Apr. 7, 1993).

[193] *Id.*

asserted.[194] The defense in *Ganal* also tried to explain Ganal's wounding of his wife in cultural terms: Ganal was culturally compelled to "control his wife" and "keep her in line" when his wife was having an affair.[195] One wonders whether Ganal could have successfully explained away his wounding of his wife had the killing and injuring of others not occurred. Probably Ganal would not even have been prosecuted if this were a solely domestic violence case because of the "de facto cultural defense." During the trial, Mabel, Ganal's estranged wife, testified that she could not identify the person who shot her.[196] The reluctance of abused women from minority groups to cooperate with prosecutors often presents an obstacle for American law enforcement to effectively protect women. Therefore, courts should be extremely cautious in allowing the cultural defense in domestic violence cases when battered wives are brave enough to report and testify so that the deterrent effect of the law can be maximized.

If recognizing a separate cultural defense for violent crimes such as the one committed in *Ganal* is inappropriate, the question remains as to whether cultural factors should be excluded from the courtroom. In his testimony at the trial, Anthony Marsella, the expert witness for the defense, said that "culture along with biology, psychology and the physical environment is one of the four major categories of influence upon human behavior."[197] Marsella's view is widely accepted in the academic community. Anthropologists commonly recognize culture as "a force that shapes individuals and determines their values and goals, beliefs, and attitudes."[198] Therefore, the knowledge of defendants' cultural background would shed light on what motivates their action.[199]

Contrary to the public perception as reflected in the news media, the defense attorney in *Ganal* did not raise a separate "cultural defense," but rather sought to introduce cultural evidence to support the defense

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[194] *See, e.g.*, People v. Chen, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988), *cited in* Volpp, *supra* note 3, at 64.

[195] *See* Aquino & Miralao, *supra* note 191.

[196] *See* Seto, *supra* note 184. Because Mabel's testimony was damaging to the prosecution's case, Arrisgado found himself discrediting her during his closing argument. Arrisgado said: "I wonder if Mabel Ganal earned her $37,000 testifying for her husband?" referring to the worker's compensation award Mabel received on behalf of her husband, who claimed he hurt his back while working for Young Laundry, his former employer. *Id.*

[197] *See* Transcript of Proceedings, *Ganal*, Cr. No. 91-2273.

[198] *See* Rimonte, *supra* note 51, at 1315.

[199] *See* Renteln, *supra* note 1, at 445.

of "extreme mental or emotional disturbance." The court's decision in allowing the introduction of cultural evidence is consistent with the Hawaii Penal Code, which permits a reduction of the offense from murder to manslaughter if "the defendant was, at the time he caused the death of the other person, under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation."[200] The defense contended that Ganal killed under the influence of extreme mental or emotional disturbance, and provided the amok theory as an explanation. Whether the explanation is reasonable or not is a question for the jury. *Ganal* exemplified the approach discussed in the preceding section with respect to violent crimes: admit cultural evidence and then decide the case on its merits.

The *Ganal* case also accentuated a major problem in admitting cultural evidence, namely, the stereotyping of an ethnic culture. The focus on the Philippine culture during the trial led some people to believe that the culture became "the culprit or scapegoat."[201] The local Filipino community perceived the case to have created a stereotype that jealous Filipino men are more criminally predisposed.[202] The experts' testimonies for the defense were criticized as "impressionistic descriptions . . . (which) do not and cannot convey the complexity and diversity of behavior with cultures."[203]

However, even if there was misinformation about Filipino culture in *Ganal*, it apparently did not influence the jury since the defendant was convicted. Furthermore, the discussion in the news media engendered by the courtroom description of the Philippine culture, might have helped in educating the public and dispelling some of their stereotypical view about the culture. Thus, the limited, if any, negative impact of cultural stereotyping should not be used as an excuse to exclude cultural evidence when the benefit of maintaining a culturally sensitive legal system is evident.

V. CONCLUSION

In a society of diverse cultures, the exclusion of cultural factors from the legal system contravenes the principles of American jurisprudence. To choose between the other two options of recognizing a separate

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[200] HAW. REV. STAT. § 707-702(2) (1993).

[201] *See* Aquino & Miralao, *supra* note 191.

[202] *See* Letters, HONOLULU STAR-BULLETIN, Apr. 10, 1993, at A7.

[203] *See* Aquino & Miralao, *supra* note 191.

cultural defense and merely allowing cultural evidence in criminal proceedings, the nature of the crime ought to be the determinant factor. A separate cultural defense should be recognized for crimes without any identifiable victims. The need for such a recognition is accentuated in light of the inadequate representation of minority ethnic groups in the process of law-making. However, recognizing a separate cultural defense would go too far for violent crimes. To balance our commitment toward cultural sensitivity and our desire to maintain law and order and to protect the rights of victims, we should adopt, in cases of violent crimes, the intermediate approach of allowing the use of cultural evidence to explain the defendant's state of mind.

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Confidentiality Breeds Contempt: A First Amendment Challenge to Confidential Ethics Commission Proceedings of the City & County of Honolulu

I. INTRODUCTION

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation

> and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the [Hawaii] legislature declares that it is the policy of this State that the formation and conduct of public policy-the discussions, deliberations, decisions, and action of government agencies-shall be conducted as openly as possible.[1]

Many states have organizations established to govern the ethical conduct of their public officials and employees. The island of Oahu in Hawai'i has both a State Ethics Commission and an Ethics Commission of the City & County of Honolulu ("City").[2] These Commissions are authorized to render advisory opinions and recommend disciplinary actions for individuals who are found in violation of the established Standards of Conduct.[3] Currently, a disturbing conflict exists between the procedures maintained by the City Ethics Commission and the State Ethics Commission of Hawai'i. The State Ethics Commission's proceedings are open to the public; they conduct public hearings and their records are a matter of public record.[4] However, the City Ethics Commission is mandated by law to keep its hearings and records confidential from the public.[5]

These City procedures restrict all public access to the Ethics Commission's proceedings and directly oppose the goals of the First Amendment.[6] The United States Supreme Court has said that "there is practically universal agreement that a major purpose of [the First] Amendment[7] was to protect the free discussion of governmental affairs,"[8] and to insure its extensive public scrutiny.[9] The rights guar-

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[1] Act 166, 8th Leg., 1975 Reg. Sess., 1975 Haw. Sess. Laws 364.

[2] Hawai'i has a State Ethics Commission and an Ethics Commission in each county. Only the Ethics Commissions on Oahu are addressed in this comment.

[3] REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU 1973, § 13-104 (1994 Edition). HAW. REV. STAT. § 84-31 (1985).

[4] Act 221, 18th Leg., 1995 Reg. Sess., 1995 Haw. Sess. Laws 566.

[5] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, §§ 1-9 (1995).

[6] *See* Jeffrey M. Shaman & Yvette Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 TEMP. L.Q. 755, 757 (1985) (asserting the goals of the First Amendment are compromised by keeping the proceedings and records of judicial disciplinary proceedings confidential).

[7] U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[8] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (quoting

anteed by the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[10] The City's denial of access to ethical violations of public officials[11] and employees[12] is a restriction on public dissemination of information pertaining to governmental affairs and impinges on the rights guaranteed by the First Amendment.

This comment begins by questioning the confidentiality requirements maintained by the City Ethics Commission and the silence that surrounds its proceedings. Part II examines the history of the Ethics Commissions of Hawai'i. Part III details the current confidentiality provisions of the City Ethics Commission which are being challenged. Part IV analyzes relevant case law that addresses confidentiality and the limitations placed on it by the First Amendment. Part V analyzes the case law bearing on the issue of a First Amendment right to access to Ethics Commission proceedings. Part VI examines the recent legislative revisions to confidentiality clauses of the Hawai'i State Ethics Commission. Part VII recommends revisions to the City Ethics Commission's current provisions. Part VIII presents the opinions of proponents of confidentiality and illustrates why these arguments are insufficient to justify its retention. Part IX concludes that a constitutional challenge to the City Ethics Commission's confidentiality pro-

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Mills v. Alabama, 384 U.S. 214, 218 (1966) (upholding the right of the press to publish information regarding judicial conduct proceedings).

[9] *Id.* at 839 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

[10] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (implicit in the guarantees of the First Amendment is the public's right to attend criminal trials).

[11] The term city "public official" as used in this comment is synonymous with "public officer" as defined by the City Charter to include the following:

(a) Members of the council, the mayor and the managing director.

(b) Any person appointed as administrative head of any agency of the city or as a member of any board or commission.

(c) Any person appointed by a board or commision as the administrative head of such agency.

(d) The first deputy or a division chief appointed by the administrative head of any agency of the city.

(e) Deputies of the corporation counsel and the prosecuting attorney.

REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU 1973, art. XIII, § 13-101(4) (1994 Edition).

[12] A City "employee" includes any person who is employed by the city or any agency of the city. It does not include persons who are city "public officials" nor does it include independent contractors. REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU 1973, art. XIII, § 13-101(3) (1994 Edition).

visions cannot be ignored. This comment resolves that these provisions require immediate attention, reevaluation, and revision.

II. History of Hawai'i's Ethics Commissions

In 1978, the Constitution of the State of Hawaii mandated the foundation of an Ethics Commission with passage of article XIV.[13] It was passed to ensure honest government for the people by making sure that Hawai'i's public officers and employees "exhibit the highest standards of ethical conduct . . . ."[14] Chapter 84, Standards of Conduct, of the Hawaii Revised Statutes was enacted to prescribe a Code of Ethics, to educate the people on ethics in government and to establish an Ethics Commission.[15] The stated purpose of the Ethics Commission is to administer the Code of Ethics, render advisory opinions, and "enforce the provisions of this law so that public confidence in public servants will be preserved."[16]

The Ethics Commission of the City and County of Honolulu was established by ordinance in 1966.[17] The ordinance contained several

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[13] Haw. Const. art. XIV. The article was added by the Constitutional Convention of 1978 and the election on November 7, 1978. *Id.*

[14] Haw. Const. art. XIV.

[15] Haw. Rev. Stat. pmbl., § 84 (1985). The preamble states:

> The purpose of this chapter is to (1) prescribe a code of ethics for elected officers and public employees of the State as mandated by the people of the State of Hawai'i in the Hawaii Constitution, Article XIV; (2) educate the citizenry with respect to ethics in government; and (3) establish an ethics commission which will administer the codes of ethics adopted by the constitutional convention and by the legislature and render advisory opinions and enforce the provisions of this law so that public confidence in public servants will be preserved.

Id.

[16] Haw. Rev. Stat. § 84 (1985).

[17] Honolulu, Haw., Rev. Ordinances ch. 3, art. 6, § 1 (1995). The ordinance provides:

> There shall be an Ethics Commission consisting of seven members who shall be appointed by the mayor with the approval of the council. Of the members originally appointed, one shall serve for a term of one year, two for a term of two years, two for a term of three years and two for a term of four years. Thereafter, each member shall be appointed for a term expiring four years from the date of the expiration of the term of the member's predecessor, or in the case of a vacancy for the remainder of the unexpired term. Each member shall serve until the member's successor has been appointed and qualified. The commission shall annually select a chair.

Id.

provisions for the administration of the Commission.[18] It also authorized the Commission the discretion to put into effect rules and regulations to provide further guidance for the administration of the Commission.[19] Any rules and regulations, once approved, promulgated, and filed, in accordance with Hawaii Revised Statutes section 91, would have the force and effect of law.[20] In 1984, the City Ethics Commission's Rules of Procedure were approved and passed into law.[21] The City Ethics Commission was added to the Revised Charter of the City & County of Honolulu in 1984.[22] The policy provision for the City's standards of conduct states that "[e]lected and appointed officers and employees shall demonstrate by their example the highest standards of ethical conduct, to the end that the public may justifiably have trust and confidence in the integrity of government."[23]

III. THE CHALLENGED PROVISIONS OF THE CITY'S ETHICS COMMISSION

The activities of the City Ethics Commission are mandated by law to be kept closed and confidential from the public. Confidentiality is enforced by provisions contained in both the City ordinance[24] and the

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[18] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, §§ 1-9 (1995).

[19] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 3(f) (1995). The ordinance provides:

> The commission may, from time to time adopt, amend and repeal such rules and regulation, not inconsistent with the provisions herein and of Article 8 of this chapter, as in the judgment of the Commission seem appropriate for the carrying out of the provisions herein and of Article 8 of this chapter and for the efficient administration thereof, including every matter or thing required to be done or which may be done with approval or consent or by order or under the direction or supervision of or as prescribed by the commission. The rules and regulations, when approved, promulgated and filed as provided in HRS Chapter 91 shall have the force and effect of law.

Id.

[20] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 3(f) (1995).

[21] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU (1984). Adopted December 3, 1984, by Gilbert A. Gima, Chairperson Ethics Commission, City and County of Honolulu. Approved December 11, 1984, by Mayor Eileen Anderson and Deputy Corporation Counsel, Charlotte Stretch. *Id.*

[22] REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU 1973, art. XI, § 11-107 (1994 Edition). The Ethics Commission falls under the department of the corporation counsel for administrative purposes. *Id.*

[23] REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU 1973, art. X, § 11-101 (1994 Edition).

[24] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, §§ 1-9 (1995).

Ethics Commission's Rules of Procedure.[25] These provisions enforce confidentiality in the areas of hearings held by the Commission, documents and reports received by the Commission, and disclosure of Ethics Commission's activities.

Currently, ordinance section 3-6.7(e)[26] and Rules of Procedure section 4.13(b),[27] provide that all hearings before the City Ethics Commission be held in executive session, which are closed to the public. The only exception where a hearing would be open to the public is if the person against whom the allegation is made consents to a public hearing.[28] Because the individual allegedly in violation is given the option to maintain the confidentiality of the hearing, it is a rare occurrence for a hearing to be public.[29]

In addition, ordinance section 3-6.5(c)[30] and Rules of Procedure section 4.13(a),[31] require that all records, reports, or documents received

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[25] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13 (1984).

[26] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 7(e) (1995) (emphasis added) reads:

> (e) *All hearings before the commission involving an alleged conflict of interest of any employee or officer shall be held in executive session*, provided that a public hearing may be held where such officer or employee, alleged to have a conflict of interest, consents thereto.

[27] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(b) (1984) (emphasis added) reads:

> (b) *All hearings before the Commission shall be held in executive session*; provided that a public hearing may be held where the officer or employee alleged to have the conflict of interest requests or consents to a public hearing.

[28] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 7(e) (1995). RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(b) (1984).

[29] Telephone Interview with Carolyn Stapleton, Legal Counsel for the Ethics Commission, City & County of Honolulu, in Honolulu, Haw. (Feb. 11, 1996). Ms. Stapleton states that in her six and one-half years at the Ethics Commission they have never held a formal hearing. *Id.*

[30] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 5(c) (1995) (emphasis added) reads:

> (c) *All records, reports, writings, documents, exhibits, and other evidence received by the Commission shall be held in confidence* and no information as to the contents thereof shall be disclosed unless such items are presented and received by the commission at a hearing or meeting that is open to the public.

[31] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(a) (1984) (emphasis added) reads:

by the Commission remain confidential. The only time that the public would be able to gain access to these writings is if they were received by the Commission at a hearing which was open to the public.[32] The previous section illustrated that public hearings rarely occur because the individual charged with the allegation is given the discretion to keep the hearing confidential. Because public hearings rarely occur, and only records, reports, and documents received by the Commission during a public hearing are open to the public, the items are held in confidence. Thus, the individual alleged with the violation is provided the discretion to determine whether the hearing, and any record of the proceeding, will be made public.

Moreover, ordinance section 3-6.3(g)[33] and Rules of Procedure section 4.13(c),[34] provide that if the Commission determines that an

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(a) *All records, reports, documents, exhibits, and other evidence received by the Commission shall be held in confidence* and no information as to the contents thereof shall be disclosed unless such items are presented and received by the Commission at a hearing or meeting that is open to the public.

[32] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 5(c) (1995). RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(c) (1984).

[33] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 3(g) (1995) (emphasis added) reads:

(g) *Any commission member or commission staff, who divulges information concerning the allegation* prior to the issuance of an advisory opinion by the commission, or *if the investigation discloses that the advisory opinion should not be issued by the commission, any commission member or commission staff who, at any time, divulges any information* concerning the original allegation, or divulges the contents of disclosures except as permitted by this article, *shall, if found guilty, be subject to the applicable provisions of Section 11-106 of the revised charter.*

[34] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(c) (1984) (emphasis added) reads:

(c) Pursuant to Section 3-2.3(g), ROH:

(g) *Any individual*, except as hereinafter provided, including the individual making the allegation, who divulges information concerning the allegation prior to the issuance of an advisory opinion by the Commission, *or if the investigation discloses that the advisory opinion should not be issued by the Commission, at any time divulges any information* concerning the original allegation, or divulges the contents of disclosures except as permitted by this ordinance, shall, *if found guilty, be punishable by a fine of not more than $1,000.00 or imprisonment of not more than one year, or both*, except that an officer or employee shall be subject to the provisions of Section 11-106 of the Revised Charter.

advisory opinion will not be issued, the initial allegation and any contents of the allegation are to remain confidential permanently. This sweeping restriction denies the public access to any information regarding the allegation including the reasoning behind the Commission's decision. In addition, the public is unable to assess the Commission's work to determine whether or not allegations of ethical violations were adequately pursued. The public has no way of ensuring that allegations of misconduct relayed to the Commission are handled properly and that improprieties do not occur.

Finally, ordinance section 3-6.3(g) and Rules of Procedure section 4.13 (c) further ensure confidentiality of Ethics Commission's proceedings by providing punishment for disclosure. The ordinance states that "any [C]ommission member or [C]ommission staff, who divulges information concerning the allegation"[35] is subject to penalties and disciplinary action as provided by the Revised Charter of the City.[36] The confidentiality provision of the ordinance differs from the Rules of Procedure in that it provides sanctions only to Commission members or staff for divulging confidential information. The Rules of Procedure punish "any individual" who divulges information concerning the allegation by fine, imprisonment, or both.[37] According to Legal Counsel for the City Ethics Commission, the ordinance, which punishes only Commission members and staff, commands a higher authority than the Rules and therefore, the Rule is considered overridden and obsolete.[38]

These provisions compromise the basic foundation of Hawai'i's Ethics Commissions. The stated purpose of the state's Code of Ethics is to

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[35] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 3(g) (1995).

[36] REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU 1973, § 11-106 (1994 Edition) reads:

> The failure to comply with or any violation of standards of conduct established by this article of the charter or by ordinance shall be grounds for impeachment of elected officers and for the removal from office or from employment of all other officers and employees. The appointing authority may, upon the recommendation of the ethics commission, reprimand, put on probation, demote, suspend or discharge an employee found to have violated the standards of conduct established by this article of the charter or by ordinance.

[37] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(c) (1984).

[38] Telephone Interview with Carolyn Stapleton, Legal Counsel for the Ethics Commission, City & County of Honolulu, in Honolulu, Haw. (Aug. 17, 1995). Ms. Stapleton explains that the ordinance supersedes the rules, thus a revision to the rule is unnecessary as it is not the current law. *Id.*

prescribe a code of ethics, educate the citizenry on ethics in government, and to establish an Ethics Commission to administer the code, render advisory opinions, and enforce the provisions to preserve public confidence.[39] The City's present provisions frustrate the general principle of the Commission's goal to educate the public on the principles of ethical conduct. First, the Commission is not educating the public through advisory opinions as expected. No advisory opinions have been published by the City Ethics Commission since 1983.[40] Moreover, the Commission will not release to the public any opinions that have not yet been published.[41] The Charter requires the Commission to publish advisory opinions; however, it also requires that the opinions be edited so that the identity of the individuals involved is not made known.[42] Second, much of the potential educative effect is lost by keeping all proceedings of the Commission closed. Public exposure of the Commission's proceedings and its decision-making process would heighten the public's knowledge of ethical violations. Furthermore, the Commission's objective to preserve public confidence is frustrated. The current system of secrecy provides no accountability to the public. The public is unable to hold public officials and employees accountable for their ethical violations. Not only is the public left without any checks and balances on the public officials and employees, but also without any checks and balances on the Commission itself. Thus, public confidence is undermined as the confidentiality actually brings about contempt, mistrust and suspicion of the process.

These provisions also violate the fundamental principles of the First Amendment by denying the public the right of access as well as the right of free discussion of governmental affairs. They prohibit the public from gaining knowledge of the existence or the contents of

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[39] HAW. REV. STAT. § 84 (1985). While the City is not bound by the State's Code of Ethics, the Code illustrates the fundamental principles and foundation from which the county commissions were formed.

[40] Telephone Interview with Carolyn Stapleton, Legal Counsel for the Ethics Commission, City & County of Honolulu, in Honolulu, Haw. (Sept. 5, 1995). According to Ms. Stapleton, the advisory opinions from January, 1984, through December, 1994, are in the process of being published. *Id.*

[41] *Id.*

[42] REVISED CHARTER OF THE CITY & COUNTY OF HONOLULU 1973, art. XI, § 11-107 (1994 Edition). The Charter does not require confidentiality of Ethics Commission proceedings but states: "The commission shall publish its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the persons involved." *Id.*

ethical violations of public officials and employees. They prohibit discussion of ethical violation of public officials and employees. These provisions endanger the objective of open communication of government affairs as guaranteed by the First Amendment.

IV. First Amendment Limitations on Confidentiality

The question arises as to whether the Ethics Commission's confidential proceedings violate the First Amendment. While there is no United States Supreme Court case law directly addressing whether or not it is unconstitutional to prohibit access to Ethics Commission proceedings, the analysis can begin with case law that has addressed confidentiality and the First Amendment in similar contexts. This part of the comment will consider the existing case law in the context of a challenge to confidentiality.

A. Landmark Communications, Inc. v. Virginia

The United States Supreme Court addressed confidentiality in the context of the judicial disciplinary process and reviewed the authority of a judicial review commission to keep its records confidential in *Landmark Communications, Inc. v. Virginia*.[43] The Court held that it is unconstitutional for the judicial review commission to restrict publication of information concerning the Commission's proceedings.[44]

The Virginia statute[45] being challenged in *Landmark*, declared that all proceedings before the Commission were confidential and provided criminal prosecution to "any person" who divulged information about the proceedings. A Landmark newspaper accurately reported and published an article on a pending confidential proceeding before the Judicial Inquiry and Review Commission and identified the judge being inves-

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[43] 435 U.S. 829, 829 (1978).

[44] *Id.*

[45] Va. Code Ann. § 2.1-37.13 (1973) (emphasis added) provided in relevant part: *All papers filed with and proceedings before the Commission*, and under the two preceding sections. . . including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, *shall be confidential and shall not be divulged by any person* to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character . . . . *Any person who shall divulge information* in violation of the provisions of this section *shall be guilty of a misdemeanor.*

tigated.[46] The Circuit Court held, and the Supreme Court of Virginia affirmed, that Landmark violated the Virginia statute and was subject to criminal punishment.[47]

The issue on appeal was whether the statute, which permitted the criminal punishment of third persons who divulged information regarding confidential proceedings of the Judicial Inquiry and Review Commission, encroached on First Amendment guarantees.[48] The court determined that a principal basis of the First Amendment is "to protect the free discussion of governmental affairs," and that the type of speech the Virginia statute attempted to punish "lies near the core of the First Amendment."[49] The Supreme Court concluded that the speech the statute meant to restrict was exactly the type of speech the First Amendment was meant to protect.[50] It was established that in order for a state to restrict speech of governmental affairs, it must prove by actual facts that there exists "clear and present danger"[51] to the orderly administration of justice and that "[t]he danger must not be remote or even probable; it must immediately imperil."[52]

The Court considered the basis for confidentiality of the Virginia judicial disciplinary procedures.[53] They examined the purposes of confidentiality as determined by the Virginia Supreme Court: 1) protection of the judge's reputation from adverse publicity; 2) protection for potential complainants and witnesses from retaliation; and 3) protection of public confidence in the judicial system.[54] In weighing the costs of the risks of disclosure against the risk of injury to the Judicial Inquiry and Review Commission, the court held that the risk of injury did not meet the test for "clear and present danger" which would justify encroachment on speech protected by the First Amendment.[55] The Supreme Court reversed the lower court's decision and held that the

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[46] *Landmark*, 435 U.S. at 831.

[47] *Id.* at 832. The Court noted that the issue of whether the statute violated the First Amendment was a case of first impression and of wide importance as several States maintain similar statutes which require confidentiality of judicial disciplinary proceedings.

[48] *Id.* at 837.

[49] *Id.* at 838 (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[50] *Id.* at 845.

[51] *Id.* at 843.

[52] *Id.* at 845 (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)).

[53] *Id.* at 836.

[54] *Id.* at 833.

[55] *Id.* at 845.

Virginia statute was unconstitutional.[56] The Court held that the First Amendment prohibits criminal punishment of third persons for divulging information regarding confidential proceedings of the Judicial Inquiry and Review Commission.[57]

B. Lind v. Grimmer

The Ninth Circuit Court of Appeals addressed a similar issue of confidentiality when it reviewed a statute[58] maintained by the State of Hawai'i's Campaign Spending Commission in *Lind v. Grimmer*.[59] Lind, the author, editor, and publisher of the "Hawaii Monitor" newsletter,[60] reported the fact that he had filed a complaint with the Campaign Spending Commission alleging that another party had failed to disclose political contributions.[61] A complaint was filed against Lind for violation of Hawai'i's statute, which required that all proceedings, including the filing of a complaint, be kept confidential.[62] Lind filed this lawsuit in response.[63] The suit brought action against the State Campaign Spending Commission claiming that the Hawai'i statute,[64] requiring that all proceedings related to the filing of a complaint with the Commission

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[56] *Id.* at 845-46.

[57] *Id.*

[58] HAW. REV. STAT. § 11-216(d) (1988 & Supp. 1992) (emphasis added) read as follows:

> (d) Until a determination of probable cause is made by the commission, *all proceedings, including the filing of the complaint*, investigation, and hearing *shall be confidential* unless the person complained of requests an open hearing. In the event the commission determines that probable cause does not exist, the complaint shall be dismissed and the entire record of the proceedings shall be kept confidential at the option of the person complained of.

[59] 30 F.3d 1115 (9th Cir. 1994).

[60] *Id.* at 1117. The "Hawaii Monitor" newsletter is stated to be an independent non-partisan feature which reports on election campaign issues within the State of Hawai'i. *Id.*

[61] *Id.* Lind filed a complaint alleging that the University of Hawai'i Professional Assembly failed to disclose large campaign contributions to Governor John D. Waihee's election campaign during 1990. *Id.*

[62] *Id.* The University of Hawai'i Professional Assembly did not file a complaint but had asked the Campaign Spending Commission to clarify whether or not section 11-216(d) applied to Lind. It was the Commission's decision to deal with this request as a complaint towards Lind for violation of the provision. *Id.*

[63] *Id.*

[64] *See supra* text accompanying note 60.

be kept confidential, was unconstitutional and violated his rights under the First Amendment.

The District Court of Hawaii held that the statute violated the First Amendment of the United States Constitution.[65] The court held the statute unconstitutional as applied to Lind, the party that filed the complaint, and that it was unconstitutionally overbroad, both in its application to third parties and even after a determination of no probable cause has been made.[66] The court declared that enforcement of the provision needed to be permanently enjoined because "there [was] no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands."[67]

The Ninth Circuit Court of Appeals upheld the district court's decision that the statute was unconstitutional as applied to Lind and that the statute was unconstitutionally overbroad.[68] The Court of Appeals first determined that the statute was unconstitutional as applied to Lind.[69] The court reasoned that the speech the statute regulated, "speech about political processes and governmental investigations of wrongdoing by public officials, [fell] near to the core of the First Amendment."[70] The court concluded that the speech was regulated on the basis of its content[71] and that section 11-216(d) regulated fully protected speech.[72] A regulation that restricts content-based speech is

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[65] Lind v. Grimmer, 859 F. Supp. 1317, 1337 (D. Haw. 1993), *aff'd* 30 F.3d 1115 (9th Cir. 1994). Initially the parties submitted to the Hawai'i District Court a Stipulation of Dismissal with Prejudice of all Claims to state that the parties agreed that HAW. REV. STAT. section 11-216(d) was unconstitutional. However, the Court refused to accept the stipulation stating that it was unwilling to overturn a legislative act without thorough deliberation and caselaw to support its decision. Thus, the parties vacated their prior stipulations. *Id.* at 1319.

[66] *Id.* at 1338. The court also found that the statute is not subject to a narrow construction or state supreme court certification. *Id.*

[67] *Id.* at 1331 (quoting Secretary of State of Md. v. Joseph Munson Co., 467 U.S. 947, 965-66 n.13 (1984)).

[68] Lind v. Grimmer, 30 F.3d 1115, 1123 (9th Cir. 1994).

[69] *Id.* at 1118-19.

[70] *Id.* at 1118. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 270-71 (1964).

[71] *Lind*, 30 F.3d at 1121. The court noted that this conclusion agrees with the majority of court decisions that have addressed similar statutes. *Id.* (citing Butterworth v. Smith, 494 U.S. 624 (1990) (confidentiality of grand jury testimony); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (testimony before judicial review board); First Amendment Coalition v. Judicial Inquiry & Review Board, 784 F.2d 467 (3d Cir. 1986)).

[72] *Lind*, 30 F.3d at 1119.

subject to a strict scrutiny standard of review and "will survive scrutiny only if it is narrowly drawn and is necessary to serve a compelling state interest."[73] The State asserted several interests to support section 11-216(d);[74] however, the court held that the concerns were insufficient to justify restrictions on Lind's speech.[75] The State argued that when Lind filed his complaint with the Commission he subjected himself to the confidentiality requirements of section 11-216(d) and, therefore, could not complain that the restrictions violated his First Amendment rights.[76] The Court responded that the restrictions existed before any interaction with Lind and the Commission and that the State could "not condition Lind's ability to trigger an investigation on the theory that by filing a complaint he bargained away his First Amendment rights."[77] The Court concluded that section 11-216(d) was unconstitutional when used to prevent an individual from stating that he had filed a complaint.[78]

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[73] *Id.* at 1118.

[74] *Id.* at 1117-18. The State asserts that section 11-216(d) served:

> (a) to prevent the Commission's credibility from being invoked to support scandalous charges, (b) to protect fledgling political groups and candidates from the publicity that would befall them from open proceedings, (c) to prevent candidates and their supporters from being unduly tarred by a vindictive complaint, (d) to promote settlement of disputes over violations of spending laws, and (e) to eliminate distractions and collateral concerns that would exist if commission proceedings were made public.

Id.

[75] *Id.* at 1119.

[76] *Id.* at 1118. The State relied on Cohen v. Cowles Media Co., 501 U.S. 663 (1991), where the court held that the First Amendment did not bar the plaintiff from recovering damages when a newspaper breached its promise to provide confidentiality to the plaintiff in exchange for information and restrictions on publication were self-imposed. *Id.*

[77] *Lind*, 30 F.3d at 1118. The Court distinguished *Lind* from *Cowles* in that the statute existed previously to interaction between the Commission and Lind and imposed direct and significant restrictions on content-based speech to require a burden of proof that the provisions were necessary to serve a compelling state interest. *Id.*

[78] *Id.* at 1121. The court noted that this conclusion agrees with the majority of court decisions that addressed this question in similar contexts. *Id.* (citing First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467 (3d Cir. 1986) (judicial review board); Doe v. Florida Judicial Qualifications Comm'n, 748 F. Supp. 1520 (S.D. Fla. 1990) (judicial review board); Providence Journal Co. v. Newton, 723 F. Supp. 846 (D.R.I. 1989) (Ethics Commission proceedings)). *But see, e.g.*, Kamasinski v. Judicial Review Council, 797 F. Supp. 1083 (D. Conn. 1992) (judicial review board).

In addition to finding that the statute was invalid as applied to Lind, the court on appeal also upheld the district court's decision that the statute was unconstitutionally overbroad.[79] The district court held that the statute was overbroad in two aspects: 1) it applied to third parties, who are strangers to the investigation, from divulging any information about an investigation, and 2) it applied even after a determination of no probable cause had been made by the Commission.[80] On appeal the State asserted the following reasons why the district court erred in reaching the decision that the statute was overbroad: 1) that the State was deprived of notice as required by the Federal Rules of Civil Procedure; 2) that the district court should have abstained and certified the question to the Hawaii Supreme Court; and 3) that Lind did not have standing to challenge the overbreadth of the statute.[81] The court did not find any of the claims meritorious.[82] The overbreadth of the statute, which seeks to keep all information regarding the Ethics Commission's proceedings confidential, is "not only. . . real, but substantial."[83] The court stated that in the situation where a statute's overbreadth is material with its effect, the statute in its entirety may need to be invalidated to protect interests guaranteed by the First Amendment.[84]

C. Application to Ethics Commission's Confidentiality Provisions

Although neither *Landmark* nor *Lind* addressed the question of whether it is constitutional to prohibit access to proceedings, they provide a starting point in which to address the conflict between confidentiality and the First Amendment. In *Landmark*, the Supreme Court recognized

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[79] *Lind*, 30 F.3d at 1123. The court concluded that the overbreadth of the statute was "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*

[80] *Id.* at 1122.

[81] *Id.* at 1121-22.

[82] *Id.*

[83] *Id.* at 1123 (quoting Broodrick v. Oklahoma, 413 U.S. 601, 615 (1973)). The court stated: "[i]n view of the variety of applications of section 11-216(d) that are unconstitutional, we agree with the district court that nothing short of a complete rewrite of the statute will save it." *Lind*, 30 F.3d at 1123.

[84] *Lind*, 30 F.3d at 1123. The court stated: "when a statute's only unconstitutional application is the one directed at a party before the court, invalidation of that portion of the statute obviates any chilling effect the statute may have, and thus eliminates any justification for declaring the statute invalid in all its applications." *Id.*

that the First Amendment does not allow criminal sanctions of third parties for disclosing information on confidential judicial review commission proceedings. The Ninth Circuit Court of Appeals in *Lind* extended this reasoning and declared that the First Amendment does not allow the State to prohibit an individual involved in the complaint process of the Campaign Spending Commission from revealing that a complaint had been filed. This part of the comment addresses the conflict that exists between the City Ethics Commission's confidentiality provisions and the First Amendment.

The United States Supreme Court has said that "there is practically universal agreement that a major purpose of [the First] Amendment[85] was to protect the free discussion of governmental affairs,"[86] and to insure its extensive public scrutiny.[87] The *Landmark* court determined that speech on the proceedings of the Judicial Inquiry and Review Commission is the type of speech that is protected by the First Amendment.[88] The Court reasoned that information on the Commission's proceedings was a matter of public interest and restricting public scrutiny and discussion of the proceedings infringed on rights the First Amendment was meant to protect.[89] "[T]he type of danger evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification."[90] This analysis was extended to include the Campaign Spending Commission's proceedings by the *Lind* court.

As speech on the proceedings of the judicial disciplinary commission and the Campaign Spending Commission is considered protected speech,

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[85] U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[86] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966) (upholding the right of the press to publish information regarding judicial conduct proceedings)).

[87] *Landmark*, 435 U.S. at 839 (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

[88] *Landmark*, 435 U.S. at 838. The court's exact words were: "We conclude that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment . . . ." *Id.*

[89] *Id.* The Court stated that public dissemination of information on governmental affairs guards against the potential miscarriage of justice by exposing the process to public inspection, observation and comment. *Id.*

[90] *Id.* at 845 (quoting Wood v. Georgia, 370 U.S. 375, 388 (1962)).

it would follow that speech on Ethics Commission proceedings would also be protected by the First Amendment. As one district court has stated "there can be no doubt that the First Amendment protection . . . on public issues encompasses citizens' complaints that public officials, be they elected, appointed or employed, have breached contemporary canons of ethics in government."[91] The information in regard to an ethics complaint filed against a public official is the type of information on governmental affairs that the First Amendment was meant to protect.[92] Even though *Landmark* and *Lind* provide a beginning to dealing with the conflict between the First Amendment and rules of confidentiality, they do not address whether or not the general public has a First Amendment right of access to the proceedings.[93]

V. First Amendment Right of Access

The question arises as to whether the public has a First Amendment right of access to the Ethics Commission's confidential proceedings. Again, while there is no United States Supreme Court case law directly addressing whether or not it is unconstitutional to prohibit access to the proceedings, the analysis can begin with case law that has addressed whether confidential provisions violate the First Amendment's right of access in similar contexts. This part of the comment analyzes the Supreme Court's reasoning in recognizing a right of access to criminal trials and considers why that reasoning should be extended to include a right of access to Ethics Commission's proceedings.

A. Richmond Newspapers, Inc. v. Virginia

The Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*[94] marked the Court's first recognition of a constitutional right of access.[95]

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[91] Providence Journal Co., v. Newton, 723 F. Supp. 846, 851 (D.R.I. 1989).

[92] *See, e.g.*, Providence Journal Co., v. Newton, 723 F. Supp. 846, 851 (D.R.I. 1989).

[93] *See, e.g.*, Shaman, *supra* note 6, at 766. The Court in *Landmark* stated, "We do not have before us any constitutional challenge to a State's power to keep the Commission's proceedings confidential . . . . Nor does Landmark argue for any constitutionally compelled right of access for the press to those proceedings." *Landmark*, 435 U.S. at 837.

[94] 448 U.S. 555 (1980).

[95] *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. Pa. L. Rev. 1163, 1170 (1984). The case produced seven opinions. Although there was no

The issue before the Supreme Court was whether the United States Constitution guaranteed the right to attend criminal trials.[96] The Court reasoned that the First Amendment's guaranteed freedoms assure "freedom of communication on matters relating to the functioning of government."[97] The public has a right to be informed and "a right of access to information about the operation of their government."[98] The Court held that even though the right of access had not been expressly guaranteed, "the right to attend criminal trials is implicit in the guarantees of the First Amendment."[99]

The court explained that two factors of the criminal trial were relevant to determine if a right of access existed: 1) a tradition of openness,[100] and 2) important functional values that would be served by access.[101] The first factor, a tradition of openness, was disposed with quickly as it was undisputed that criminal trials had a long, consistent history of being open to the public.[102] The second factor, that important functional values be served by access, was also satisfied. The importance of openness was stated to provide several functional values. First, openness was stated to "foster the appearance of justice"[103] as it provided the "assurance that the proceedings were conducted fairly to all concerned. . . ."[104] Moreover, it was found that openness " discouraged perjury, the misconduct of participants, and decisions based

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majority opinion, seven Justices recognized a right of access embodied in the First Amendment. A majority opinion of a First Amendment right to access came with Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), where the court held that a statute which closed trials to the press during the victim's testimony in cases of alleged sexual offenses was unconstitutional. *Id.*

[96] *Richmond*, 448 U.S. at 558. Earlier Supreme Court Cases which claimed a right of access were rejected by the Court. *Id.* (citing Houchins v. KQED, Inc., 438 U.S. 1 (1978) (plurality opinion); Nixon v. Warner Communications, 435 U.S. 589 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974)).

[97] *Richmond*, 448 U.S. at 575.

[98] *Id.* at 584 (Stewart, J., concurring).

[99] *Id.* at 580. The State argued that a right to attend trials was not expressed in the Constitution and, therefore, no such right exists. However, the Court held that certain unarticulated rights have been found to be implicit in the Constitution and share constitutional protection. *Id.*

[100] *Id.* at 564.

[101] *Id.*

[102] *Id.* at 569.

[103] *Id.*

[104] *Id.*

on secret bias or partiality.''[105] Another key function served by open trial proceedings was stated to be a "check and balance," to allow the public to participate and view the proceedings would serve as a check on the system.[106]

B. *Globe Newspaper Co. v. Superior Court*

In *Globe Newspaper Co. v. Massachusetts*,[107] the Supreme Court supported a First Amendment right of access when it held unconstitutional a Massachusetts statute[108] that closed trials to the public of minor victims testifying to alleged sexual offenses. Globe Newspaper had attempted to gain access to a rape trial where the criminal defendant had been charged with raping three minor girls.[109] The trial court relied on the statute and ordered that the press and the public be excluded from the courtroom for the duration of the trial.[110] The Supreme Judicial Court dismissed Globe's appeal and concluded that the closure of the trial was a matter of discretion by the judge.[111] The Court determined that the statute required closure only during the testimony of minor victims at sex-offense trials and did not require exclusion of the public from the entire trial.[112] On remand the Supreme

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[105] *Id.*

[106] *Id.*

[107] 457 U.S. 596 (1982).

[108] MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981), which provides:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

[109] *Globe*, 457 U.S. at 598. The defendant had been charged with forcible rape and forced unnatural rape of two girls, 16 years old, and of one girl, 17 years old.

[110] *Id.* at 599. "The court caused a sign marked closed to be placed on the courtroom door, and court personnel turned away people seeking entry." *Id.* at 599 n.2.

[111] *Id.* at 600. The Court issued its judgment nine months after the end of the criminal trial. Even though the trial was over the court determined that the issues required review because they were capable of repetition. *Id.*

[112] *Id.* The Court did not rule on Globe's contentions that it had a constitutional right of access to attend the entire trial in order to wait for the Supreme Court's pending decision in *Richmond*. Upon the Supreme Court's decision that there did exist a constitutional right of access to criminal trials, they remanded this case to the Supreme Judicial Court for consideration in light of the outcome in *Richmond*. *Id.* at 600-01.

Judicial Court upheld the statute as constitutional and held that there was a tradition of openness in criminal trials, and that the statute furthered genuine state interests.[113]

The Supreme Court noted that while the right of access is not explicitly stated in the First Amendment, the Amendment is broad enough to encompass this right as it guarantees freedom of communication on matters relating to the functioning of government.[114] In determining whether or not a right of access existed, the Court looked to *Richmond* and the two part test developed in that case: 1) a tradition of openness, and 2) important functional values that would be served by access. The Court briefly noted that the criminal trial has long been presumptively open to the public.[115] The Court then held that the right of access to criminal trials plays a significant role in the functioning of the judicial process.[116] The right of access heightens the quality and integrity of the process, it cultivates the appearance of fairness and public respect, and it allows the public a check on the system.[117] The Court also noted that while there exists a right of access to criminal trials, that right is not absolute.[118] In order to restrict disclosure, "it must be shown that the denial is necessitated by a compelling government interest and is narrowly tailored to serve that interest."[119] The Court held that the State's interest articulated did not justify a mandatory closure rule; therefore, the statute violated the First Amendment.[120]

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[113] *Id.* at 601-02. The Court again dismissed Globe's appeal. Globe sought appeal and the Supreme Court noted probable jurisdiction. *Id.* at 602.

[114] *Id.* at 604.

[115] *Id.* at 605. The appellee argued that the Court did not address that criminal trials involving minor sex victims had not always been open to the public. *Id.* at 605 n. 13.

[116] *Id.* at 606. The Court stated, "the constitutional value of the open criminal trial is recognized in both logic and experience." *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.* at 607. Justice Stewart concluded that while the First Amendment provides a right of access to trials, several considerations may justify limitations on that right. However, the court did not specify what considerations would justify placing limits on the right to access a trial, only stating that the State's justifications must be weighty. *Id.*

[120] *Id.* at 610. The State's interests articulated were: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner. *Id.* at 609.

C. *Application to Ethics Commission's Confidentiality Provisions*

Because the Supreme Court has recognized a First Amendment right of access to a criminal trial, that precedent and analysis should extend to recognize a right of access to proceedings of the Ethics Commission. Several state supreme courts have cited *Globe* and *Richmond Newspapers* to recognize a First Amendment right to access beyond the criminal trial.[121] This part of the comment will analyze the Supreme Court's reasoning in *Richmond* and *Globe* to provide insight into whether the First Amendment requires a right of access to Ethics Commission proceedings.

As with the criminal trial, the two factors of openness and functional values would need to be considered in determining if a right of access to Ethics Commission proceedings exists. The City Ethics Commission has, since formation in 1966, kept its records and hearings confidential. However, the movement of the Ethics Commissions in general is towards a more open and accountable govrnment. Besides the State of Hawaii Ethics Commission's recent elimination of confidentiality,[122] Maui County does not currently require it and Hawaii County is in the process of questioning it.[123] Furthermore, the Council on Governmental Ethics laws states that the model law on confidentiality provided to ethics agencies nationwide is that the records compiled by the agency are made available to the public, but they are kept confidential until the investigation is complete.[124] The model law illustrates that the overall trend for Ethics Commission's procedures is to allow the public access to the records.

There is also the contention that the tradition of openness factor is inappropriate for Ethics Commissions. While the history of the criminal

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[121] *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. Pa. L. Rev. 1163, 1173 n.83-84 (1984) (citing Buzbee v. Journal Newspapers, Inc., 465 A.2d 426 (1983) (extending access rights to pre-trial suppression hearings); Herald Ass'n v. Ellison, 419 A.2d 323 (1980) (assuming *Richmond* extended to pretrial proceedings but based access right on other grounds)).

[122] *See infra* part VI.

[123] Telephone Interview with Carolyn Stapleton, Legal Counsel for the Ethics Commission, City & County of Honolulu, in Honolulu, Haw. (Jan. 9, 1996).

[124] Telephone Interview with Robert M. Stern, Staff Director, Council on Governmental Ethics Laws, in Los Angeles, Cal. (Jan. 10, 1996). Mr. Stern stated that Hawaii was one of the first states to form an Ethics Commission. He suggested that this may explain the protective nature of the procedures. *Id.*

trials spans several hundred years,[125] the development of Ethics Commissions can only be traced back a quarter of a century.[126] Because of the limited history in Ethics Commission's proceedings, it may be argued that this renders the tradition of openness as inapplicable in the present case and that the functional role of access is the dispositive issue in determining a right to access.[127]

In *Globe*, the Supreme Court did not heed as relevant the fact that criminal trials involving sexual offenses against minors had historically been closed to the press and public.[128] They appear to have disregarded the importance of a tradition of openness. The majority's slighting of history was highlighted by Chief Justice Burger's dissent in which he protested that the majority was "ignor[ing] the weight of historical practice."[129] It is unclear whether the Supreme Court, in failing to acknowledge the tradition of openness in *Globe*, changed the two-part test to a single determinative factor as dispositive, or, if it just failed to apply all the factors. Since the *Globe* court did not apply this portion of the test, it may be argued that the test has evolved and that the dispositive issue is: whether important functional values would be served by access.

Thus, the essential factor in considering whether a right of access to Ethics Commission proceedings exists depends upon whether functional values would best be served by access. The functional values that would be served by open proceedings to Ethics Commission proceedings are much the same as the functional values that would be served by open

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[125] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

[126] Telephone Interview with Robert M. Stern, Staff Director, Council on Governmental Ethics Laws, in Los Angeles, Cal. (Jan. 10, 1996). According to Mr. Stern, most Ethics Commissions were formed in the 1970's in response to Watergate. *Id.*

[127] *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163, 1176 n. 106 (1984) (citing United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982) (acknowledging history rationale but granting access to voir dire proceedings on second rationale of *Globe*, the functional value of access); Newman v. Graddick, 696 F.2d 796, 800-01 (11th Cir. 1983) (granting right of access to civil trials without discussion of historical considerations)).

[128] Several states have maintained longstanding provisions excluding the public from trials that involved sexual assault against minors. Globe Newspaper Co. v. Massachusetts, 457 U.S. 596, 614 (1982) (Burger, J., dissenting) (citing ALA. CONST. art. VI, § 169 (1901) (repealed 1973); FLA. STAT. § 918.16 (1979); GA. CODE § 81-1006 (1978); MISS. CONST. art. 3, § 26; N.H. REV. STAT. ANN. § 632-A:8 (Supp. 1981); N.C. GEN. STAT. § 15-166 (Supp. 1981); UTAH CODE ANN. § 78-7-4 (1953)).

[129] *A First Amendment Right of Access to Judicial Disciplinary Proceedings*, 132 U. PA. L. REV. 1163, 1176 (1984).

proceedings of a criminal trial. The Supreme Court acknowledged the public's right to know about the activities of its public officials when it stated, "the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of . . . *public servants*, and all the actors in the judicial arena[.]"[130]

The right of access plays a significant role in several aspects of the functioning of government.[131] Open proceedings enhance the appearance of justice. At common law the belief was that an essential element of justice was that it must satisfy the appearance of justice.[132] Public observation of the process benefits society as it increases the quality and protects the integrity of the entire system.[133] Public access to government procedures is vital to obtain public confidence.[134]

In addition, open proceedings with public access promotes self-government. An essential element of self-government and access is to allow the public the ability to serve as a check on the system.[135] "Without publicity, all other checks are insufficient . . . . Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance."[136] Potential abuse of the process would be thwarted if individuals had the knowledge that their actions were subject to public scrutiny.

The Supreme Court has repeatedly stated that "First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression."[137] The functional values of open proceedings of Ethics Commission's proceedings play a fundamental role in fur-

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[130] *Richmond*, 448 U.S. at 604 (Blackmun, J., concurring) (emphasis added).

[131] Globe Newspaper Co. v. Massachusetts, 457 U.S. 596, 605 (1982).

[132] *Richmond*, 448 U.S. at 593 (1980) (Brennan, J., concurring). Within the context of open criminal trials, Justice Brennan stated, "The trial is a means of meeting the notion, deeply rooted in the common law, that justice must satisfy the appearance of justice." *Id.* at 594 (quoting Levine v. U.S., 362 U.S. 610, 616 (1960) (quoting Offutt v. U.S., 348 U.S. 11, 14 (1954)).

[133] *Globe*, 457 U.S. at 605 (Brennan, J., concurring).

[134] *Richmond*, 448 U.S. at 594 (1980) (Brennan, J,. concurring). Justice Brennan stated, "[c]losed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." *Id.* at 595.

[135] *Globe*, 457 U.S. at 606.

[136] *Richmond*, 448 U.S. at 569 (quoting 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

[137] *Id.* at 575.

thering the "expressly guaranteed freedoms of the First Amendment to share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[138] Therefore, the constitutional right of access to criminal trials established by the Supreme Court in *Richmond* should be expanded to include a constitutional right of access to Ethics Commission's proceedings.

VI. Recent Revisions to the State Ethics Commission's Procedures

A direct conflict exists between the current procedures of the Honolulu City Ethics Commission and the State Ethics Commission. The State Ethics Commission previously maintained confidentiality provisions similar to the provisions maintained by the City Ethics Commission. However, during the 1995 legislative session, the Hawaii State Legislature dispensed with the confidentiality provisions in order "to provide greater openness in the proceedings of the State Ethics Commission."[139] The legislative action of House Bill No. 112 was remedial and in direct response to the *Lind v. Grimmer* case. This part of the comment will discuss the State Ethics Commission's revisions as well as examine the reasoning behind the movement away from confidentiality.

House Bill No. 112 transformed the confidentiality requirements of the State Ethics Commission. Previously all hearings held by the Commission were closed to the public, except in the rare event that the accused requested a public hearing.[140] House Bill No. 112 amended the law so that now all hearings are mandated to be open to the public.[141] In addition, a section was added to require that any decisions of the Commission made after a hearing, along with the findings and

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[138] *Globe*, 457 U.S. at 604 (quoting *Richmond*, 448 U.S. at 575).

[139] H.R. Stand. Comm. Rep. No. 862, 18th Leg., 1995 Reg. Sess., *reprinted in* 1995 Haw. House J. 1354.

[140] Haw. Rev. Stat. § 84-31(d) (1985) (emphasis added) provides: "All hearings shall be in accordance with chapter 91. All witnesses shall testify under oath and *the hearings shall be closed to the public unless the party complained against requests an open hearing.*"

[141] H.R. 112, 18th Leg., Reg. Sess. (1995) (emphasis added) provides: "All hearings shall be in accordance with chapter 91. All witnesses shall testify under oath and *the hearings shall be open to the public,* unless in the best judgment of the commission the hearings should be closed to the public."

records of the proceedings, become a matter of public record.[142] Furthermore, the section which provided criminal punishment to individuals for divulging information on Ethics Commission's proceedings was repealed in its entirety.[143]

There was unanimous committee support for the passage of House Bill No. 112.[144] The Committee on Judiciary stated that they "agree with the intent of this bill to make public the hearings, charges, and decisions of the ethics commission, as well as disciplinary actions taken against state employees for violation of ethics laws."[145] The Committee on Agriculture, Labor, and Employment specifically found that "the public should be entitled to review charges and alleged violations of the State Ethics Code[.]"[146] An important factor considered by the committees was that opening the Ethics Commission's procedures to the public would provide a check on the system. The Committee on Legislative Management reported that the bill would

> enable the public to ascertain that those who are subject to the State Code of Ethics (Code) are acting in the public's best interest and

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[142] H.R. 112, 18th Leg., Reg. Sess. (1995) (emphasis added) provides: "*a decision of the commission* rendered after a hearing together with findings and the record of the proceeding *shall be a public record*, unless in the best judgment of the commission it should remain closed to the public."

[143] HAW. REV. STAT. § 84-31(c) (1985) which provided:

> (c) Any commission member or individual, including the individual making the charge, who divulges information concerning the charge prior to the issuance of the complaint by the commission, or if the investigation discloses that the complaint should not be issued by the commission, at any time divulges any information concerning the original charge, or divulges the contents of the disclosures except as permitted by this chapter, shall be guilty of a felony which shall be punishable by a fine of not more than $5,000 or imprisonment of not more than five years, or both, or in the case of a legislator, when acting in the legislator's legislative capacity, be subject to discipline pursuant to Article III, section 12, of the Hawaii Constitution as the case may be.

[144] *See, e.g.*, H.R. STAND. COMM. REP. No. 200, 18th Leg., 1995 Reg. Sess., *reprinted in* 1995 HAW. HOUSE J. 1103, 1104 (Committee on Legislative Management); H.R. STAND. COMM. REP. No. 862, 18th Leg., 1995 Reg. Sess., *reprinted in* HAW. HOUSE J. 1354 (Committee on Judiciary); S. STAND. COMM. REP. No. 963, 18th Leg., 1995 Reg. Sess., *reprinted in* HAW. SENATE J. 1191 (Committee on Agriculture, Labor, and Employment); S. STAND. COMM. REP. No. 1211, 18th Leg., 1995 Reg. Sess., *reprinted in* HAW. SENATE J. 1283 (Committee on Judiciary).

[145] S. STAND. COMM. REP. No. 1211, 18th Leg., 1995 Reg. Sess., *reprinted in* HAW. SENATE J. 1283.

[146] S. STAND. COMM. REP. No. 963, 18th Leg., 1995 Reg. Sess., *reprinted in* HAW. SENATE J. 1191.

> complying with the public trust and confidence conferred upon them by making public the State Ethics Commission's enforcement hearings and disciplinary actions taken against state officials and employees who violate the Code.[147]

Additionally, there was overwhelming testimony in favor of the bill. Favorable testimony was received from the Democratic Party of Hawai'i,[148] the State Ethics Commission[149] and the League of Women Voters.[150] No significant opposition to the bill ever arose. The fact that the bill passed with overwhelming support indicates the public's as well as the legislature's desire for openness in government. The recent revisions to the State of Hawaii Ethics Commission's confidentiality provisions along with collaborative support, illustrates a trend towards opening government to the people. Although the City Ethics Comission is not bound by procedures maintained by the State Ethics Commission, these amendments provide a background against which revisions to the City Ethics Commission's proceedings should be considered.

VII. Recommended Revisions to the City Ethics Commission's Procedures

The current all-encompassing confidentiality requirements provisions maintained by the City Ethics Commission require revision for several reasons. The provisions promote secrecy, violate the fundamental principles of the First Amendment, conflict with the basic foundation of the Ethics Commissions, and directly oppose the current procedures of the State of Hawaii's Ethics Commission. These provisions fail to impose accountability, undermine public confidence and breed contempt, suspicion and mistrust. In order to make revisions to the ordinances, the revision must be submitted in the form of a bill, passed by the city council, and approved by the mayor.[151] Revisions to the

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[147] H.R. Stand. Comm. Rep. No. 200, 18th Leg., 1995 Reg. Sess., *reprinted in* Haw. House J. 1103, 1104. *See also* S. Stand. Comm. Rep. No. 1211, 18th Leg., 1995 Reg. Sess., *reprinted in* Haw. Senate J. 1283.

[148] H.R. Stand. Comm. Rep. No. 200, 18th Leg., 1995 Reg. Sess., *reprinted in* Haw. House J. 1103, 1104.

[149] H.R. Stand. Comm. Rep. No. 862, 18th Leg., 1995 Reg. Sess., *reprinted in* Haw. House J. 1354.

[150] *Id.*

[151] Revised Charter of the City & County of Honolulu 1973, ch 2, § 3-202 (1994 Edition).

rules may be submitted to the Commission by any person following the required form.[152] This part of the comment will make specific recommendations for revisions to the challenged provisions taking into consideration the points previously addressed in this comment.

Ordinance section 3-6.5(c)[153] and Rules of Procedure section 4.13(a),[154] which require that all records, reports, or documents received by the Commission remain confidential, should be amended to read:

> All records, reports, writings, documents, exhibits, and other evidence received by the Commission shall be held in confidence until the Commission completes an investigation. Upon completion of an investigation, all records, reports, writings, documents, exhibits, and other evidence received or prepared by the Commission shall be a matter of public record, unless a majority of the Commission determines that a compelling governmental interest necessitates that the item remain confidential.

This revision would allow the public to serve as a check on the Commission. It would provide the public the ability to assess and analyze the Commission's work. The current system does not allow the public access to the information that the Commission utilizes to make its determinations. The public is basically left to accept the Comission's opinion without the ability to review the basis for that opinion. The revision would deter potential abuse and make the Commission more accountable and more acceptable to the people.

Ordinance section 3-6.7(e)[155] and Rules of Procedure section 4.13(b),[156] which require that all hearings before the City Ethics Commission be

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[152] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § § 2.1-2 (1984).

[153] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 5(c) (1995) (emphasis added) reads:

> (c) *All records, reports, writings, documents, exhibits, and other evidence received by the commission shall be held in confidence* and no information as to the contents thereof shall be disclosed unless such items are presented and received by the commission at a hearing or meeting that is open to the public.

[154] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(a) (1984) (emphasis added) reads:

> (a) *All records, reports, documents, exhibits, and other evidence received by the Commission shall be held in confidence* and no information as to the contents thereof shall be disclosed unless such items are presented and received by the Commission at a hearing or meeting that is open to the public.

[155] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 7(e) (1995) (emphasis added) reads:

> (e) *All hearings before the commission involving an alleged conflict of interest of any*

held in executive session, which are held behind closed doors, should be amended to read:

> All hearings before the Commission involving an alleged conflict of interest of any employee or officer shall be open to the public, unless a majority of the Commission determines that a compelling governmental interest necessitates that the hearing be closed to the public. The findings and record of the proceeding shall be a matter of public record.

The rationale for this revision is basically the same as the rationale for the previous revision. It would allow the public to analyze the Commission's work and review the information utilized by the Commission to determine its decisions. It would increase the accountability and the trustworthiness of the Commission.

Ordinance section 3-6.3(g)[157] and Rules of Procedure section 4.13(c),[158] which enables the Commission to keep any contents of an allegation confidential indefinitely, should be amended to read as follows:

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employee or officer shall be held in executive session, provided that a public hearing may be held where such officer or employee, alleged to have a conflict of interest, consents thereto.

[156] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(b) (1984) (emphasis added) reads:

(b) *All hearings before the Commission shall be held in executive session*; provided that a public hearing may be held where the officer or employee alleged to have the conflict of interest requests or consents to a public hearing.

[157] HONOLULU, HAW., REV. ORDINANCES ch. 3, art. 6, § 3(g) (1995) (emphasis added) reads:

(g) *Any commission member or commission staff, who divulges information concerning the allegation* prior to the issuance of an advisory opinion by the commission, or *if the investigation discloses that the advisory opinion should not be issued by the commission, any commission member or commission staff who, at any time, divulges any information* concerning the original allegation, or divulges the contents of disclosures except as permitted by this article, *shall, if found guilty, be subject to the applicable provisions of Section 11-106 of the revised charter.*

[158] RULES OF PROCEDURE OF THE ETHICS COMMISSION, CITY & COUNTY OF HONOLULU, § 4.13(c) (1984) (emphasis added) reads:

(c) Pursuant to Section 3-2.3(g), ROH:

(g) *Any individual,* except as hereinafter provided, including the individual making the allegation, who divulges information concerning the allegation prior to the issuance of an advisory opinion by the Commission, *or if the investigation discloses that the advisory opinion should not be issued by the Commission, at any time divulges any information* concerning the original allegation, or divulges the contents of disclosures except as permitted by this ordinance, shall, *if found guilty, be punishable by a fine of not more than $1,000.00 or imprisonment of not more than one year, or both*, except that an officer or employee shall be subject to the provisions of Section 11-106 of the Revised Charter.

> Within thirty days after a request for an opinion, or within thirty days after a final hearing on any request shall have been concluded, whichever is later, the Commission shall render its opinion in writing and shall set forth the reasons for the opinion. All requests for advisory opinions and the Commission's advisory opinions shall be a matter of public record.

This revision would require the Commission to address each and every request for an advisory opinion that it receives. It would provide the public with confidence that each request is thoroughly investigated. Under the present procedures, if the Commission determines that an advisory opinion will not be issued, the Commission has the power to keep the allegation of misconduct confidential indefinitely. The potential for abuse is manifest.

While changes to the ordinances and the rules are relatively easy, revisions to the Charter provide greater difficulty. A Charter revision requires a resolution by the council, a petition signed by ten percent of registered voters from the last mayoral election, and the revision to be submitted to the voters at the following election.[159] The Charter requires the Commission to publish advisory opinions but to make the necessary deletions to prevent disclosure of the parties involved.[160] It may be argued that opening the Commission's records and hearings to the public would not violate the Charter. Literally, the Charter requires that the Commission delete any information necessary to prevent disclosure of the parties involved only when publishing "advisory opinions" and, thus would not apply to public records or hearings. Even if it is determined that the Charter requires that the parties identities must be protected from any disclosure, the recommended revisions could be amended to comply with the Charter. Such deletions as may be necessary could be made to prevent disclosure of the identity of the persons involved from the public records and hearings. Furthermore, a revision to the Charter could be made to delete this provision.

VIII. Opposing Viewpoints

Proponents of confidentiality maintain that several state interests are served by keeping the Ethics Commission's proceedings confidential.[161]

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[159] Revised Charter of the City & County of Honolulu 1973, art. XV, § § 15-101, 102 (1994 Edition).

[160] Revised Charter of the City & County of Honolulu 1973, art. XI, § 11-107 (1994 Edition). The Charter does not require confidentiality of Ethics Commission proceedings but states: "The Commission shall publish its advisory opinions with such deletions as may be necessary to prevent disclosure of the identity of the persons involved." *Id.*

[161] *See, e.g.*, Lind v. Grimmer, 859 F. Supp. 1317 (D. Haw. 1993), *aff'd*, 30 F.3d

These interests include: 1) protection of complainants and witnesses from retaliation; 2) protection of the reputation of the accused; 3) facilitation of the investigation; and 4) maintaining confidence in the Ethics Commission.

The United States Supreme Court reviews provisions which restrict protected speech by first determining whether the provision is restricting speech that is content-based[162] or content-neutral."[163] The *Lind* court determined that the confidentiality provisions of the State Ethics Commission regulate speech on the basis of its content.[164] The court held that in order to justify regulation of content-based speech, the provisions "are subject to strict scrutiny and require a governmental showing that the regulation in question is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[165] Therefore, in analyzing the interests articulated by proponents of confidentiality the question becomes whether the interests are compelling enough to repress citizens from knowing the functioning of the Ethics Commission's proceedings and whether or not they are necessary and narrowly drawn.[166] Many of the state interests articulated have previously been

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1115 (9th Cir. 1994) (confidentiality of proceedings before the State Ethics Commission in Hawai'i); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (confidentiality of proceedings before Virginia Judicial Inquiry and Review Commission); Providence Journal Co. v. Newton, 723 F. Supp. 846 (D.R.I. 1989) (confidentiality of proceedings before the Rhode Island government Ethics Commission).

[162] *Lind*, 859 F. Supp. at 1322 (citing Police Dept. v. Mosely, 408 U.S. 92, 95 (1972) ("A content- based regulation restricts speech precisely because of the ideas or information that the speech contains or eause of its general subject matter.")).

[163] *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 797-801 (1989) ("A content-neutral regulation involves an incidental interference with speech merely as a byproduct of the government's effort to regulate some evil unconnected with the content of the affected speech.")).

[164] Lind v. Grimmer, 30 F.3d 1115, 1118 (9th Cir. 1994). The court noted that this conclusion agrees with the majority of court decisions that have addressed similar statutes. *Id.* (citing Butterworth v. Smith, 494 U.S. 624 (1990) (confidentiality of grand jury testimony); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, (1978) (testimony before judicial review board); First Amendment Coalition v. Judicial Inquiry & Review Bd., 784 F.2d 467 (3d Cir. 1986) (testimony before judicial review board)).

[165] *Lind*, 859 F. Supp. at 1323. The Supreme Court uses the strictest scrutiny standard provided by the federal courts in analyzing governmental restrictions on content-based speech because the restrictions conflict with the fundamental principles protected by the First Amendment. Content-neutral restrictions of protected speech are subjected to a lesser level of judicial review. *Id.*

[166] *See* Providence Journal Co. v. Newton, 723 F. Supp. 846, 857 (D.R.I. 1989).

considered by the courts in varying contexts. This part of the comment considers these interests in the context of the Ethics Commission.

A. *Protection of Complainants and Witnesses*

A principal if not the main concern of discontinuing confidentiality of Ethics Commission's proceedings is the protection of potential complainants and witnesses.[167] "Confidentiality is thought to encourage . . . the willing participation of relevant witnesses by providing protection against retaliation or recrimination."[168] There is a fear that without confidentiality potential complainants and witnesses would be reluctant to come forward with complaints.[169]

The concern of the Ethics Commission of protecting potential complainants and witnesses is a legitimate issue. However, this concern is considerably diminished by the fact that there are already laws in place to provide protection to these individuals. The Whistleblowers' Protec-

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The court held that the defendant did not advance interests sufficient to justify the confidentiality requirements of Rhode Island government ethics law. *Id.*

[167] Telephone Interview with Carolyn Stapleton, Legal Counsel for the Ethics Commission, City & County of Honolulu, in Honolulu, Haw. (Aug. 17, 1995). Ms. Stapleton states that the protection of potential complainants and witnesses is her main concern with openning the proceedings to the public. *Id.*

[168] *Lind*, 859 F. Supp. at 1333. The court found the following interests to be served by keeping the Campaign Spending Commission's proceedings confidential. They include:

> 1. Confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. 2. [T]he confidentiality of the proceedings protects those complained of from the publication of unexamined and unwarranted complaints. 3. To prevent a complaint from enhancing the veracity and credibility of his complaint by invoking the name of the Campaign Spending Commission. 4. Confidence in the Legislature is maintained by avoiding premature announcement of groundless claims of campaign contribution violations since it can be assumed that some frivolous complaints will be made against Legislators who rarely can satisfy all contending constituents. 5. Confidentiality is thought to promote the effectiveness of an investigation.

Id.

[169] Telephone Interview with Carolyn Stapleton, Legal Counsel for the Ethics Commission, City & County of Honolulu, in Honolulu, Haw. (Aug. 7, 1995). Ms. Stapleton reports that her experience with the Ethics Commission has proven that potential complainants and witnesses already exhibit a reluctance to come forward with complaints even though the current system ensures confidentiality. It is her belief that opening the proceedings to the public would exacerbate the problem. *Id.*

tion Act[170] was initiated by the Hawaii Legislature with the specific purpose of protecting complainants and witnesses in situations such as this. The legislative history of this act reveals that the legislature intended to shield the public by giving certain protections to individuals for 'blowing the whistle' on violations of law.[171] The statute prohibits an employer from discharging, threatening, or discriminating against an employee who reports violations of a law or rule or who participates in an investigation of wrongdoing.[172] A witness or complainant may bring a civil action for injunctive relief as well as damages for a violation of this provision.[173] While the protection of complainants and witnesses is a valid concern, the Whistleblowers' Protection Act minimizes the concern by providing protection against potential retaliation, and it does not meet the necessary compelling interest requirement to justify confidential proceedings.

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[170] HAW. REV. STAT. § 378-61 (Supp. 1991).

[171] S. STAND. COMM. REP. No. 1127, 14th Leg., 1987 Reg. Sess., *reprinted in* 1987 HAW. SENATE J. 1391 ("providing protection to government employees and citizens who are willing to blow the whistle when they are aware of ethical or other violations of law will help the State maintain high standards of ethical conduct."); H.R. STAND. COMM. REP. No. 25, 14th Leg., 1987 Reg. Sess., *reprinted in* 1987 HAW. HOUSE J. at 1090.

[172] HAW. REV. STAT. § 378-62 (Supp. 1991) (emphasis added). The statute provides:

> *An employer shall not discharge, threaten, or otherwise discriminate against an employee* regarding the employee's compensation, terms, conditions, location, or privileges of employment because:
>
> (1) *The employee*, or a person acting on behalf of the employee, *reports or is about to report to a public body*, verbally or in writing, *a violation or a suspected violation of a law* or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee knows that the report is false; or
>
> (2) An employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

[173] HAW. REV. STAT. § 378-63 (1985) (emphasis added). The statute provides:

> Civil actions for injunctive relief or damages.
>
> (a) *A person who alleges a violation of this part may bring a civil action for appropriate injunctive relief, or actual damages,* or both within ninety days after the occurrence of the alleged violation of this part.
>
> (b) An action commenced pursuant to subsection (a) may be brought in the circuit court for the circuit where the alleged violation occurred, where the complainant resides, or where the person against whom the civil complaint is filed resides or has a principal place of business.
>
> (c) As used in subsection (a), "damages" means damages for injury or loss caused by each violation of this part, including reasonable attorney fees.

B. *Protection of the Accused*

Proponents of confidentiality are concerned for the reputations of public officials and employees who may be the target of unfounded complaints.[174] There is concern that adverse publicity and harm to reputation may occur by complainants filing frivolous charges for the sole purpose of damaging a person's reputation.[175] There is also a fear that revengeful complainants may attempt to use the fact that they filed a complaint with the Ethics Commission to enhance the credibility of their complaint.[176]

The fear of unwarranted, frivolous attacks on public officials and employees in order to soil one's reputation or to harass them is a genuine concern. It can be assumed that some frivolous complaints as a source of harassment will be made against individuals within the public eye because they are unable to satisfy everyone.[177] However, the Supreme Court has repeatedly found that injury to reputation is an insufficient reason for suppressing political speech.[178] The First

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[174] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 833 (1978). The court identified three main functions that were advanced by providing confidentiality before a Judicial Inquiry and Review Commission. They include 1) protecting a judge's reputation from frivolous complaints; 2) maintaining confidence of the judicial system; and 3) protecting complainants and witnesses from recrimination. *Id.*

[175] *See id.* at 833.

[176] Providence Journal Co. v. Newton, 723 F. Supp. 846, 856 (D.R.I. 1989). Defendants objecting to the Plaintiff's Motion for Summary Judgment, put forth seven functions that the contend to justify confidentiality requirements of which prohibited public discussion of the existence and content of ethics complaints. The requirements include:

> 1. to prevent a complainant with self-serving motives from publicly discussing an unfounded complaint until the Commission has had an opportunity to rule thereon; 2. to minimize the injury to the reputation of a public official caused by adverse publicity from unfounded complaints; 3. to maintain the public's confidence in its elected officials by preventing the premature disclosure of unfounded complaints; 4. to protect the complaintants and witnesses from possible recrimination; 5. to facilitate the investigation of the complaint; 6. to prevent the use of a state agency to injure the reputation of another person; and 7. to prevent a complainant from enhancing the veracity and credibility of his complaint by invoking the name of the ethics commission.

Id.

[177] *See supra* text accompanying note 168.

[178] New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964). The Supreme Court held that libelous statements criticizing the official conduct of a public official were matters of public concern and were constitutionally protected regardless of injury to official reputation. *Id.*

Amendment ensures freedom of speech on public issues, such that it should be, "uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[179] Criticism of the functioning of government does not lose its constitutional protection merely because it has the potential to cause harm to an individual's reputation.[180] To advance government interests, public employees working on behalf of the people must be prepared to bear an increased level of criticism regarding improprieties.[181]

The fear that the filing of a complaint with the Ethics Commission would enhance the credibility of the complaint can be countered through education of the public on the process. It is important to educate the public that "[b]ecause the state has no influence over when or whether a complaint is filed, the fact of filing simply cannot signal the State's approval of a complainant's charges."[182] The fact of filing is indicative only of an allegation of a violation of the Code of Ethics and does not give viability to the complaint. Although protecting the privacy and reputations of public officials and employees is a legitimate interest, the Supreme Court has determined that injury to reputation is not a sufficient reason for suppressing political speech and that the interest is not compelling. Moreover, the concern that filing a complaint would add validity to the complaint can be minimized by educating the public that filing a complaint is merely an allegation of wrongdoing. It would not be considered compelling enough to substantiate retention of confidentiality.

C. Facilitation of the Investigation

An additional concern of proponents is the apprehension that lack of confidentiality of the Ethics Commission's proceedings would hinder the Commission's activities. Confidentiality is thought to facilitate the work of the Ethics Commission.[183] Several predictions have been made

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[179] *Id.* at 270 (1964). "[P]ublic discussion is a political duty; and that this should be a fundamental principle of the American government." *Id.*

[180] *Id.* at 273.

[181] *Id.*

[182] Lind v. Grimmer, 30 F.3d 1115, 1119 (9th Cir. 1994). The court held that this concern was insufficient to justify a restriction on speech as it could be countered by making the public aware that anyone can file a complaint in spite of its substance. *Id.*

[183] *Id.* at 1120.

that elimination of confidentiality would hinder the Commission's activities because it would encourage unfounded complaints, bring undue public pressure to the Commission, and result in a disincentive for parties to settle.[184]

The strength of this assertion is substantially reduced by the fact that it is based merely on speculation and is not substantiated by actual facts. It is extremely difficult to estimate the potential effect that lack of confidentiality would have on the Commission's activities. "Official speculation and anxiety about the dangers of protected speech can never serve to justify its censorship[.]"[185] Moreover, if the assertions do come true and the commission is overloaded with additional work, confidentiality would not be considered a necessity as other less restrictive alternatives are available.[186] Potential problems with increased frivolous complaints, fewer cases settling, and additional pressure placed on the Commission from public inquiries, could be handled internally by the Commission. The Commission could look at becoming more efficient by streamlining its investigatory processes, by hiring more staff, or by implementing other internal procedures which would provide less restrictive alternatives.[187] Therefore, it would not follow that the requirement of confidentiality is necessary or narrowly drawn. Because there is no factual support that the elimination of confidentiality would hinder the Commission's work and because less restrictive alternatives are available to the Commission, confidentiality cannot be considered necessary to justify maintaining confidential proceedings.

D. Maintaining Confidence in the Ethics Commission

Another pertinent issue that proponents of confidentiality argue is that by maintaining confidentiality in the Ethics Commission's proceedings, they maintain confidence in the Ethics Commission. There is belief that the best way to maintain confidence in the system is "by preventing the premature disclosure of a complaint before the Commission has determined that the charge is well founded[.]"[188]

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[184] *Id.*

[185] Providence Journal Co. v. Newton, 723 F. Supp. 846, 859 (D.R.I. 1989). The court stated that it required a "solidity of evidence" and not just mere assertions that are unsubstantiated. *Id.*

[186] *Lind*, 30 F.3d at 1120.

[187] *Id.*

[188] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 833 (1978) (maintaining confidentiality of judicial review commissions is perceived to ensure confidence in the judges).

The claim that confidentiality maintains confidence in the system is based on the assumption that the best way to keep the public's confidence is to keep them uninformed.[189] On the contrary, there are indications that the confidentiality actually undermines public confidence. "Mistrust of government, we believe, grows more from enforced silence, with its potential for breeding 'resentment, suspicion and contempt,' than from free wheeling discussion and debate, however 'premature.'"[190] In a system of secrecy, the public is unable to assess whether justice is or is not being served by the Commission's work. The integrity of the Commission and the appearance of justice would be increased by providing access to the proceedings, as the public would be allowed the opportunity to participate in and to serve as a check upon the process.[191] The most desirable way to satisfy the appearance of justice is to allow the people the ability to observe it.[192] Respect for the law is increased as well as the public's confidence, which could never occur in a system of secrecy.[193]

Although proponents argue that confidentiality maintains confidence in the Ethics Commission, the argument is unconvincing due to indications which point to the contrary. Because there are signs to indicate that confidentiality actually frustrates public confidence, the argument fails to meet the compelling interest test.

IX. Conclusion

Constitutional law provides that "debate on public issues should be uninhabited, robust, and wide-open."[194] Moreover, "a major purpose

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[189] *See* Jeffrey M. Shaman & Yvette Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 Temp. L.Q. 764 (1985) (examining confidentiality in the judicial disciplinary process).

[190] Providence Journal Co. v. Newton, 723 F. Supp. 846, 857 (D.R.I. 1989) (quoting Bridges v. California, 314 U.S. 252, 270-71 (1941) (concerning confidentiality requirements of government ethics law)). The court held that "it is a fundamental assumption of our system of government that the public's confidence in its elected officials is best maintained not by shielding them from public criticism but by welcoming it." *Providence*, 723 F. Supp. at 857.

[191] Globe Newspaper Co. v. Massachusetts, 457 U.S. 596, 604 (1982) (holding that the First Amendment guarantees individuals participation in our nations system of self-government including the right that criminal trials cannot be closed to the public).

[192] Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 572 (1980). "One of the demands of a democratic society is that the public should know what goes on in courts . . . that the public may judge whether our system of criminal justice is fair and right." *Id.* at 574 (quoting Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari)).

[193] *Richmond*, 448 U.S. at 572.

[194] New York Times, Co. v. Sullivan, 376 U.S. 254, 270 (1964).

of the [First] Amendment was to protect the free discussion of governmental affairs.''[195] An unsettling dichotomy exists between the goals of the First Amendment and the confidentiality provisions maintained by the Ethics Commission of the City and County of Honolulu. In addition, these provisions directly oppose provisions maintained by the Ethics Commission of the State of Hawai'i, the purpose for which the Commission was founded, and the modern trend toward openness in government. The Ethics Commission is a public agency conducting public business and needs to be open and accountable to the public.

The recommended revisions would open the Ethics Commission's proceedings to the public, ensure accountability, heighten integrity, and further facilitate the purposes of the Commission. ''[P]ublic discussion of ethics in government . . . will arguably facilitate the purposes of the Commission much more than the Commission's current, contradictory attempt to air such issues in secret.''[196]

While proponents of confidentiality put forth interests in support of it, those interests are insufficient to justify restriction of rights protected by the First Amendment. The countervailing interest of protecting the free discussion of governmental affairs guaranteed by the First Amendment makes it extremely difficult to justify the need for maintaining confidentiality. The continuance of these provisions is likely to result in future litigation where a constitutional challenge to these provisions would not be easily dismissed. These provisions require immediate attention, reevaluation and revision.

Toni M. Nelson[197]

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[195] Providence Journal Co. v. Newton, 723 F. Supp 846, 851 (D.R.I. 1989) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[196] *Id.* at 859.

[197] Class of 1997, William S. Richardson School of Law. The author wishes to thank Larry Meacham, Executive Director, Common Cause Hawaii, for his assistance and guidance with this project. The author also wishes to thank David Callies, Esq., Professor of Law, William S. Richardson School of Law, Jon Yoshimura, Esq., City Councilmember, City and County of Honolulu, and Carolyn Stapleton, Esq., Legal Counsel for the Ethics Commission, City and County of Honolulu, for their helpful suggestions and feedback.

Fighting in Another Direction: The Posse Comitatus Act and the War on Drugs in Hawai'i Under *State v. Pattioay*

I. INTRODUCTION

In the 1970's, the U.S. began a "war on drugs" and it had been relatively successful until a few years ago.[1] The use of illicit drugs by Americans steadily declined from the start of the "war" until it reached an all time low in 1992.[2] When the Clinton administration took office, for the first time since the "war" was declared, drug use was not considered a national priority.[3] Not surprisingly, the rate of illicit drug use began to increase at about this time.[4] Today, drug use and abuse is on the rise in all areas of our society[5] and it is costing the American people billions of dollars every year in lost productivity, medical expenses, and construction costs for correctional facilities.[6] President Clinton, facing these statistics and his own administration's inability

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[1] *Prepared Testimony by John P. Walters Before the Committee on the Judiciary, United States Senate Friday, February 10, 1995*, Fed. News Serv. Wash. Package, Feb. 2, 1995, *available in* Westlaw, FEDNSWASH [hereinafter *Walters Testimony*].

[2] 141 CONG. REC. S9514-01 (daily ed. June 30, 1995) (Statement of Sen. Dole).

[3] *Walters Testimony*, *supra* note 1.

[4] *Id.*

[5] 141 CONG. REC. S9514-01 (daily ed. June 30, 1995) (Statement of Sen. Dole); Angela Miller, *The Cops, Suspect High on Crystal Meth is High Risk for Police Safety*, HONOLULU ADVERTISER, Oct. 1, 1995, at B5.

[6] 140 CONG. REC. S9256-03, S9257, S9258 (daily ed. July 19, 1994) (Statement of Sen. D'Amato). *See* Angela Miller, *Oahu on Ice*, HONOLULU ADVERTISER, Oct. 1, 1995, at A1 (stating that drugs are fueling a crime wave in Hawai'i); Angela Miller, *The User*, HONOLULU ADVERTISER, Oct. 1, 1995, at A5 (stating the effects of drugs on family and finances); Eric Gregory and Angela Miller, *The Counselor*, HONOLULU ADVERTISER, Oct. 1, 1995, at B5 (exploring treatment centers as a valuable alternative to jails and hospitals).

to deal with the problem,[7] has returned the "war on drugs" to its rightful position among the most serious of national threats.[8] The President's proposed plan will expand previously established treatment programs, increase the number of police officers, and will refine the cooperation between federal and local police organizations.[9] One area that has received special attention throughout the "war on drugs" campaign is the military.[10] The military's role in the "war on drugs" has expanded greatly over the last decade but the increased participation has mainly affected activities beyond U.S. borders with little mentioned about a domestic military-use policy.[11] In communities with military bases, the cooperation between local police authorities and military investigators can be a valuable weapon to combat the recent trend towards increased drug use and abuse.

The amount of cooperation that can lawfully exist between the military and the civilian authority is a question that has revitalized a post Civil War statute,[12] the Posse Comitatus Act

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[7] 141 CONG. REC. S9514-01 (daily ed. June 30, 1995) (Statement of Sen. Dole). *See Walters Testimony*, *supra* note 1 (speaking about the former Surgeon General of the United States, appointed by President Clinton, who advocated the consideration of legalizing drugs).

[8] *Prepared Testimony of the Honorable Lee P. Brown Director Office of National Drug Control Policy Executive Office of the President Before the Senate Committee on the Judiciary Friday, February 10, 1995*, Fed. News Serv. Wash. Package, Feb. 2, 1995, *available in* Westlaw, FEDNSWASH [hereinafter *Brown Testimony*].

[9] *Walters Testimony*, *supra* note 1; Lt. Col. Thomas S.M. Tudor, USAF & Maj. Mark E. Garrand, USAF, *The Military and the War on Drugs*, 37 A.F. L. REV. 267, 269 (1994).

[10] 10 U.S.C. § 375 (1981). The Secretary of Defense was given the authority to make regulations controlling the use of the military in the enforcement of civil laws. *Id.* Section 375 was amended in 1988 and 1989 to give greater flexibility and scope to the use of military participation in the war on drugs. Section 375 now reads "any activity under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest or other similar activity unless participation in such activity by such member is otherwise authorized by law." *Id.*

[11] *See* Tudor, *supra* note 9, at 276-278 (1994) (stating that § 375 of Title 10 provides an exception to the Posse Comitatus Act in order to encourage greater Department of Defense counter-drug support for overseas operations).

[12] *See* 18 U.S.C. § 1385 (providing that no specific constitutional provision prohibits the armed forces from enforcing then laws of the land). Many provisions of the U.S. Constitution tend to tightly control the standing army. *See* U.S. CONST. art I, § 8 (stating that Congress has the power to raise armies and declare war); U.S. CONST. art II, § 2 (stating that the President is designated Commander-in-Chief).

(PCA).[13] This Act was enacted to limit the use of the military in the enforcement of civil laws.[14] The Hawaii Supreme Court in *State v. Pattioay*,[15] recently affirmed a state circuit court ruling that the U. S. Army had violated the Posse Comitatus Act when it conducted an investigation of civilian drug dealers.[16] The Hawaii Supreme Court also affirmed the lower court's ruling suppressing the evidence which was gained during this investigation.[17]

This case note first examines the Posse Comitatus Act's history and corollary statutes in Part II. The facts of *Pattioay* are discussed in Part III. The Hawaii Supreme Court's decision is analyzed in part IV followed by critical commentary on the decision in Part V. The potential impact of this decision is briefly discussed in part VI. In Part VII this note concludes that the Hawaii Supreme Court has made an important decision with regard to drug investigations but has not provided an adequate legal basis with which to guide the legal and military communities.

II. Legal Authorities Pertaining to the Military Investigation of Civilians

A. *Posse Comitatus Act*[18]

1. *History*

Traditional American antipathy for standing armies originated in pre-Revolutionary War times when British soldiers routinely quartered

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[13] 18 U.S.C. § 1385 (1994). The Posse Comitatus Act states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, wilfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Id.

[14] Maj. Clarence I. Meeks III, USMC, *Illegal Law enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L.R. 83 (1975). The Act as passed in 1878 read:

> From and after passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $10,000 or imprisonment not exceeding two years or both such fine and imprisonment.

Id. at 92 n.67 (citing 7 Cong. Rec. 4648).

[15] 78 Hawai'i 455, 896 P.2d 911 (1995).

[16] *Id.* at 470, 896 P.2d at 926.

[17] *Id.*

[18] 18 U.S.C. § 1385 (1994). The Posse Comitatus Act states:

themselves in private homes.[19] After the Revolution, the quartering of soldiers in private homes was prohibited by the Third Amendment to the U.S. Constitution.[20] However, the Judiciary Act of 1789 allowed federal marshals to "'command all necessary assistance in the execution of his duty. . . .'"[21] The Act did not specifically address the use of the military, but in 1792, an act was passed that allowed the use of the state militia to enforce the laws of the land.[22] This Act authorized the calling into service of the militia, not the standing army, in the execution of civil law and was based on the constitutional distinction between the two groups.[23] The distinction between the regular standing army and the militia faded with time until it became standard procedure for a federal marshal to call the regular army into service for the execution of civil law.[24] In 1854, the Attorney General of the U.S. issued an opinion which gave U.S. Marshals the authority to order any military member into their posse for the purposes of enforcing civil law.[25] The rationale behind this opinion was that any person who is participating in a sheriff's posse comitatus is acting so purely as a

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Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, wilfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Id. See also United States v. Hartley, 796 F.2d 112, 114 n.3 (5th Cir. 1986) (stating that posse comitatus translated from Latin literally means the "power of the county" meaning the power of the sheriff to call into service anyone over the age of fifteen to assist him in the enforcement of the civil laws).

[19] *See* Kurt A. Schlichter, Comment, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291, 1297 (1993). *See* Meeks, *supra* note 14, at 86 ("Eighteenth century colonists were distraught over the British practice of requisitioning their property for use as quarters for British soldiers.").

[20] U.S. CONST. amend. III. "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be proscribed by law." *Id.*

[21] Meeks, *supra* note 14, at 88 (citing The Judiciary Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87).

[22] *Id.* (citing Act of May 2, 1792, ch. 28, § 9, 1 Stat. 265).

[23] U.S. CONST. art I, § 8, cl. 15. "To provide for calling forth the militia to execute the Laws of the Union, suppress insurrections and repel invasions . . . ." *Id. See* State v. Valdobinos, 858 P.2d 199 (Wash. 1993) (stating that the question of whether the National Guard is "militia" and therefore exempt from the PCA is still an issue today).

[24] Meeks, *supra* note 14, at 88-89.

[25] *Id.* (citing 6 OP. ATT'Y GEN. 466, 473 (1854)).

private citizen.[26] The PCA was originally intended to limit the Army's involvement in post-Reconstruction elections.[27] In 1956, Congress codified Title 10 and moved the PCA to Title 18.[28]

The PCA served its purpose at the time of its enactment and then lay dormant for almost 80 years. In the early 1900's, the statute was characterized as "obscure and all but forgotten."[29] In the 1960's, the PCA resurfaced as a controversial issue due to military involvement in

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[26] *Id.*

[27] Immediately after the Civil War ended, Congress enacted the Reconstruction Act of 1867 which set up military government rule in the Southern states. For the next decade, military districts were governed by military commanders. The U.S. Army was used to suppress civil disturbances and to enforce the civil laws. It became commonplace to use federal troops to enforce tax collection, quell labor disputes and to guard polling places. Even after the Southern states had been restored to the union, the use of federal troops to enforce the civil laws continued. In 1871, Congress passed the Klu Klux Klan Act which gave the President of the United States the authority to use the military to suppress insurrection and domestic violence. President Grant used this authority to send federal troops into South Carolina to apprehend Klansmen and to suspend the writ of habeas corpus within the state. *Id.* at 83, 89-90.

In the ex-Confederate states where civil authority had been restored, the Democrats were upset with the interference by federal troops in the presidential elections taking place at that time. In the Presidential election of 1876, federal troops were used in the south to counter white intimidation at the polls aimed at the newly freed blacks. The common Democrat belief was that the troops had played a significant part in the outcome of the election. During the next two sessions of Congress, intense debates ensued over the funding of the Army and its role in civil matters. Eventually, the Army Appropriations Act was passed, of which section 15 established the PCA. *Id.* at 90-93.

[28] 10 U.S.C. addresses the armed forces. Section 15 of the Army Appropriations Act was replaced by Title 18 § 1385, the present form of the PCA. Act of Aug. 10, 1956, ch. 1041, § 18, 70A Stat. 626; 18 U.S.C. § 1385 (1956).

The federal circuit courts are split over whether the PCA applies to the Navy and Marine Corps. The Department of the Navy has self-imposed the PCA on itself as a matter of policy when the Secretary of the Navy issued instructions to the Department of the Navy citing the PCA and giving guidelines. DOD Directive 3025.12 (June 8, 1968) made the PCA applicable to all services. This directive was replaced by DOD Directive 3025.12 (August 19, 1971) which omitted the language making the PCA applicable to all services, and did not mention the Navy or Marine Corps. The Secretary of the Navy Instruction was still in effect at the time of the revision. The self-imposed regulation was valid regardless of whether the DOD Directive intended to omit the Navy and Marine Corps. United States v. Walden, 490 F.2d 372, 374 n.4 (4th Cir. 1974), *cert. denied*, 416 U.S. 983 (1974). *See also* Wrynn v. United States, 200 F. Supp. 457, 464 (E.D.N.Y. 1961) (stating that legislative history and interpretive opinions would indicate that the PCA is applicable to all of the armed services).

[29] Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).

criminal investigations.[30] But in the last two decades, the PCA has become a hotly contested issue in both the federal and the state courts.[31] The growing frequency of appearance of the PCA as an issue in the state courts is due mainly to the increased number of theft and drug trafficking investigations by military investigators that ultimately involve civilians.[32] Prior to its application to criminal investigations, the PCA primarily arose as an issue in cases involving the use of the military and state militia in the suppression of civil disturbances.[33] Regardless of this recent trend shifting the focus of the PCA to the local law enforcement scene, the PCA exists primarily to limit the use of the military to enforce the civil laws of the land.[34]

2. Corollary statutes

The most useful function of the PCA today is to define the allowable cooperation between the armed forces and civil law enforcement agencies without hampering the ability of the military to train for war.[35] In an effort to help with the "war on drugs," Congress in 1981, liberalized the restrictions of the PCA of 1878 by amending Title 10 of the U.S. Code.[36] Congress desired to increase the allowable cooperation between military and civilian law enforcement agencies in order to reduce the drug flow into the United States while at the same time maintaining the traditional separation of military and civilian authority.[37] Section 375 was

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[30] Meeks, *supra* note 14, at 84-85.

[31] *See id.* (indicating that *Chandler* is one of only a few cases in which the PCA was an issue before 1960 when the bulk of the cases began to emerge primarily dealing with the military investigation of civilian and not the Presidential Powers issue).

[32] *Id.*

[33] *Id.*

[34] *See* 18 U.S.C. § 1385 (1994) (stating that the use of the Army or Air Force as a posse comitatus to enforce the laws of the land is illegal in most cases).

[35] Steven S. Neff, Comment, *The United States Military vs. The Media: Constitutional Friction*, 46 MERCER L. REV. 977, 978 (1995); William Rosenau, *Non-Traditional Missions and the Future of the U.S. Military*, 18-SPG FLETCHER F. WORLD AFF. 31, 32 (1994); LCDR Kurt A. Johnson, USN, *Military Department General Counsel as "Chief Legal Officers": Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field*, 139 MIL. L. REV. 1, 4, 59 (1993).

[36] 10 U.S.C. § 371-378. Although the term amendment is used, Congress actually did not amend the PCA, but rather broadened the role of the military through other Acts with regard to the enforcement of civilian law. *Id.*

[37] *See* Leroy C. Bryant, *The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?*, 1990-DEC ARMY LAW. 3, 6 (1990).

added to Title 10 to give the Secretary of Defense the authority to make regulations controlling the use of the military in the enforcement of civil laws.[38] While section 375 included a provision that prohibited direct involvement of military personnel,[39] the section was amended in 1988 to allow for greater flexibility on the part of the military in assisting civil law enforcement agencies.[40] The corollary changes allow the military to provide civilian law enforcement agencies with equipment, maintenance, information and assistance,[41] but do not permit military personnel to directly participate in the arrest of civilians.[42] As an additional safeguard, section 376 was reenacted to ensure that military preparedness would not suffer because of support obligations to civilian law enforcement.[43]

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[38] 10 U.S.C. § 375. Section 375 maintains that "any activity under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest or other similar activity unless participation in such activity by such member is otherwise authorized by law." *Id.*

[39] *Id.*

[40] National Defense Authorization Act, FY 1989, Pub. L. No. 100-456, § 11041988 U.S.C.C.A.N. (102 Stat.) 2503, 2582. The intent was to expand the ability of the military to provide assistance to civilian police officers that was "consistent with the requirements of military readiness and the historic relationship between [them]." *Id.* In 1988, Congress also passed legislation to provide more funding for military support of drug enforcement authorities, enhance military surveillance operations, and to provide a military central command and control operation to monitor drug traffickers. *Id.* Congress authorized military personnel to conduct aerial reconnaissance and to intercept vessels and aircraft outside of U.S. boarders for the purpose of directing them to locations designated by civilian law enforcement agencies. *Id.* at 2580. In order to allow interdiction of international vessels and aircraft, Congress deleted from § 375 the provision which prohibited the direct participation of military personnel in interdictions outside of the U.S. 10 U.S.C. § 375 (1988). Congress also revived § 376 which mandates that military preparedness not suffer due to support of civilian law enforcement activities. 10 U.S.C. § 376 (1988). *See* 1988 U.S.C.C.A.N. (102 Stat.) 2503, 2582 (noting that the military capability could be compromised if military assets are drained by civilian agencies).

[41] 10 U.S.C. § 374. *See* United States v. Roberts, 779 F.2d 565, 567 (9th Cir. 1986) (stating that the Secretary of Defense may make military equipment available to the Coast Guard for law enforcement purposes), *cert. denied*, 479 U.S. 839 (1986); United States v. Khan, 35 F.3d 426, 431 (9th Cir. 1994) (stating that 10 U.S.C. § 375 and 32 C.F.R. § 213.10 interpret the PCA to allow indirect assistance to civilian law enforcement agencies).

[42] 10 U.S.C. § 375. *See* United States v. Rasheed, 802 F. Supp. 312, 323 (D. Haw. 1992) (stating that the Navy is prohibited from "direct participation" in an "search, seizure, arrest, or other similar activity."). *Cf.* State v. Short, 775 P.2d 458 (Wash. 1989) (holding that a civilian employee of the Navy was not considered a member of the armed services for § 375 purposes).

[43] 10 U.S.C. § 376.

B. Department of Defense

In addition to the PCA and in accordance with the amendments, the Department of Defense (DOD) issued a directive to assist the military in joint operations with civilian law enforcement authorities.[44] The DOD directive prohibits, in the absence of DOD approval, (1) the interdiction of vessels, vehicles, aircraft or similar activity, (2) a search and/or seizure, (3) an arrest, stop and frisk, or similar activity, and (4) the use of military personnel for surveillance or pursuit of individuals, informants, undercover agents, or investigators or interrogators.[45]

C. Exceptions

The PCA states in part "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress"[46] uses the military as a posse comitatus is violating the Act. Congress can provide exceptions to the PCA through constitutional amendment or by its regular lawmaking responsibility.

The PCA permits Congress to authorize uses of the military which would otherwise violate the act.[47] Regulation of military involvement in civil law enforcement is implemented in Title 10 of the U.S. Code,[48] which enables the President to order the military into action for reasons of insurrection, rebellion, natural disaster, or civil unrest.[49]

Depending upon the nature of the DOD interest and the specific action in question, the following purposes are permissible: (1) enforcement of the Uniform Code of Military Justice (UCMJ), and (2) actions which are taken for a primary military purpose.[50]

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[44] *See* 32 C.F.R. § 213.10(a)(3) (1989) (repealed in 1993 but continues now as DOD Directive 5525.5).

[45] *Id.*

[46] 18 U.S.C. § 1385 (1995).

[47] *Id.*

[48] 10 U.S.C. § 1374-375 (1995).

[49] 10 U.S.C. § 331 (1995).

[50] 32 C.F.R. § 213.10(a)(2)(I)(A), (F) (1992). Section 213 was removed in 1993. 58 Fed. Reg. 25776 (Apr. 28, 1993). "These parts have served their purpose and are no longer valid." *Id. See* Harker v. State, 663 P.2d 932, 936 (Alaska 1983) (noting that the majority of cases in which no violation of the PCA has been found, preventing members of the military from conducting drug transactions has been held as a valid military purpose regardless of whether such conduct took place on military installations).

DOD may permit incidental military assistance to local law enforcement agencies to investigate the impact of drug trafficking on a military installation.[51] DOD allows the military to assist civilian law enforcement agencies if (1) there are reasonable grounds to believe that a person has committed a drug crime with a person who is subject to the UCMJ[52] and the investigation is an attempt to gain all evidence pertaining to the person who is subject to the UCMJ, or (2) there are reasonable grounds to believe that a civilian person is the immediate source of illegal drugs entering a military installation and the investigation seeks to gain all evidence concerning all persons involved in the drug trafficking.[53]

The PCA limits the use of the military in civilian law enforcement. In order to use the military to enforce civilian law and avoid violating the PCA, there must be an exception found either in the Constitution or laws enacted by Congress. Congress controls the amount of allowable military participation in civilian law enforcement through amendments to Title 10. When the "war on drugs" became a critical issue, Title 10 was amended and the military was allowed to participate in a broader range of civilian investigations.[54]

III. FACTS OF *State v. Pattioay*[55]

The U.S. Army's Criminal Investigation Department (CID) at Schofiled Barracks in Wahiawa, Hawai'i, began an investigation based on information provided by a military dependant[56] who was the subject of a prior drug trafficking investigation.[57] The military dependant informant

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[51] Hayes v. Hawes, 921 F.2d 100, 103 (7th Cir. 1990) ("[W]here there is an independent military purpose of preventing illicit drug transactions to support the military involvement, the coordination of military police efforts with those of civilian law enforcement officials does not violate either § 1385 or § 375.").

[52] 10 U.S.C. § 802 (1994). Persons subject to the UCMJ include active duty and reserve personnel, National Guard and Air National Guard when serving in a federal status, retirees, cadets, midshipmen, other federal employees when serving with the armed forces, and other persons in special circumstances and usually depending on pay and service with the armed forces. *Id.*

[53] 32 C.F.R. § 213.10(a)(2)(I)(A), (F) (1992).

[54] Peter M. Sanchez, *The "Drug War": The U.S. Military and National Security*, 34 A.F. L. REV. 109, 122-25 (1991).

[55] 78 Hawai'i 455, 896 P.2d 911 (1995).

[56] A military dependant is someone who is supported by an active duty member of the military. The most common military dependants are spouses and children.

[57] *Id.* at 457, 896 P.2d at 913.

informed Army CID investigators that the suspects were selling drugs to military personnel.[58] The suspects were civilians who did not live on the Army base and had no personal connection to the military.[59] After CID obtained proper authorization[60] from the Army's regional headquarters in Korea, investigators commenced an investigation targeting the defendant.[61] The investigation was conducted as a joint effort with the Honolulu Police Department (HPD) and consisted of several controlled drug purchases.[62] When an Army CID investigator attempted to buy drugs from the defendant, he was specifically asked to show his military identification, which he did.[63] The CID investigator made six controlled drug purchases from the defendants.[64] Each time, he was armed and accompanied by a surveillance team made up of both Army CID investigators and HPD officers.[65] Following the final drug purchase, HPD obtained warrants, searched the suspects' house, and arrested the defendants.[66] Military personnel neither participated in the execution of the search warrants, nor did they participate in the arrests of the defendants.[67] The investigation concluded when the defendants were charged with 10 counts violating Hawai'i's drug laws.[68]

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[58] *Id.* Initially, the CID informant (dependant of military member) was the subject of an investigation involving drugs and later cooperated with CID as an informant. *Id.* at 457, 896 P.2d at 913.

[59] *Id.* All targets of the investigation were civilians and were not subject to the Uniform Code of Military Justice. *Id.* at 463, 896 P.2d at 919.

[60] *Id.* The CID supervisor testified that the request for approval procedures were followed in this case, but this evidence was admitted only to show what normally happens because the supervisor had no personal knowledge of the facts. *Id.* at 458, 896 P.2d at 914.

[61] *Id.* at 457, 896 P.2d at 913.

[62] *See id.* (CID agent made six controlled buys).

[63] *Id.* For the first two controlled buys, the CID agent was instructed to show his military identification card. *Id.* at 457, 896 P.2d at 913.

[64] *See id.* at 457, 896 P.2d at 913 (CID agent made six controlled drug purchases).

[65] *Id.* "As in all previous buys, [the CID agent] was armed and the surveillance team provided protection for him." *Id.* at 457, 896 P.2d at 913.

[66] *Id.* at 457, 896 P.2d at 913.

[67] *Id.*

[68] *Id.* The first three counts were the product of an independent HPD investigation in which three purchases were made. Counts IV through VIII originated with the Army CID investigation and drug purchases. One defendant faced an additional charge of promoting a dangerous drug in the second degree. This additional charge and charges IX and X were the result of the HPD search warrant and were dropped because the warrant was based on the Army CID investigation. After the court ruled in favor of the defense on their motion to suppress the evidence, only counts I through III remained. *Id.* at 458-59, 896 P.2d at 914-15.

IV. Analysis of the Hawaii Supreme Court's *Pattioay* Rationale

A. *Posse Comitatus Act*

In deciding *Pattioay*, the Hawaii Supreme Court first had to determine whether the joint investigation violated the PCA.[69] The court ruled that the defendant, in alleging a violation of the PCA, had the burden of proof by a preponderance of the evidence that the military's actions actually violated the PCA.[70] The court held, based upon testimony of the CID investigator and the Army investigation request and approval documents, that the joint investigation lacked a valid military purpose.[71]

Under the Hawaii Supreme Court's analysis, a military operation must have as a primary purpose the furthering of a military function in order to avoid a violation of the PCA.[72] When a civilian is the target of an investigation, the primary military purpose of furthering a military function is valid if there is a recognizable nexus between either the civilian and a person who is subject to the UCMJ, or between the civilian and a military installation.[73] The court first looked at what prompted the investigation and found that the Army documents requesting investigation authorization contained a statement that the objective of the investigation was to assist HPD.[74] The court consequently ruled that the primary purpose of the investigation was not to further a military function.[75] The CID informant was not able to testify as to her connection with the defendants.[76] Therefore the court ruled that there was no nexus between the defendant and the military installation or personnel.[77] The court also rejected the Army's approval of the investigation as proof of a primary military purpose furthering a military function.[78]

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[69] *Id.* at 461-65, 896 P.2d at 917-21.

[70] *Id.* at 466, 896 P.2d at 922.

[71] *Id.* The CID request and authorization documents stated in part that the purpose of the investigation was to assist HPD in introducing a covert agent posing as a soldier because HPD officers cannot effectively pose as soldiers. *Id.* at 462 n.10, 896 P.2d at 918, n.10.

[72] *Id.* at 465, 896 P.2d at 921.

[73] *Id.* at 464, 896 P.2d at 920.

[74] *Id.* at 462 n.10, 896 P.2d at 918 n.10.

[75] *Id.*

[76] *Id.* The CID informant was brought in to testify from West Virginia, where she was in jail. The trial was continued due to defense counsel's illness, and the informant was never able to testify. *Id.* at 463 n.14, 896 P.2d at 919 n.14.

[77] *Id.*

[78] *Id.* at 466, 896 P.2d at 922.

B. Exclusionary Rule

Having found a violation of the PCA, the court next had to decide whether to suppress the evidence obtained in violation of the PCA.[79] At common law, illegally obtained evidence was still admissible at trial.[80] The exclusionary rule is a judge-made remedy used to suppress evidence obtained in violation of an accused's constitutional rights in order to deter such conduct by the police.[81] However, courts also occasionally invoke the exclusionary rule when certain rules or statutes are violated.[82]

In *Weeks v. United States*,[83] the U.S. Supreme Court established the federal exclusionary rule for violations of the Fourth Amendment.[84] The exclusionary rule at that time was only applied to cases involving federal agents[85] and was not applicable to the states and state agents until 1961.[86] In *Mapp v. Ohio*,[87] the Supreme Court held that the "exclusionary rule is an essential ingredient of the Fourth Amendment"[88] and that evidence obtained by state officers in an unreasonable search is inadmissible in a state criminal trials.[89]

The Hawaii Supreme Court correctly determined that there was not an unreasonable search and seizure issue in *Pattioay* under the U.S. Constitution nor the Hawaii State Constitution.[90] The court also found no grounds under the Hawaii Constitution which would support a claim that a person has a right to be free from the military investigation of a

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[79] *Id.*

[80] Larry L. Boshee, *The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal to Go Free Because the Soldier Has Blundered?*, 61 N.D. L. REV. 107, 126 (1985).

[81] Toby M. Tonaki et al., Comment, *State v. Quino: The Hawai'i Supreme Court Pulls Out All the "Stops,"* 15 U. HAW. L. REV. 289, 298 (1993).

[82] Boshee, *supra* note 80, at 126. *See* Lee v. Florida, 392 U.S. 378, 386-87 (1968) (excluding evidence obtained in violation of the Federal Communications Act).

[83] 232 U.S. 383 (1914).

[84] *Id.* at 398.

[85] *Id.*

[86] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (requiring invocation of the exclusionary rule for Fourth Amendment violations in state courts).

[87] 367 U.S. 643 (1961).

[88] *Id.* at 651.

[89] *Id.* at 655.

[90] State v. Pattioay, 78 Hawai'i 455, 466, 896 P.2d 911, 922 (1995). *See also* State v. Roy, 54 Haw. 513, 515, 510 P.2d 1066, 1068 (1973) (holding that there is no unreasonable search and seizure or invasion of privacy under the U. S. Constitution or the Hawaii State Constitution, when undercover agents conceal their identity and purchase drugs).

civilian crime.[91] The court acknowledged that the PCA is not analogous to constitutional rights.[92] The PCA does not create personal rights to be free from military investigations while constitutional rights are personal rights from which suppression of evidence results when these rights are violated.[93]

The court then had to decide whether to invoke the exclusionary rule as it applied to a violation of the PCA.[94] The Hawaii Supreme Court recognized that a violation of the PCA does not automatically warrant the use of the exclusionary rule.[95] The Hawaii Supreme Court stated that the circuit court erred when it upheld the suppression of the evidence based on a finding that there was a pattern of PCA violations.[96] The Hawaii Supreme Court instead chose to invoke the exclusionary rule based in part on the similarity of the PCA to another federal statute where the exclusionary rule was invoked to suppress evidence obtained in violation of that statute.[97] Additionally, the court relied heavily upon the inherent power of the judiciary to supervise and control the litigation process.[98] The court further relied on Hawai'i's traditional sensitivity to the military's presence.[99]

1. The Federal Communications Act as an analogous statute

The Hawaii Supreme Court premised its invocation of the exclusionary rule upon *Lee v. Florida*,[100] where there were violations of the Federal

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[91] *Pattioay*, 78 Hawai'i at 466, 896 P.2d at 922. *See also* Haw. Const. art I, § 16 (stating that "The military shall be held in strict subordination to the civil power.").

[92] *Pattioay*, 78 Hawai'i at 466, 896 P.2d at 922.

[93] *Id.* at 466-67, 896 P.2d at 922-23.

[94] *Id.*

[95] *Id.*

[96] *Id.* The Hawaii Supreme Court upheld the circuit court's order to suppress the evidence, but stated that the circuit court's order was based on wrong conclusions of a repeated and pervasive pattern of conduct. *Id.* at 469, 896 P.2d at 925.

[97] *Id.* The court attempted to analogize a case involving the Federal Communications Act of 1934. *Id.* at 467, 896 P.2d at 923.

[98] *Id.* at 469, n.28, 896 P.2d at 925 n.28.

[99] *Id.* at 467, 896 P.2d at 923.

[100] 392 U.S. 378 (1968). In *Lee*, the defendant had a telephone installed in his house. At the time, there were no private lines available so the defendant was given a telephone on a four-person line. The Orlando Police had a telephone installed on the same four-party line which also contained a recorder, automated actuator, and headphones. Police recorded Lee's calls for more than a week and gathered evidence of his activities. At trial, Lee objected to admission of the tapes as evidence but the

Communications Act[101] (FCA). In *Lee*, the U.S. Supreme Court held that evidence obtained in violation of the FCA was inadmissable based on the "imperative of judicial integrity."[102] The Hawaii Supreme Court followed the *Lee* decision because of its analogousness as a federal statute.[103] The court also analogized the U.S. Supreme Court's "imperative of judicial integrity" to the Hawaii Supreme Court's inherent powers.[104]

2. Inherent power of the courts

Applying the reasoning of *Lee* to bolster its holding, the Hawaii Supreme Court relied on its inherent powers recognized by the Hawaii Constitution.[105] The court stated that it has the inherent responsibility to (1) deter illegal police conduct, and (2) to recognize the inherent supervisory power of the courts of Hawai'i over criminal procedures to ensure that no government officials are allowed to illegally obtain evidence and use it in the courts of Hawai'i.[106] According to the court in *Pattioay*, "necessity" is the test for exclusion of evidence based on the court's inherent powers.[107] Even though the PCA does not contain the exclusion of evidence as a remedy, the court chose to invoke the exclusionary rule as an additional deterrent to violating the PCA.[108] The court stated that

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court held that the tapes were admissible. Lee was convicted and he appealed. The U.S. Supreme Court ruled the evidence should have been suppressed because the police violated the Federal Communications Act (FCA) which prohibits unauthorized interception of communications. While the FCA does not provide within its text that a violation of the Act results in the exclusion of the unlawfully obtained evidence, the Court held the evidence should be suppressed based on "judicial integrity" and the need to keep the courts from becoming accomplices to the wilful transgressions of the federal laws. *Id.* at 382-87.

[101] Federal Communications Act of 1934, 47 U.S.C. § 605.

[102] *Lee*, 392 U.S. at 385-86.

[103] *Pattioay*, 78 Hawai'i at 468, 896 P.2d at 924.

[104] *Id.*

[105] *Id.* at 469, n.28, 896 P.2d at 925 n.28. *See* HAW. CONST. art VI, § 1 (stating "The judicial power of the state shall be invested in one supreme court.").

[106] *Pattioay*, 78 Hawai'i at 468-70, 896 P.2d at 924-26. The Hawaii Supreme Court also affirmed the suppression of the evidence obtained by HPD during the search of the defendant's residence because the warrant was based in part on the CID investigation. *Id.*

[107] "Necessity is the sine qua non" explaining that necessity determines when the inherent power to exclude is used. *Id.* at 467 n.28, 896 P.2d at 923 n.28.

[108] *Id.* at 468-70, 896 P.2d at 924-26.

permitting only the statutory remedy would undermine the power of the state courts to supervise criminal proceedings and would give the appearance of judicial approval of federal statute violations.[109] The court held that the exclusion of evidence was necessary to "vindicate its authority" when there has been a violation of the PCA.[110] Based on its inherent powers, the court held that it must affirm the suppression of evidence obtained in violation of the PCA.[111]

3. Concurring opinion

Justice Ramil's concurring opinion, in which Chief Justice Moon joined, states an additional reason for invoking the exclusionary rule.[112] Describing the majority's reasoning as over broad, the concurring opinion identified Hawai'i's sensitivity towards martial law as a separate basis for invoking the exclusionary rule.[113] Justice Ramil argued that the exclusionary rule should only be used to remedy violations of an individual's constitutional rights and that the mere violation of a law does not justify invocation of the exclusionary rule.[114] Instead, Justice Ramil stated the historical sensitivity of military governance in Hawai'i during World War II[115] justified invocation of the exclusionary rule, even in the absence of widespread abuse of the PCA.[116]

V. COMMENTARY

This commentary will first consider the factors which other courts have used to determine whether a PCA violation has occurred and how they

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[109] *Id.*

[110] *Id.* at 469, 896 P.2d at 925.

[111] *Id.*

[112] *Id.* at 470-73, 896 P.2d at 926-295.

[113] *Id.* at 472, 896 P.2d at 928. "Trepidation toward the notion of military involvement in civilian law enforcement is particularly prominent in the state of Hawai'i. Indeed, many of our citizens still remember the period during World War Two when Hawai'i existed under martial law." *Id.*

[114] Justice Ramil stated: "The exclusionary rule should . . . apply only in situations where the evidence . . . was obtained in violation of an individual's constitutional rights. Thus, when government agents obtain evidence . . . without violating any constitutional rights, the exclusionary rule should only be applied in very limited situations." Justice Ramil further states that these cases should be examined to determine "whether the rationales underlying our exclusionary rule are served and whether the law violated warrants its application." *Id.* at 470- 71, 896 P.2d at 926-27.

[115] For a thorough discussion of martial law in Hawai'i during World War II, *see* Duncan v. Kahanamoku, 327 U.S. 304 (1946).

[116] *Pattioay*, 78 Hawai'i at 473, 896 P.2d at 929.

compare to the Hawaii Supreme Court's formulation in *Pattioay*. Next, the factors that other courts have used to determine whether to invoke the exclusionary rule as a result of a PCA violation are compared to the *Pattioay* PCA exclusionary rule analysis.

A. Has There Been a Violation of the PCA?

The PCA has not been dealt with as extensively and regularly in Hawai'i as it has been in other states and jurisdictions.[117] Courts that have ruled on PCA issues recognize three factors determinative of a PCA violation: (1) military purpose motivating the investigation,[118] (2) willful use of the military by civilian authorities,[119] and (3) extent of direct participation by military personnel.[120]

1. Valid military purpose

The Hawaii Supreme Court failed to recognize the importance of preventing drugs from making their way onto military bases to the efficiency and effectiveness of the armed forces. Drug abuse is a problem which results in low levels of readiness and affects the military's ability to carry out its primary mission which is to fight and win wars.[121]

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[117] *See id.* at 467 n.23, 896 P.2d at 923 n.23 (noting that State v. Howard, Crim. No. 93- 0582 (1st Cir. Haw., Jan. 6, 1994) is the only other case in Hawai'i that has found a violation of the PCA).

[118] Marrone v. Hames, 1994 WL 273885, at *3 (9th Cir. 1994) (unpublished disposition); United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988); United States v. Brown, 9 M.J. 666, 668 (N.C.M.R. 1980); Moon v. State, 785 P.2d 45, 47-48 (Alaska Ct. App. 1990); Harker v. State, 663 P.2d 932, 936 (Alaska 1983).

[119] People v. Wells, 221 Cal. Rptr. 273, 275 (Cal. Ct. App. 1985); State v. Maxwell, 328 S.E.2d 506, 509 (W. Va. 1985); State v. Presgraves, 328 S.E.2d 699, 700-01 (W. Va. 1985); Harker v. State, 663 P.2d 932, 937 (Alaska 1983); Hilderbrandt v. State, 507 P.2d 1323, 1325 (Okla. Crim. App. 1973); Hubert v. State, 504 P.2d 1245, 1246-47 (Okla. Crim. App. 1972); State v. Hayes, 494 N.E.2d 1238, 1241 (Ill. App. Ct. 1986).

[120] Hayes v. Hawes, 921 F.2d 100, 103-04 (7th Cir. 1990); United States v. Bacon, 851 F.2d 1312, 1313-14 (11th Cir. 1988); State v. Maxwell, 328 S.E.2d 506, 509 (W. Va. 1985); State v. Presgraves, 328 S.E.2d 699, 700-01 (W. Va. 1985); Hilderbrandt v. State, 507 P.2d 1323, 1325 (Okla. Crim. App. 1973); Lee v. State, 513 P.2d 125, 126 (Okla. Crim. App. 1973); Hubert v. State, 504 P.2d 1245, 1247 (Okla. Crim. App. 1972).

[121] *See* Schlichter, *supra* note 19, at 1295 ("The military is designed, organized, and equipped to effect the rapid, violent, and efficient destruction of the 'enemy' whoever that may be."); State v. Gunter, 902 S.W.2d 172, 174 (Tex. Ct. App. 1995) (stating that the use of drugs by members of the military, who operate high tech and dangerous equipment, could result in serious injuries and accidents).

Servicemen and women under the influence of drugs will adversely affect the capability of the armed services to carry out their mission.[122] This policy was put forth in a memorandum from the Inspector General of the Department of Defense setting out procedures to be followed when the military requests permission to conduct joint investigations with civilian law enforcement authorities.[123] Preventing illicit drugs from entering a military installation is widely recognized by courts of other jurisdictions as a valid primary purpose which furthers a military function.[124]

In *Moon v. State*,[125] for example, the Alaska Court of Appeals recognized that preventing the sale of illicit drugs by civilians to military personnel established a valid military purpose for the investigations involving those

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[122] *See Gunter*, 902 S.W.2d at 174 (noting testimony that stating that use of drugs by members of the military, who operate high tech and dangerous equipment, could result in serious injuries).

[123] Moon v. State, 785 P.2d 45, 47 (Alaska Ct. App. 1990) (citing Memorandum, DOD Inspector General to Service Secretaries, *Subject: Criminal Investigations Policy Memorandum Number 5 Criminal Drug Investigative Activities*, (1 Oct. 1987)); *See* MAJ Saviano, USA, *The Exclusionary Rule's Applicability to Violations of the Posse Comitatus Act*, 1995-JUL ARMY LAW. 61, 62 n.126 (providing authority for military personnel to act as undercover agents in joint investigations when there is a valid military purpose as put forth in DOD Instruction 5525.5).

[124] Marrone v. Hames, 1994 WL 273885, at *3-*4 (9th Cir. 1994) (holding that prevention of drug trafficking by civilians involving military personnel was a valid military purpose for the CID investigation and therefore there was no violation of the PCA); *See Hayes*, 921 F.2d at 103 (holding that there is no violation of the PCA when the purpose of an investigation is to prevent illicit drug transactions); *Moon*, 785 P.2d at 48 (holding that the Army had a valid military purpose in preventing illicit drug transactions involving active duty personnel); *Harker*, 663 P.2d at 936 (holding that the prevention of illicit drug transactions involving military personnel is an independent military purpose for an investigation).

[125] 785 P.2d 45 (Alaska Ct. App. 1990). Moon was convicted following an Anchorage Police Department (APD) investigation of drug activities centered around an Anchorage hotel. The APD believed drug dealers were targeting soldiers from nearby Army bases. The APD contacted Army CID and initiated a joint investigation. CID verified the APD reports when undercover agents were solicited numerous times to buy drugs. CID requested and received approval from their headquarters via standard operating procedures. A CID investigator bought drugs on several occasions from Moon. The Alaska Court of Appeals affirmed the conviction holding CID involvement did not violate the PCA because 1) the Army had a valid military purpose in preventing illicit drug transactions involving military personnel, 2) it was reasonable to infer that drugs were making their way onto base, and 3) the investigation was not begun until military investigators were satisfied that the dealers were targeting military personnel. *Id.* at 46-47.

civilians, even when the drug transactions took place off-base.[126] The Hawaii Supreme Court attempted to distinguish *Moon* based on evidence that the drug dealers in *Moon* were purposely targeting active duty military personnel and not mere dependants as in *Pattioay*.[127] This attempt to distinguish *Moon* fails because the same type of evidence (Army approval documents) used in *Moon* to show a valid primary military purpose was rejected in *Pattioay*.[128] In both cases, Army CID obtained approval in accordance with established regulations from their higher authority before beginning the joint investigations.[129] The approval documents show that the Army saw a military purpose for the investigation.[130] The court tried to distinguish *Moon* by saying, "unlike the instant case, a sufficient military connection was clearly established in Moon,"[131] ignoring the fact that the *Moon* court found a valid military connection based on the same documents which were rejected by the *Pattioay* court. The *Pattioay* court, unlike the *Moon* court, refused to allow the authorization documents to show Army approval of the investigation indicating that there was a valid military purpose and no danger of violating the PCA.[132]

In *Pattioay*, a clear nexus was established between the defendant and the Army CID investigator when the defendant required the investigator to show his military identification before any sale would take place.[133] This is a clear indication that the drug dealers were only targeting military personnel because only military members and their dependants would have military identification cards. The court's narrow reading of "military purpose" goes against the public policy of non-tolerance towards drug proliferation and drug related crimes.[134] A more reasonable inter-

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[126] *Id.* at 48.

[127] State v. Pattioay, 78 Hawai'i 455, 457, 464, 896 P.2d 911, 913, 920 (1995). The Hawaii Supreme Court claimed the informant's status as a military dependant living on base provided insufficient nexus between military personnel and civilian drug dealers. *Id.* Further the court did not consider the fact that CID agents were required to show their military identification as sufficient evidence to conclude that military personnel were being targeted by the civilian drug dealers. *Id.*

[128] *See Moon*, 785 P.2d at 47-48 (stating Army CID satisfaction of valid military purpose based on 1) that CID was sure that the drug dealers had targeted military personnel as a market, and 2) compliance with the military purpose doctrine).

[129] *Pattioay*, 78 Hawai'i at 458-59, 896 P.2d at 914-15; *Moon* 785 P.2d at 47-48.

[130] *Pattioay*, 78 Hawai'i at 462 n.10, 896 P.2d at 918 n.10.

[131] *Id.* at 464, 896 P.2d at 920; *Moon*, 785 P.2d at 47-48.

[132] *Pattioay*, 78 Hawai'i at 464, 896 P.2d at 920.

[133] *Id.* at 457, 896 P.2d at 913.

[134] *See* N.Y. TIMES, Sept. 6, 1990, A14 (discussing a public opinion poll showing that sixty-four percent of Americans believe that the drugs are the number one problem in America).

pretation of "military purpose," such as that which the military would consider a "military purpose," would be more in line with the public policy confronting the drug problem.

2. Wilful use of the military

Generally, courts find that there has been no "wilful use of the military" and therefore no violation of the PCA when military investigators initiate the joint operation or solicit assistance from the civilian police.[135] Based on this clause, which comes from the language of the PCA, if military investigators solicit the assistance of civilian police, then there is no "wilful use of the military" and thus no violation of the PCA.[136] The rule is established in many jurisdictions that there may be a violation of the PCA if local police initiate the joint operation with the military investigators. However, some courts in the minority have even been able to find no wilful use of the military, and therefore no violation

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[135] *See* United States v. Wolffs, 594 F.2d 77, 78 (5th Cir. 1979) (declining to rule on the PCA issue and finding that the military involvement did not warrant exclusion of evidence where military member approached local police detective with information about a local drug dealer and later conducting a controlled drug purchase); State v. Gunter, 907 S.W.2d 172, 175 (Tex. Ct. App. 1995) (stating that where the CID initiate contact with local police, there is no wilful use of the military and no violation of the PCA); People v. Wells, 221 Cal. Rptr. 273, 275 (Cal. Ct.. App. 1985) (holding that there was no violation of the PCA where NIS agents initiated the joint investigation with local police); State v. Maxwell, 328 S.E.2d 506, 509 (W. Va. 1985) and State v. Presgraves, 328 S.E.2d 699, 701 (W. Va. 1985) (holding there was no violation of the PCA in part because NIS agents had requested assistance from the State police in a drug operation); Hilderbrandt v. State, 507 P.2d 1323, 1325 (Okla. Crim. App. 1973) (finding no violation of the PCA based in part because CID agents contacted the local police for assistance once their investigation went beyond their jurisdiction by involving civilians); Hubert v. State, 504 P.2d 1245, 1246-47 (Okla. Crim. App. 1972) (finding no violation of the PCA in part because CID investigators requested the assistance of local police and then assumed the status of no more than that of a private citizen). *See also* Harker v. State, 663 P.2d 932, 937 (Alaska 1983) (holding that there was no violation of the PCA noting the statutory requirement of "wilfully uses" was not met in the case because the local police did not request the assistance of the military). *Cf.* Lovelace v. State, 411 S.E.2d 770, 771 (Ga. Ct. App. 1991) (finding no wilful use even where the police did request the assistance of the military investigators).

[136] *See Harker*, 663 P.2d at 937 (stating that in all cases where a violation of the PCA is found, the civil authority requested assistance of the military).

of the PCA where local police seek the assistance of the military.[137] The court in *Pattioay* should have found that there was no wilful use of the military because the Honolulu Police Department did not solicit the Army CID's assistance in investigating Pattioay.[138] The Hawaii Supreme Court did not consider the fact that the Army CID investigators solicited the assistance of the HPD in this case.

In *Pattioay*, when CID investigators realized that their investigation was leading them to civilian involvement, they contacted HPD as was common practice.[139] The procedure was commonplace to both HPD and CID as it had been done numerous times before.[140] Coincidentally, HPD was conducting an investigation of the same civilians before CID became involved.[141] HPD also had the opportunity to request assistance from CID, but did not.[142] Therefore because CID solicited the assistance of HPD there was no "wilful use of the military."[143]

3. Direct participation of military personnel

The CID investigators who were involved in the investigation of the *Pattioay* defendants did not participate in the search or arrest of the

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[137] Lovelace v. State, 411 S.E.2d 770 (Ga. Ct. App. 1991). The Court of Appeals of Georgia upheld a drug conviction when the local sheriff's department requested and used the assistance of the Army CID. Two CID agents accompanied an informant to buy drugs from the defendant. The informant bought cocaine from the defendant in the presence of the two CID agents and turned the drugs over to them. The court affirmed the conviction holding that there was no violation of the PCA because CID involvement "did not pervade the activities of civilian officials and did not subject the citizenry to regulatory exercise of military power." Additionally, the court held that even if there was a violation of the PCA, it was not a "wilful violation of the spirit of the Act, nor did it demonstrate any aggravated or repeated instances of violations." *Id.* at 770-771.

[138] State v. Pattioay, 78 Hawai'i 455, 457, 896 P.2d 911, 913 (1995).

[139] *Id.* at 457, 896 P.2d at 913. The CID investigator assigned to the investigation testified that he had been involved in more that twenty-five investigations which targeted civilians and that the procedure was to get authorization from Army headquarters first and then to contact HPD to plan undercover operations. *Id.*

[140] *Id.* at 457-58, 896 P.2d at 913-14. HPD Officer Clark testified that he had participated in over one-hundred joint operations with Army CID and that in every case, the Army contacted HPD to set up the joint investigation. *Id.*

[141] *Id.* at 459, 896 P.2d at 915.

[142] *See id.* at 459 n.4, 896 P.2d at 915 n.4 (stating that HPD had already made controlled buys from the defendants up to four months prior to CID participation).

[143] *See id.* at 457, 896 P.2d at 913 (stating that CID would contact HPD after receiving authorization). *See also* Harker v. State, 663 P.2d 932, 937 (Alaska 1983) (stating that a violation of the PCA requires "wilful use of the military" and there is none when the military seeks the assistance of the civil authorities).

civilians and acted with no more authority than that of a private citizen.[144] Consideration of the level of participation and authority exercised by military personnel is a determining factor in a majority of the cases which have considered the use of military investigations and have found no violation of the PCA.[145]

In an Eleventh Circuit case, *United States v. Bacon*,[146] upon facts similar to *Pattioay*, the court based its holding on the amount of military control

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[144] *Pattioay*, 78 Hawai'i at 457-58, 896 P.2d at 913-14.

[145] *See* Hayes v. Hawes, 921 F.2d 100, 104 (7th Cir. 1990) (holding that there was no violation of the PCA in part because military involvement was limited, not pervasive, and served the same type of function as a civilian cooperating with the police and the military did not become involved with activities which are typically performed by police such as arresting and searching suspects); State v. Maxwell, 328 S.E.2d 506, 509 (W. Va. 1985) and State v. Presgraves, 328 S.E.2d 699, 700-01 (W. Va. 1985) (holding that the NIS agents were not acting as police officers of the state and therefore there was no violation of the PCA).

Oklahoma has dealt extensively with the PCA in its state courts establishing several factors which indicate when the PCA is violated. Three cases in the early 1970's upheld convictions and provided a foundation of factors which were used to reverse a conviction in 1982. The first case was Hubert v. State, 504 P.2d 1245 (Okla. Crim. App. 1972), where the court held that there was no violation of the PCA in part on the finding that at the time that the investigation went beyond the CID jurisdiction, the CID agents involved became nothing more than private citizens. *Id.* at 1246. In Hilderbrandt v. State, 507 P.2d 1323 (Okla. Crim. App. 1973), the court again held that there was no violation of the PCA because the CID agents' investigation of a soldier had led them beyond their jurisdiction, therefore, the agents assumed no greater authority than that of a private citizen. *Id.* at 1325. Finally, in Lee v. State, 513 P.2d 125 (Okla. Crim. App. 1973), *cert. denied*, 415 U.S. 932 (1973), the court found no violation of the PCA due to the limited extent of military involvement. The court based its decision on 1) the CID investigator did not try to arrest Lee or exert any military power over him, and 2) the CID investigator was acting in no greater authority that of a private citizen. *Id.* at 126. In 1982, the Oklahoma Court overturned the conviction in Taylor v. State, 645 P.2d 522 (Okla. Crim. App. 1982). The court found a violation of the PCA and held that the military involvement was excessive because the CID investigator pulled his weapon during the arrest constituting direct participation in that arrest and thereby acting with more authority than that of a private citizen. *Id.* at 525.

[146] 851 F.2d 1312 (11th Cir. 1988). The Eleventh Circuit affirmed the conviction of the defendant for possession and distribution of cocaine and conspiracy to distribute cocaine. The investigation in this case was aimed at ferreting out an illegal drug supply to the military base. An undercover Army CID investigator bought cocaine from Bacon in a coordinated operation with the local and state police. A state police officer accompanied the CID agent during the transaction. The court held that the CID agent did not pervade the activities of the civilian officials and did not subject

and involvement.[147] In *Bacon*, the Army CID investigation targeted a civilian suspected of selling drugs to military personnel who were then bringing the drugs on base.[148] The investigation was conducted in conjunction with the Georgia Bureau of Investigation and consisted of the undercover Army CID investigator buying drugs from the defendant.[149] The court held that there was no violation of the PCA because (1) the investigator merely assisted civilian personnel and did so "only to the extent of activities normally performed in the ordinary course of his duties;" (2) there was no "military permeation of civilian law enforcement;" and (3) "in this case the limited military participation was nothing more than a case of assistance to civilian law enforcement efforts by military personnel and resources."[150]

The majority of courts hold that where military participation in the investigation of civilian drug trafficking is limited,[151] and the involved

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the citizenry to the regulatory exercise of military power. The court further held that even if the CID conduct was considered a violation of the PCA, it was not a wilful violation of the spirit of the Act nor did it demonstrate any aggravated or repeated instances of violations. The court based its decision on the finding that 1) the investigator merely assisted civilian personnel and did so "only to the extent of activities normally performed in the ordinary course of his duties," 2) there was no "military permeation of civilian law enforcement," and 3) "In this case the limited participation was nothing more than a case of assistance to civilian law enforcement efforts by military personnel and resources." *Id.* at 1312-13.

[147] *See id.* at 1313 (holding that assistance by military personnel in civilian investigations does not violate the PCA where the participation does not "pervade the activities of civilian officials" and does not "subject the citizenry to the regulatory exercise of military power").

[148] *Id.* at 1313.

[149] *Id.*

[150] *Id.* at 1313-14.

[151] Hayes v. Hawes, 921 F.2d 100 (7th Cir. 1990). The *Hayes* court held that there was no violation of the PCA in part because military involvement in a drug investigation was limited, not pervasive, and served the same type of function as a civilian cooperating with the police. The court focused on the extent of military involvement as a basis of its holding stating that the NIS agents did not become involved in the activities that are typically performed by the police such as arrest, search, and seizure. *Id.* at 103-04. *See* Taylor v. State, 645 P.2d 522, 525 (Okla. Crim. App. 1982) (finding a violation of the PCA where military involvement in an undercover drug investigation was excessive because the CID investigator pulled his weapon during the arrest of the defendant, participated in the search of the defendant's home, and did not act as a private citizen but solely under his authority as a military investigator). *See also* Lee v. State, 513 P.2d 125, 126 (Okla. Crim. App. 1973) (holding that there was no violation of the PCA where military involvement in an undercover drug investigation was limited and the CID investigator did not participate in the arrest of the suspect).

military personnel are merely acting as private citizens,[152] no violation of the PCA will be found.[153] In *Pattioay*, however, the Hawaii Supreme Court failed to consider the level of participation of the CID investigators as a factor in determining whether a violation of the PCA had occurred.[154] The court offers no explanation for not examining this well established determining factor.

In addition, the majority of courts agree that the factors indicating a violation of the PCA due to direct participation of military personnel include the arrest of the civilian criminal; drawing a weapon in the course of the military personnel's involvement; and searching, seizing, and administratively handling suspects and evidence at the time of arrest.[155] All of these factors are conspicuously absent in *Pattioay*.

B. Exclusionary Rule

In cases where a violation of the PCA has been found, or where it is unclear whether a violation has occurred, courts must determine if the evidence obtained in the course of a PCA violation is admissible. At common law, evidence obtained in violation of a statute would be admissible, but several exceptions to the common law rule are now recognized which require exclusion.[156] The Fourth Circuit in *United States*

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[152] *Hayes* 921 F.2d at 103-04; *Taylor* 645 P.2d at 524-25; Hilderbrandt v. State, 507 P.2d 1323, 1325 (Okla. Crim. App. 1973); *Lee*, 513 P.2d at 126; Hubert v. State, 504 P.2d 1245, 1247 (Okla. Crim. App. 1972).

[153] *Id.*

[154] *See* State v. Pattioay, 78 Hawai'i 455, 459, 896 P.2d 911, 915 (1995) (finding that the controlled drug purchases clearly involved the direct assistance of military personnel).

[155] *See Hayes*, 921 F.2d at 103-04 (holding no violation of the PCA when military involvement was limited, not pervasive, and served the same type of function as a civilian cooperating with the police focusing on the extent of military involvement as a basis of its holding); *Taylor*, 645 P.2d at 525 (finding a violation of the PCA when military involvement was excessive because the CID investigator pulled his weapon during the arrest of the defendant and participated in the search of the defendant's home); *Lee*, 513 P.2d at 126 (holding no violation of the PCA where military involvement was limited and the CID investigator did not participate in the arrest of the suspect).

[156] Boshee, *supra* note 80. Exceptions include when evidence is obtained in violation of a person's constitutional rights and sometimes when evidence is obtained in violations of statutes or rules. *Id.* at 126.

v. Walden,[157] and the Oklahoma Court of Criminal Appeals in *Taylor v. State*,[158] have put forth the most widely used tests for determining whether or not to exclude evidence obtained in violation of the PCA.[159] First, the *Walden* court stated that the exclusionary rule should only be invoked when there are "widespread or repeated violations of the Act."[160] Second, the *Taylor* court established a "pervasive" standard where the exclusionary rule is invoked only when the military intervention is intolerably excessive.[161]

Most courts have followed *Walden* in their analysis of the exclusionary rule.[162] The Ninth Circuit Court of Appeals in *United States v. Roberts*[163]

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[157] 490 F.2d 372 (4th Cir. 1974). The defendants, Ruby and William Walden were convicted of illegally selling firearms through third parties. Treasury Department agents requested Marines from nearby Quantico, Virginia, be used as undercover investigators to purchase firearms from the Waldens. The court affirmed the convictions and held the illegal use of the military personnel in an investigation did not require the suppression of the evidence obtained by that investigation. The court held the "extraordinary" remedy of exclusion of the evidence was not warranted in this case because 1) the instruction prohibiting the use of Marines in ordinary civilian investigations was not very well known prior to this case, 2) the instruction, like the PCA, exists to benefit the people as a whole, while the Fourth Amendment exists to protect the rights of individuals and invoking the exclusionary rule in this case would benefit the individual and pose a cost to the people as a whole, and 3) the instruction does not provide within itself a sanction for its violation and therefore "admission of the evidence of guilt does not require the court to condone dirty business." The court additionally states that more importantly, the fact that there has been no "widespread or repeated" violations of the PCA compelling them to deny invoking the exclusionary rule. *Id.* at 376-77.

[158] 645 P.2d 522 (Okla. Crim. App. 1982).

[159] Boshee, *supra* note 80, at 126-29.

[160] *Walden*, 490 F.2d at 376-77.

[161] *Taylor*, 645 P.2d at 524-25.

[162] *See* Marrone v. Hames, 1994 WL 273885, at *3 (9th Cir. 1994) (unpublished disposition); Hayes v. Hawes, 921 F.2d 100, 104 (7th Cir. 1990); United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988); United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986); State v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979); Lovelace v. State, 411 S.E.2d 770, 771 (Ga. Ct. App. 1991); Moon v. State, 785 P.2d 45, 48 (Alaska Ct. App. 1990); State v. Roberts, 786 P.2d 630, 634-35 (Kan. Ct. App. 1990).

[163] 779 F.2d 565 (9th Cir. 1986). Roberts' marijuana-filled sailboat was intercepted and searched at sea by Navy and Coast Guard personnel. The boarding party found several bails of marijuana and took one aboard the Navy ship as evidence. Defendants were taken aboard the Navy ship and their sailboat was put in tow. Unsuccessful towing resulted in the scuttling of the sailboat. Defendants appealed claiming that the Navy's involvement violated both the PCA and DOD regulations. The court affirmed

followed the *Walden* court's reasoning by treating a violation of Title 10 as the equivalent of a violation of the PCA for purposes of determining whether to invoke the exclusionary rule. The court found that there was such a close similarity between the PCA and sections 371-378 of Title 10 that it declined to suppress the evidence because courts have so "uniformly refused to apply the exclusionary rule to evidence seized in violation of the Posse Comitatus Act."[164] In its exclusionary rule analysis, the Ninth Circuit refused to invoke the exclusionary rule because (1) there was good faith effort[165] on the part of the civilian police, and (2) there was no "widespread and repeated abuse" of the PCA.[166]

In an unpublished disposition, *Marrone v. Hames*,[167] the Ninth Circuit recently reaffirmed its exclusionary rule analysis, which the Hawaii Supreme Court could have adopted to better support its decision to invoke the exclusionary rule.[168] *Marrone v. Hames*, like *Roberts*, involved the issue of whether to invoke the exclusionary rule. In *Marrone*, the court considered the issue in terms of the PCA while in *Roberts*, the court decided its applicability in terms of Title 10, § 371-378.[169] In both *Marrone* and *Roberts*, the Ninth Circuit chose not to invoke the exclusionary rule, even if it could have found a violation of the PCA, because there was no demonstrable need to deter future violations.[170] This holding is only slightly different from the majority of courts which tend to follow *Walden* and hold that there must be a history of "widespread and repeated abuse."[171]

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the convictions holding that the PCA does not apply to the Navy but that there was a violation of Title 10 U.S.C. § 371-378. The court further held that this case does not warrant invoking the exclusionary rule because there is no demonstrable "need to deter future violations." The court held that the exclusionary rule analysis should be same whether it is dealing with the PCA or with Title 10. *Id.* at 568.

[164] *Id.* at 568.

[165] The *Roberts* court stated that an unintentional violation which was committed in good faith adds strength to the argument for not invoking the exclusionary rule because the policy reason in favor of exclusion is the deterrence of illegal police conduct. *Id.*

[166] *Id.*

[167] 1994 WL 273885 (9th Cir. 1994) (unpublished disposition).

[168] *Id.* at *3.

[169] *Roberts*, 779 F.2d at 568.

[170] *See Marrone*, 1994 WL 273885, at *3 (holding that the defendant was not entitled to exclusion of evidence because there was no demonstrable "need to deter" future violations); *Roberts*, 779 F.2d at 568 (holding that the exclusionary rule should not be invoked because there is no "need to deter" future violations of 10 U.S.C. § 371-378).

[171] *Roberts* 779 F.2d at 568. *Compare Walden*, 490 F.2d 372, 376-77 (4th Cir. 1974)

A better approach for the Hawaii Supreme Court would have been to adopt the Ninth Circuit's reasoning, rather than the *Lee* reasoning, to support its decision to exclude the evidence. The Ninth Circuit's test for exclusion centered on the "need to deter future violations."[172] Adopting the Ninth Circuit's reasoning would have allowed the Hawaii Supreme Court the flexibility to define exactly what the "need to deter future violations" standard for Hawai'i is while giving the decision a more logical legal basis than either the *Lee* reasoning or the inherent judicial powers reasoning.[173]

The Ninth Circuit in *Roberts* stated that an unintentional violation committed in good faith adds strength to the argument for not invoking the exclusionary rule.[174] In *Pattioay*, CID investigators had been conducting investigations with HPD as a standard practice without any violations of the PCA.[175] When CID became involved in an investigation with HPD, it was standard operating procedure for the investigators to get approval from their headquarters.[176] The CID investigators who participated in the undercover drug purchases were doing so under approval from their headquarters.[177] There were procedures for this kind of joint investigation, those procedures were followed, and there was no reason to believe that the CID investigators were acting in anything but good faith.[178] Because the investigation was conducted in good faith, the court should have decided to admit the evidence and not to suppress it.[179]

There have been no widespread violations of the PCA in Hawai'i. The Hawaii Supreme Court did not give the Ninth Circuit's analysis much weight. The trial court excluded the evidence, finding "widespread

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(holding that the exclusionary rule should not be invoked unless there is "widespread or repeated" violations of the PCA).

[172] *Marrone*, 1994 WL 273885, at *3; *Roberts*, 779 F.2d at 568.

[173] *See Roberts*, 779 F.2d at 568 (declining to define exactly what a demonstrable "need to deter" would be in order to warrant invoking the exclusionary rule).

[174] *Roberts*, 779 F.2d at 568.

[175] *See* State v. Pattioay, 78 Hawai'i 455, 457, 896 P.2d 911, 913 (1995) (showing that HPD and Army CID had conducted over 100 joint investigations without a violation of the PCA).

[176] *See id.* at 458, 896 P.2d at 914 (noting that the CID agent testified that the request for approval procedures were followed and approval was received).

[177] *See id.* (stating that the CID supervisor testified that CID agents received approval for undercover investigation from their headquarters).

[178] *See id.* (stating that the CID supervisor testified that the request for approval procedures were followed and approval was received).

[179] *See Roberts*, 779 F.2d at 568 (stating that unintentional violations committed in good faith should not be used as a basis for invoking the exclusionary rule).

and repeated'' violations of the PCA even though there is not a single reported case where a Hawai'i state court determined that PCA was even an issue.[180] The Hawaii Supreme Court disagreed and found no ''widespread and repeated'' violations of the Act, but excluded the evidence based on its own inherent judicial powers.[181]

The Hawaii Supreme Court had the opportunity to use either the PCA analysis or the closely related Title 10 analysis to guide its exclusionary rule holding.[182] The court instead chose to ignore both the PCA and Title 10 analysis in favor of the Federal Communications Act (FCA) analysis of *Lee v. Florida*.[183] *Lee* fails in persuasive comparison to both *Roberts* and *Walden*, which held that the exclusionary rule should not be invoked in absence of ''widespread and repeated'' violations or without a demonstrable ''need to deter future violations'' of the PCA.[184]

In *Pattioay*, the Hawaii Supreme Court found the violation of a federal statute grounds for invoking the exclusionary rule. A careful reading of *Lee* shows that it does not support the court's reasoning. *Lee* does not involve the military investigation of civilians, which is the pivotal issue in *Pattioay*.[185] Violations of the PCA or Title 10 do not automatically invoke the exclusionary rule like the FCA.[186] The FCA was enacted to protect individuals from the unwanted publishing of their private conversations.[187] The FCA is similar to the Fourth Amendment because both protect the individual's personal right to privacy and both lead to the exclusion of any evidence obtained in violation of those rights.[188] The *Pattioay* court found no unreasonable search and seizure in violation of the Fourth Amendment or article I, section 7, of the Hawaii Constitution,

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[180] *See Pattioay*, 78 Hawai'i at 467 n.23, 896 P.2d at 923 n.23 (noting that State v. Howard, Crim. No. 93-0582 (Haw. 1st Cir. Ct. Jan. 6, 1994) is the only other case in Hawai'i that has found a violation of the PCA).

[181] *Id.* at 467, 896 P.2d at 923.

[182] *See id.* at 466-67, 896 P.2d at 922-23 (discussing the Ninth Circuit exclusionary rule cases but choosing to follow the Lee v. Florida analysis instead).

[183] 392 U.S. 378 (1968); *Pattioay*, 78 Hawai'i at 466-67, 896 P.2d at 922-23.

[184] *See* Boshee, *supra* note 80, at 126-29 (1985) (stating that it is uniform throughout the country to invoke the exclusionary rule only where there is widespread and repeated abuses of the PCA).

[185] *Pattioay*, 78 Hawai'i at 464, 896 P.2d at 921.

[186] *See* United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986) (stating that courts have uniformly refused to invoke the exclusionary rule for PCA and the similar Title 10 violations).

[187] *Lee*, 392 U.S. at 382-83.

[188] *See id.* (stating that § 605 of the FCA was adopted by Congress based on the protection of privacy).

which would require invocation of the exclusionary rule.[189] The PCA, on the other hand, was enacted to benefit people as a whole, not to protect individual rights.[190] An individual's constitutional rights are not violated *per se* when the PCA is violated.[191] The PCA is a statute which is unrelated to the Fourth Amendment as opposed to the FCA which is very closely related to the Fourth Amendment.[192] Therefore, exclusion of the evidence should not occur merely because the PCA is violated.[193] The FCA is too different in its intent and scope from the PCA to draw analogous reasoning for determining whether or not to invoke the exclusionary rule.

C. Inherent Power of Hawai'i's Judiciary

The Circuit Court applied the exclusionary rule in *Pattioay* because it found "widespread and repeated" abuse of the PCA.[194] The Hawaii Supreme Court found no "widespread and repeated" abuse but chose to rely upon its inherent judicial power and the *Lee* reasoning to suppress the evidence as unfair and illegally obtained.[195] The court used the inherent judicial powers argument to circumvent persuasive legal authority which invokes the exclusionary rule only when there is pervasive military involvement,[196] "widespread and repeated" violations, or when there is a demonstrable "need to deter future violations."[197]

The court has put too much legal weight on its own inherent powers and has reached too far to find justification for suppressing the evidence

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[189] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[190] United States v. Walden, 490 F.2d 372, 377 (4th Cir. 1974).

[191] *Id.*

[192] *See Lee*, 392 U.S. at 382 (stating that the FCA was enacted to protect the individual from unwanted publication of his communications); *Walden*, 490 F.2d at 377 (stating that the PCA was enacted to protect people as a whole and does not protect personal rights).

[193] *See* State v. Pattioay, 78 Hawai'i 455, 466, 896 P.2d 911, 922 (1995) (stating that defendants are not entitled to suppression of evidence just because the PCA was violated).

[194] *Id.* at 467, 896 P.2d 923.

[195] *Id.* at 469, 896 P.2d at 925. "[T]he court was right for the wrong reasons." *Id.*

[196] United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988); Taylor v. State, 645 P.2d 522, 525 (Okla. Crim. App. 1982); Lee v. State, 513 P.2d 125, 126 (Okla. Crim. App. 1973); Hilderbrandt v. State, 507 P.2d 1323, 1325 (Okla. Crim. App. 1973); Hubert v. State, 504 P.2d 1245, 1246 (Okla. Crim. App. 1972).

[197] *Walden*, 490 F.2d at 377; Marrone v. Hames, 1994 WL 273885, at *3 (9th Cir. 1994) (unpublished disposition); United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986).

obtained in *Pattioay*.[198] The PCA is a federal law with a criminal penalty written into its text and does not contain any language which would indicate an exclusionary remedy.[199] While Congress did not intend for evidence to be excluded as a result of a violation of the PCA, it did intend to levy a fine and/or a prison term for those who unlawfully use the military.[200] The Hawaii Supreme Court undermined the Congressional intent of the PCA by assigning a more prohibitive standard to the Act and relying on its own inherent judicial powers to justify its decision.[201] The Hawaii Supreme Court held that it was imperative to suppress the evidence because if it admitted the evidence, they would be condoning and justifying the illegal activity.[202] This policy argument is overly broad because it assumes that the people of Hawai'i prefer to let drug offenders go where compelling evidence was tainted over a preference for convicting criminals.[203]

In an attempt to justify the decision it desired, the Hawaii Supreme Court over-extended its reach by relying too heavily on its inherent power. The unreasonable fear of martial law being abused in Hawai'i again and the court's stretching to make a connection between past martial law and present day drug investigations does not constitute the type of extreme situation in which it would be reasonable for the court to invoke its inherent judicial powers. The Hawaii Supreme Court invoked its inherent judicial power to exclude evidence in the face of well established Ninth Circuit and other legal precedent. In *Pattioay*, it is not the case of the military usurping the authority of the civilian courts and subjecting civilians to military tribunals without the opportunity for appeal as in *Duncan v. Kahanamoku*,[204] upon which the court relies heavily.

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[198] *Pattioay*, 78 Hawai'i at 469, 896 P.2d at 925.

[199] 18 U.S.C. § 1385 (1994).

[200] *See id.* (stating nothing that would indicate that exclusion of evidence is a proper remedy).

[201] *See id.* (stating that criminal remedies are a fine or imprisonment).

[202] *Pattioay*, 78 Hawai'i at 469, 896 P.2d at 925.

[203] Boshee, *supra* note 80, at 129 (1985). "[T]here [is no] evidence that the community disapproves more of convicting a lawbreaker on tainted evidence than of letting the lawbreaker loose to prey again." *Id.* (citing WIGMORE, EVIDENCE § 2184(a), at 52 (1961)).

[204] 327 U.S. 304 (1946). The U.S. Supreme Court reversed the conviction and imprisonment of civilians who were convicted in a military court during martial law in Hawai'i. The Court held that Congress authorized martial law in Hawai'i due to threatened invasion by Japan but, did not intend for it to exceed the traditional boundaries between the military and the civilian government. *Id.* at 323-24.

The situation is merely that of cooperation between the military and HPD in achieving a common and community-supported goal, which resulted in civilian criminal prosecution of a civilian. The military and HPD each had an interest in the investigation and worked together under the supervision of HPD to efficiently achieve the common goal. All people in Hawai'i, whether civilian or military, benefitted from this cooperation because an illicit drug dealer was removed from the community and would not be selling drugs to the military or anyone else. The court failed to balance public policy between the fear of military dominance and the community's desire to eliminate illegal drug activity.[205] The analogy is weak because the military activity in *Pattioay* does not come anywhere near the military governance and the martial law civilian convictions of *Kahanamoku*.[206]

VI. Impact

Hawai'i has a large military community and there is always the likelihood of interaction between civilian law enforcement authorities and military investigators. The Hawaii Supreme Court should have given a more definite holding which would give the local police and the military guidance in developing procedures which will not violate any statutes and will result in valid convictions.

Both the military and the civilian communities are adversely affected by the holding in *Pattioay*. The civilian community will be most hurt by this holding. The most extreme result could be an increased number of civilian drug dealers targeting solely military personnel due to the decreased deterrent of being caught. Civilian drug dealers who target the military will have greater incentive to do so now. Drug dealers who sell only to military personnel will be less likely to be arrested because the military authorities will be unsure how far they can lawfully investigate civilians. This will result in either (1) fruitless investigations where civilian drug dealers will have no concern of being arrested, or (2) the unwillingness of the military to conduct any drug investigations involving civilians at all due to the unclear holding in *Pattioay*. The military will

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[205] *See* N.Y. Times, Sept. 6, 1990, at A14 (discussing a public opinion poll showing that sixty-four percent of Americans believe that the drugs are the number one problem in America).

[206] *See Kahanamoku*, 327 U.S. at 309-10 (overturning the convictions of two civilians who were convicted in by a military tribunal, one for purely civilian embezzlement and the other for assault on a military sentry).

not be interested in risking time, money, and lives on investigations which will not result in convictions and will be held to be "illegal" by the courts. The military will be less likely to conduct investigations which target civilians even if the civilians are selling illicit drugs solely to military personnel. Solid evidence gained on civilian drug dealers will be turned away when the military authorities get to the point in an investigation where they can no longer pursue the supplier because he is a civilian. HPD will continue to have difficulty conducting undercover investigations because (1) ethnic and racial diversity prevent HPD from convincingly posing as military personnel who will be asked by the drug dealers to show military identification,[207] and (2) most of the HPD officers are well known to the people of Wahiawa.[208] This may seem like it is the military's problem, but in reality, it is also the civilian community's problem because the illicit drug supply system exists solely in the civilian sector. Along with the drug trade comes the unwanted side effects of additional crime and violence.[209]

The military on the other hand maintains a zero-tolerance of drug offenders. After punishment, a member of the military caught using, possessing or distributing drugs, will eventually be discharged, thereby adding to the civilian community's drug problems.

VII. CONCLUSION

In summary, there are widely accepted systems of analysis for determining whether a violation of the PCA has occurred and, if so, whether the court should exclude any evidence which was obtained as a result of that violation. The Hawaii Supreme Court has chosen a different approach that doesn't leave any signposts for the lower courts or the military investigators to follow.

First, in deciding whether the PCA had been violated, a trial court should have considered the following three factors: (1) military purpose,[210] (2) wilful use of the military,[211] and (3) extent of military involvement.[212]

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[207] *Pattioay*, 78 Hawai'i at 462 n.10, 896 P.2d at 918 n.10.

[208] *Id.*

[209] *See* Angela Miller, *Oahu on Ice*, HONOLULU ADVERTISER, Oct. 1, 1995, at A1 (finding that drugs are fueling a crime wave in Hawai'i); Angela Miller, *The Cops*, HONOLULU ADVERTISER, Oct. 1, 1995, B5 (exploring the drug users' potential for violence).

[210] *See supra* note 118 and accompanying text.

[211] *See supra* note 119 and accompanying text.

[212] *See supra* note 120 and accompanying text.

Preventing illicit drug transactions involving military personnel has universally been accepted as a valid military purpose furthering a military function.[213] The Hawaii Supreme Court agreed that preventing illicit drug transactions could be a valid military purpose, but then weakly reasoned that the real purpose behind the investigation was to assist the civil authority based on a few words from the Army approval documents.[214] It is widely accepted that wilful use of the military should be present to find a violation of the PCA.[215] There was no wilful use of the military in this case. Army CID requested assistance from HPD.[216] Finally, there should be pervasive military activity to find a violation of the PCA.[217] There was no pervasive involvement by any member of the Army CID unit because they did not participate in either the search or the arrest of the defendant.[218] Further, they acted with no more authority than that of any private citizen who could have been cooperating with HPD in the drug transactions. The Hawaii Supreme Court ignored the prerequisites of wilful use and extent of military involvement by reasoning that "they do not need pervasive military activity" because they first found no valid military purpose for the investigation.[219]

Second, after having found a violation of the PCA, the court has grounds to invoke the exclusionary rule if it can establish either (1) a history of widespread and repeated violations of the PCA,[220]or (2) a need to deter future violations.[221] Hawai'i has no history of widespread or repeated violations of the PCA and the court could only cite a single circuit court case where the PCA was an issue.[222] The Hawaii Supreme Court could have reasonably held that exclusion of the evidence was warranted to "deter" future PCA violations, but did not. There was not the level of military participation in this case that would be considered intolerably excessive. There was very little overt military participation at all and none that rose above what a private citizen could have done.[223]

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[213] State v. Pattioay, 78 Hawai'i 455, 465, 896 P.2d 911, 921 (1995).

[214] *See id.* (stating that the "documents themselves suggest a primary military purpose of facilitating civilian law enforcement.").

[215] *See supra* note 135 and accompanying text.

[216] *Pattioay*, 78 Hawai'i at 457, 896 P.2d at 913.

[217] *See supra* note 145 and accompanying text.

[218] *Pattioay*, 78 Hawai'i at 457, 896 P.2d at 913.

[219] *Id.* at 466 n.21, 467, 896 P.2d at 922 n.21, 923.

[220] United States v. Walden, 490 F.2d 372, 376-77 (4th Cir. 1974).

[221] United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986).

[222] *Pattioay*, 78 Hawai'i at 467 n.23, 896 P.2d at 923 n.23.

[223] *See supra* note 120 and accompanying text.

Foregoing all of the accepted rationale for invoking the exclusionary rule, the Hawaii Supreme Court instead chose to rely on a largely unanalogous statute and its own inherent powers to exclude substantial evidence. The Hawaii Supreme Court has given an unclear ruling which gives no logical boundaries except that, in this particular case, a violation of the PCA was found and evidence was excluded. By depending so heavily on its own inherent power, the court has left neither rhyme nor reason to guide the legal community and has weakened that very power on which it depends.

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Vernonia Sch. Dist. v. Acton: Now Children Must Shed Their Constitutional Rights at the Schoolhouse Gate

I. INTRODUCTION

James Acton wanted to play football. In the fall of 1991, James, a seventh grade student attending Washington Grade School in Oregon's Vernonia School District ("District"),[1] signed up for the school team.[2] At the first practice, the school distributed the District's consent form for drug and alcohol testing.[3] In order to address the alleged drug problem in the schools,[4] the District had recently implemented mandatory drug testing of all athletes participating in school-sponsored sports.[5] Because James and his parents objected to mandatory drug testing in the absence of any evidence of drug use, they decided not to sign the consent form.[6] After being informed that James could not then participate in school-sponsored athletics, the Actons filed suit in the federal district court for the District of Oregon, claiming a violation

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[1] Acton v. Vernonia Sch. Dist., 796 F. Supp. 1354, 1356 (D. Or. 1992), *rev'd*, 66 F.3d 217 (9th Cir. 1995), *rev'd*, 115 S. Ct. 2386 (1995). Vernonia is a small logging community in Oregon, where school athletics play a large part in the town's recreational life. The district court found that 60-65% of the high school students and 75% of the elementary school students participate in district-sponsored sports. Because sports are so important, student athletes are admired, both in the schools and in the community. *Id.*

[2] *Id.* at 1354.

[3] *Id.* at 1359.

[4] The District failed to offer specific substantial evidence of a district wide drug problem. *See infra* note 16.

[5] *Acton*, 796 F. Supp. at 1358. The mandatory drug testing program was implemented in the Fall of 1989, and applied to all students in the district interested in participating in school-sponsored athletics. *Id.* at 1358. The program affected high school students, as well as grade school students that were eligible to participate in various athletic programs. *Id.* at 1357.

[6] *Id.* at 1359.

of James's constitutional right against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and the Oregon Constitution.[7]

The Actons' case made its way into the United States Supreme Court,[8] where a 6-3 majority, led by Justice Scalia,[9] upheld Vernonia's drug testing policy, holding that the governmental interest in testing athletes outweighed what the Court perceived as the diminished privacy expectations of student athletes.[10] On remand, the Ninth Circuit held that the Oregon Constitution would not offer greater protection against intrusive searches of the student athletes affected by the District's drug testing program.[11]

This casenote analyzes the impact of the Supreme Court's decision in *Vernonia School District v. Acton*,[12] on children's constitutional rights in the school setting—and its consistency with the Court's declaration that children do not "shed their constitutional rights . . . at the schoolhouse gate."[13] Part II examines the school district's drug testing policy and the facts of the case. Part III explores the history of the Fourth Amendment and how it relates to drug testing, and relevant case law, especially that pertaining to the constitutional rights of children. Part IV analyzes the demise of childrens' constitutional rights

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[7] *Id.* at 1354.

[8] The district court ruled in favor of the District, holding that the drug testing program did not infringe upon the student athletes' rights. *Acton*, 796 F. Supp. at 1364-65. The Actons appealed to the U.S. Court of Appeals for the Ninth Circuit which reversed the district court, holding that the District's random suspicionless drug policy was an unreasonable search under the Fourth Amendment and the Oregon Constitution. Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1527 (9th Cir. 1994). The District then appealed to the United States Supreme Court.

[9] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995). Joining Justice Scalia in the majority opinion were Chief Justice Rehnquist and Justices Kennedy, Thomas, Breyer, and Ginsburg. Justice Ginsburg also filed a concurring opinion. Justice O'Connor dissented and filed an opinion in which Justices Stevens and Souter joined.

[10] *Id.* The Court remanded the case to the Ninth Circuit on the question of whether the Oregon Constitution would offer greater protection. *Id.*

[11] Acton v. Vernonia Sch. Dist., 66 F.3d 217 (9th Cir. 1995).

[12] 115 S. Ct. 2386 (1995).

[13] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969). *Tinker* is frequently cited for the proposition that children keep their constitutional rights intact at school. In *Tinker*, the Supreme Court held that the wearing of black armbands by students protesting the Vietnam War was constitutionally protected under the First Amendment. *Id.* at 514.

in recent Court decisions,[14] and the repercussions of *Vernonia* on those rights. Part V relates the Supreme Court ruling to recent developments in Hawai'i, and speculates on how Hawai'i would address a drug testing program in its courts. Part VI concludes that the Supreme Court has relegated the status of students to that of second-class citizens in affording them less constitutional protection then the general public.

II. FACTS

A. *The Policy*

In 1989, the Vernonia School District instituted a mandatory drug testing policy ("Policy") requiring all students participating in school athletics to submit to an initial urine test at the beginning of the athletic season, and random tests throughout the school year.[15] Citing complaints by a few teachers about a decline in student classroom behavior, and the forming of two groups of students calling themselves "the Big Elks" and "the Drug Cartel," the District concluded that there was an epidemic of drug use among students, and athletes in particular.[16] The evidence the District relied upon to determine that there was an epidemic of drug use among athletes was the testimony of the wresting coach that a wrestler may have been injured while under the influence of drugs, and the football coach's testimony that some of his players did not react to situations the way he taught them.[17]

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[14] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); New Jersey v. T.L.O., 469 U.S. 325 (1985).

[15] *Acton*, 796 F. Supp. at 1357.

[16] *Id.* at 1357-58. The evidence, however, was minimal that a drug problem existed beyond a few problem students, and was limited to the high school. The proof of drug use consisted almost entirely of teachers' complaints of an increase in student behavioral problems. In fact, only one high school teacher testified that she had ever observed actual drug use by students. Even more lacking was evidence of a drug use problem among athletes. The District could not confirm even one drug related injury in the sports program, although the wrestling coach testified that a wrestler was injured during a meet, and he smelled marijuana in the wrestler's room a day after the meet. This is hardly proof of an overwhelming drug problem in the Vernonia School District. *See generally* Brief of Respondent, Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

[17] Brief of Respondent, Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

School officials initiated the Policy in response to the perceived widespread drug problem in the District.[18] After studying the legality of a random, suspicionless drug testing program, the District held a public meeting, at which the parents attending the meeting unanimously voted to approve the Policy.[19] The superintendent approved the plan and submitted it to the School Board for approval and implementation, to take place in the fall of 1989.[20]

All students participating in school athletic programs are required first to sign an authorization form to consent to the drug test, then to submit to an initial urine test.[21] A student's urine sample is tested for traces of illicit drugs, namely cocaine, marijuana, amphetamines, and occasionally, LSD.[22] Steroids, a class of drugs associated with athletics, are not tested.[23] If students refuse to sign the authorization form, the school then prohibits them from participating in school sports for the remainder of the athletic season.[24] After athletes submit the consent forms, the school tests students randomly on a weekly basis, drawing their names from a "pool" each week.[25] The procedure entails athletes producing a urine sample while observed by a monitor, and the procedure varies for boys and girls.[26] The boys enter the locker room with a male school official as monitor.[27] The monitor opens the packet and gives the cup to the male student, who then proceeds to the urinal to produce the sample.[28] The monitor stands behind him the entire

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[18] *Id.* at 8. The original program, in force from September 1989 to August 1990, applied to any student participating in any extra-curricular activity, athletic or non-athletic. The District amended the program to apply only to athletes in 1990. *Id.* at 9.

[19] *Acton*, 796 F. Supp. at 1358.

[20] *Id.*

[21] *Id.*

[22] Brief of Respondent at 9, Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590). Although alcohol is arguably the most commonly abused drug among students, it is not tested. *Id.*

[23] *Id.* at 9. Steroids are used to enhance athletic performance. If a school were worried about drug abuse specifically among athletes, it would make sense to test for a drug that appeals to athletes in particular. *Id.*

[24] *Acton*, 796 F. Supp. at 1358.

[25] *Id.* The names of all students participating in sports during that season are placed in the "pool" and approximately 10% of those names are drawn weekly. The chosen student athletes are tested one at a time throughout that day. *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

time, watching the student urinate in order to assure that there is no tampering with the urine sample.[29]

The girls have slightly more privacy, and are allowed to produce their sample in a closed stall.[30] However, the monitor still listens to the sounds of urination for any evidence of tampering.[31] After testing the sample for temperature and signs of tampering, the school sends the sample to an independent lab for testing for marijuana, cocaine, amphetamines, and LSD.[32] The test results are reported by telephone to authorized school personnel.[33] If the results are positive, a second test is ordered immediately; if a subsequent test result is also positive, then the result is reported to the students' parents and a hearing is conducted.[34] The student is offered the option of participating in a drug assistance program and weekly drug testing for a period of six weeks, or suspension from all athletics for the current season and following season.[35] A second offense results in an automatic suspension from athletics for the current and following season; a third offense results in suspension for the remainder of the current season and the next two athletic seasons.[36] Before beginning the next season for which the student is eligible, the student must be re-tested.[37] The Policy does not provide for disclosure of positive test results to police.[38]

B. Proceedings Below

The Actons brought suit against the District,[39] claiming that the District's mandatory drug testing policy for athletes violated James's constitutional right against unreasonable searches and seizures under

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[29] *Id.* Although the District testified that the monitor is not required to actually observe the students urinate, the presence of the monitor, combined with the personal nature of urination, result in a loss of privacy to the student athletes. Reply Brief of Petitioner at 10, Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995) (No. 94-590).

[30] *Acton*, 796 F. Supp. at 1358.

[31] *Id.*

[32] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2389 (1995). The accuracy of these tests is approximately 99.94%. *Acton*, 796 F. Supp. at 1358.

[33] *Acton*, 796 F. Supp. at 1358.

[34] *Id.* at 1358-59.

[35] *Id.* at 1359.

[36] *Vernonia*, 115 S. Ct. at 2389.

[37] *Acton*, 796 F. Supp. at 1359.

[38] Reply Brief of Petitioner at 16, *Vernonia*, 115 S. Ct. 2386 (1995) (No. 94-590).

[39] *Acton*, 796 F. Supp. at 1359.

the Fourth Amendment of the United States Constitution,[40] made applicable to the states through the Fourteenth Amendment,[41] and under the Oregon Constitution.[42]

The United States District Court of Oregon first determined that the collection and testing of urine constituted a search within the meaning of the Fourth Amendment.[43] The court then looked at whether the District's Policy was reasonable in light of the Fourth Amendment and used a balancing test in which the government's "compelling need" for the particular invasion must outweigh the individual's reasonable expectation of privacy.[44] Using cases involving *employee* drug tests,[45] the district court determined that student athletes had a diminished expectation of privacy similar to that of highly regulated employees.[46] The court balanced what they perceived as a compelling interest in keeping student athletes drug-free, against the student's diminished privacy expectations, and concluded that the District's drug testing program was reasonable under the Fourth Amendment.[47]

The U.S. Court of Appeals for the Ninth Circuit, however, reversed the district court's ruling, holding that the mandatory drug testing policy was an unreasonable search under both the Oregon and United States Constitutions.[48] The Ninth Circuit's constitutional analysis was based on article I, section 9 of the Oregon Constitution,[49] because the

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[40] U.S. CONST. amend. IV.

[41] U.S. CONST. amend. XIV. *See infra* part III.

[42] OR. CONST. art. 1, § 9.

[43] *Acton*, 796 F. Supp at 1359 (citing Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989)). In *Skinner*, the Supreme Court upheld mandatory drug testing of railroad employees following major train accidents. The Court determined that urine tests, while not as bodily invasive as blood tests, require an employee to perform an excretory function which is traditionally shielded by great privacy. Because the collection and testing of urine intrudes upon a person's expectation of privacy, the Court held that this testing was a search under the Fourth Amendment. *Skinner*, 489 U.S. at 617.

[44] *Acton*, 796 F. Supp. at 1360.

[45] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); IBEW Local 1245 v. Skinner, 913 F.2d 1454 (9th Cir. 1990).

[46] *Acton*, 796 F. Supp. at 1360-62.

[47] *Id.* at 1364-65.

[48] Acton v. Vernonia Sch. Dist., 23 F.3d 1514 (9th Cir. 1994).

[49] *Id.* at 1518. Article I, section 9 of the Oregon Constitution provides: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause. . . . " OR. CONST. art. I, § 9.

two constitutions are not "co-extensive."[50] The Oregon Constitution offers more protection than the United States Constitution;[51] therefore, the court found itself "constrained . . . to decide this case on Oregon constitutional grounds."[52] However, because the Oregon courts had not decided a urine testing case, the court found it necessary to rely on federal constitutional case law to determine whether the drug testing program was constitutional under the Oregon Constitution.[53]

Applying the balancing test used by the Supreme Court in two employee drug testing cases,[54] the Ninth Circuit held that, although the District had "worthy goals" in deterring drug use among students, the District failed to show a compelling government interest in testing school athletes.[55] The Ninth Circuit also emphasized the basic privacy rights of children: "[c]hildren are compelled to attend school, but nothing suggests that they lose their right to privacy in their excretory functions when they do so. While they must attend classes and follow school rules, that does not indicate they have given up their basic privacy rights."[56]

The Ninth Circuit emphasized the inconsistency between a goal of reducing a widespread school drug problem, and limiting the testing

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[50] *Acton*, 23 F.3d at 1518. If the state and federal constitutional provisions are co-extensive, the court can decide the federal constitutional claims because that decision will also decide the state constitutional claims. However, if the court finds that they are not co-extensive and additionally, the state constitution gives its citizens more protections, the court will decide the claim under the state constitution, to avoid unnecessarily addressing federal constitutional claims. *Id. See generally* Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 705 n.4 (9th Cir. 1992); Ellis v. City of La Mesa, 990 F.2d 1518, 1524 (9th Cir. 1993); Hewitt v. Joyner, 940 F.2d 1561, 1565 (9th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992).

[51] The court cites a number of cases to support its contention that the Oregon Constitution can give more protection than the federal constitution. *Acton*, 23 F.3d at 1518. *See* State v. Caraher, 653 P.2d 942 (Or. 1982); State v. Florance, 527 P.2d 1202 (Or. 1974); Nelson v. Lane County, 743 P.2d 692 (Or. 1987).

[52] *Acton*, 23 F.3d at 1518.

[53] *Id.* at 1521. The court turned to the same case used by the district court in its analysis, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[54] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[55] *Acton*, 23 F.3d at 1526.

[56] *Id.* at 1525. The Ninth Circuit recognized that students' participation in athletics is "voluntary." *Id.* The court argued, however, that athletics and education "are inextricably intertwined" and students should not have to "surrender their right to privacy to secure their right to participate in athletics." *Id.*

to only athletes.[57] The court determined that a more efficient program targeted at the specific students displaying the problems noted by teachers would better serve the District's goal of reducing student drug use.[58] Although the Ninth Circuit also looked at the employee drug testing cases the district court cited, the court distinguished these cases, finding that the employee programs were implemented in the context of "truly serious concerns of a safety nature."[59] The Ninth Circuit balanced what it perceived as a minimal governmental interest against the important privacy interests of students, and held that the District's Policy was an unreasonable search and seizure under the Fourth Amendment.[60] Moreover, the court determined that Oregon would find the Policy invalid under article I, section 9 of the Oregon Constitution.[61]

C. *The Supreme Court Holding*

On June 26, 1995, the United States Supreme Court decided *Vernonia School District v. Acton*.[62] Justice Scalia, writing for a 6-3 majority,[63] reversed the Ninth Circuit holding, declaring that the Policy was "both

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[57] *Id.* at 1522.

[58] *Id.* at 1522.

[59] *Id.* at 1524. The cases the court cited include: National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (U.S. Customs Service employees involved in drug interdiction or enforcement); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) (railroad employees and commercial truckdrivers); Dep't of the Navy v. Egan, 484 U.S. 518 (1988) (military personnel); AFGE Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991) (workers with top secret security clearances); IBEW, Local 1245 v. United States Nuclear Regulatory Comm'n, 966 F.2d 521 (9th Cir. 1992) (nuclear power employees); IBEW, Local 1245 v. Skinner, 913 F.2d 1454 (9th Cir. 1990) (gas pipeline workers); International Bd. of Teamsters v. Dep't of Transp., 932 F.2d 1292 (9th Cir. 1991).

[60] *Acton*, 23 F.3d at 1527. The court also distinguished the Seventh Circuit holding in Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988). The drug testing program in *Tippecanoe* was remarkably similar to the *Vernonia* Policy; however, the Seventh Circuit upheld the program, declaring that the school district's "substantial interest" outweighed the students' privacy interests. The Ninth Circuit distinguished the "substantial interest" standard used in *Tippecanoe* from the "compelling interest" standard required by the Supreme Court in the employee drug testing cases. *Acton*, 23 F.3d at 1527 n.3. The court concluded by declaring that "we simply do not agree with the Seventh Circuit." *Id.* at 1527.

[61] *Acton*, 23 F.3d at 1527.

[62] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

[63] *Id.*

reasonable and hence constitutional'' under the Fourth Amendment.[64] Citing the 1989 employee drug testing case of *Skinner v. Railway Labor Executives' Ass'n*[65] for the appropriate test, the majority determined that whether a search passes constitutional muster "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[66]

The Court, although acknowledging that children do not "shed their constitutional rights . . . at the schoolhouse gate,"[67] nevertheless declared that "students within the school environment have a lesser expectation of privacy than members of the population generally."[68] The Court first determined that students as a general group have a reduced expectation of privacy.[69] The Court further asserted that athletes have an even lesser expectation than students in the general population, citing open locker rooms, communal undress, and the requirement of a pre-season physical examination in support of the reduced expectation of privacy.[70] After weighing the perceived minimal

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[64] *Id.* at 2396.

[65] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). The Court in *Skinner* addressed the constitutionality of a post-accident drug testing policy aimed at deterring drug use among railway employees. The Court upheld the drug testing policy, concluding that the compelling state interest in deterring drug use and avoiding serious railway accidents outweighed the diminished privacy interests of highly regulated railway employees. *Id.* at 633.

[66] *Vernonia*, 115 S. Ct. at 2390 (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (citation omitted)).

[67] *Vernonia*, 115 S. Ct. at 2392 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (holding that the School District's regulation prohibiting the wearing of black armbands in school was unconstitutional as a violation of students' First Amendment right of free speech)).

[68] *Vernonia*, 115 S. Ct. at 2392 (quoting New Jersey v. T.L.O., 469 U.S. 602 (1989)). In *T.L.O.*, the Court upheld a suspicion-based search of a student's purse after a teacher observed the student smoking in the bathroom in violation of school policy. 469 U.S. at 347-48.

[69] *Vernonia*, 115 S. Ct. at 2392. Separating students into a distinct group for the purpose of determining constitutional protection is not a new idea. In Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), the Supreme Court observed that students are persons under the Constitution and therefore possess the same rights that others possess. Nonetheless, the Court did assert that conduct by students that disrupts either classwork, or the rights of others, is not protected under the Constitution. *Tinker*, 393 U.S. at 513.

[70] *Vernonia*, 115 S. Ct. at 2392-93. The Court analogized the requirements of a physical exam, a minimum grade point average, and a dress code to the adults who voluntarily choose to participate in a closely regulated industry. *See Skinner*, 489 U.S. at 627; United States v. Biswell, 406 U.S. 311, 316 (1972).

privacy interests of student athletes against the government's "compelling need" to control drug use, the Court held that the Policy was reasonable and constitutional.[71] The Court vacated the Ninth Circuit's decision with respect to the scope of protection under the federal constitution, and remanded the case for further proceedings to determine the degree of protection afforded under the Oregon Constitution.[72]

On remand, a divided panel of the Ninth Circuit affirmed the district court's judgment, and denied certification of the question concerning application of the Oregon Constitution to the Oregon Supreme Court.[73] In a terse, one sentence opinion, the Ninth Circuit held that

> [p]ursuant to the United States Supreme Court's decision in Vernonia Sch. Dist. v. Acton, (citation omitted) and because we are of the opinion that the Oregon Supreme Court would not offer greater protection under the provisions of the Oregon Constitution in this case, (footnote omitted) we affirm the judgment of the district court.[74]

In a vigorous dissent, Judge Reinhardt, of the Ninth Circuit, emphasized that Justice Scalia remanded the case to the Ninth Circuit to determine the constitutionality of the Policy based on the Oregon Constitution.[75] The dissent argued that the Oregon Constitution *does* offer its citizens more protection than the United States Constitution.[76] The dissent also noted that it is "beyond question that states can interpret their constitutions to provide more protection than does the United States Constitution."[77] Finally, the dissent argued that the most appropriate resolution would be to allow the Oregon Supreme Court to decide the extent of the Oregon Constitution's protection, specifically in the form of a certified question.[78]

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[71] *Vernonia*, 115 S. Ct. at 2396.

[72] *Id.* at 2397.

[73] Acton v. Vernonia Sch. Dist., 66 F.3d 217 (9th Cir. 1995). Judge Fernandez wrote the majority opinion, joined by Judge Brunetti. Judge Reinhardt dissented.

[74] *Acton*, 66 F.3d at 218.

[75] *Id.* at 218-19 (Reinhardt, J., dissenting) (quoting Vernonia Sch. Dist. v. Acton, 115 S. Ct. at 2397).

[76] *Id.* at 219 (Reinhardt, J., dissenting) (quoting State v. Caraher, 293 Or. 741, 748-50, 653 P.2d 942, 946-47 (1982); Nelson v. Lane County, 304 Or. 97, 743 P.2d 692 (1987) (holding that a roadblock stop violated the Oregon Constitution despite the fact that it would not violate the Fourth Amendment)).

[77] *Id.* (Reinhardt, J., dissenting).

[78] *Id.* at 219-20 (Reinhardt, J., dissenting). Judge Reinhardt pointed out three possible courses of action the Ninth Circuit was left with on remand. The first would be to conduct

III. History of Fourth Amendment Protections against Search and Seizures

A. The United States Constitution

The Fourth Amendment to the United States Constitution states that 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 warrant 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.[79]

"The Fourth Amendment protects an individual's justified expectations of privacy against unreasonable government intrusions."[80] The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers.[81]

B. Case Law Defining the Fourth Amendment

The Supreme Court recently held that the collection and testing of urine constitutes a "search" within the meaning of the Fourth Amendment.[82] In *Skinner*, the Court compared urine testing to blood testing, and found that, although the testing of urine is not as physically invasive as the penetration of a needle for a blood test, the chemical analysis of the urine itself implicates privacy interests.[83] "There are

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a serious analysis of whether the drug testing program in Vernonia would violate the Oregon Constitution. The second was certification of this question to the Oregon Supreme Court. Lastly, the court, "discouraged by the Court's rejection of our construction of the United States Constitution," could "throw up [their] hands and simply proclaim that random, suspicionless drug tests are consistent with the Oregon Constitution as well." This, Judge Reinhardt posits, is what the majority chose to do. *Id.* at 219.

[79] U.S. Const. amend. IV.

[80] Jon M. Van Dyke & Melvin M. Sakurai, Checklists for Searches and Seizures in Public Schools (1995).

[81] New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985) (holding that school officials are public officials under the meaning of the Fourteenth Amendment).

[82] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989).

[83] *Id.* at 616-17. *See also* Schmerber v. California, 384 U.S. 757, 767-68 (1966) (holding that the taking of blood from an individual to be tested for alcohol is a Fourth Amendment search). For an extensive look at employee drug testing programs, in light of the *Skinner* decision, *see* Susan Haberberger, Note, *Reasonable Searches Absent Individualized Suspicion: Is there a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After Skinner v. Railway Labor Executives' Association?*, 12 U. Haw. L. Rev. 345 (1990).

few activities in our society more personal or private than the passing of urine."[84] The Court determined that, because the collection and testing of urine intrudes upon an individual's reasonable expectation of privacy surrounding this personal act, urine drug testing is a search under the Fourth Amendment.[85]

Generally, case law has established that "a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause."[86] In certain circumstances, however, a search lacking both probable cause and a warrant can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[87]

The Supreme Court has held that certain categories of individuals are afforded less than full protection under the Fourth Amendment.[88] The Court determined in *New Jersey v. T.L.O.*[89] that one of these classes is public school students.[90] In *T.L.O.*, a student was discovered by a teacher smoking cigarettes in the school restroom.[91] The teacher took T.L.O. and another student to the Principal's office for violation of school regulations regarding smoking.[92] After T.L.O. denied smoking, the Vice-Principal demanded to see her purse and subsequently searched it, discovering cigarettes, cigarette rolling papers, a small

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[84] *Skinner*, 489 U.S. at 617 (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

[85] *Skinner*, 489 U.S. at 617. The Court implied that the taking of a urine sample might also be characterized as a seizure under the Fourth Amendment, since it interferes with an individual's possessory interest in his bodily fluids. However, the Court found it unnecessary to decide this, based on its finding that the urine tests were a search, therefore implicating Fourth Amendment protection. *Id.*

[86] *Skinner*, 489 U.S. at 619 (quoting Payton v. New York, 445 U.S. 573, 586 (1980); Mincey v. Arizona, 437 U.S. 385, 390 (1978)). *See generally* United States v. Place, 462 U.S. 696 (1983); United States v. United States Dist. Court, 407 U.S. 297, 315 (1972).

[87] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

[88] Two such groups that are afforded less than full protection under the Fourth Amendment are probationers and prisoners. *See generally Griffin*, 483 U.S. 868 (holding that a probationer has diminished Fourth Amendment protection because of the ongoing supervisory relationship). As for prisoners, the Supreme Court has not gone so far as to say that students and prisoners should be equated for purposes of the Fourth Amendment. *See* New Jersey v. T.L.O., 469 U.S. 325, 338-39 (1985).

[89] *T.L.O.*, 469 U.S. 325.

[90] *Id.* at 340.

[91] *Id.* at 327.

[92] *Id.* at 328.

amount of marijuana, a pipe, and other paraphernalia commonly used in the dealing of narcotics.[93]

The Vice-Principal then turned the evidence over to police, and T.L.O. later confessed to dealing marijuana.[94] The State brought delinquency charges against T.L.O., who then moved to suppress the evidence and confession, arguing that the search of her purse violated her Fourth Amendment rights.[95] The Supreme Court held that public school officials do not need search warrants or probable cause in order to search school children.[96] The Court reasoned that to require a warrant would frustrate "the swift and informal disciplinary procedures needed in the schools,"[97] and that the "warrant requirement, in particular, is unsuited to the school environment."[98]

C. The Balancing Test

In order for a warrantless search to be constitutionally valid under the Fourth Amendment, the state must show a "compelling government interest" that outweighs an individual's privacy interests.[99]

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[93] *Id.* The Vice-Principal discovered a substantial quantity of one-dollar bills, a number of empty plastic bags, and an index card that listed students owing money to T.L.O., along with two letters implicating T.L.O. in marijuana dealing. *Id.*

[94] *Id.* at 329.

[95] *Id.*

[96] *Id.* at 340. The Supreme Court wrestled with the notion that school officials act *in loco parentis*, whereby they would not be subject to the Fourth Amendment's proscriptions. However, the Court found that school officials act as State representatives, and therefore cannot claim parental immunity from the prohibitions of the Fourth Amendment. *Id.* at 336-37.

[97] *Id.* at 340.

[98] *Id. See* Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967) (holding that the warrant requirement may be dispensed with when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search").

[99] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (using balancing test and holding that compelling government interest in maintaining railway safety outweighed minimal privacy interests of railway employees); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (applying balancing test and upholding urinalysis testing of applicants for customs officials promotions); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (using balancing test to hold that a roving patrol could stop motorists in the border area to inquire about their residence status); *See also* Delaware v. Prouse, 440 U.S. 648 (1979) (finding the government interest less than compelling, and holding that suspicionless spot checks of automobiles was unreasonable under the Fourth Amendment).

1. Expectations of privacy

The first prong of the balancing test consists of determining the nature of the privacy interest intruded upon by the search.[100] The Fourth Amendment protects only those expectations of privacy considered "legitimate" by society.[101] In order to determine what expectations of privacy are considered legitimate, the Court has looked at factors such as who is being searched, where the search takes place, and the nature of the intrusion itself.[102]

Case law has generally held that individuals have a legitimate expectation of privacy in their bodily functions.[103] In deciding employee drug testing challenges, however, the Court held that this legitimate expectation of privacy is diminished when the individual is employed in a field that is highly regulated.[104] In *Skinner*, the Court determined that the railway industry is regulated to ensure public safety, and a requirement that railway personnel produce a urine sample following a major train accident was minimally invasive because employees were already required to submit to physical examinations.[105]

Likewise, in *Von Raab* the Court asserted that "certain forms of public employment may diminish privacy expectations even with respect to such personal searches."[106] Specifically, the Court held that "Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test."[107] The Court compared the diminished privacy expectations of Customs employees with those of employees of the United States Mint, subject to routine personal searches when they leave work, and members of the military and intelligence services, subject to personal inquiries into their physical fitness.[108]

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[100] *Vernonia*, 115 S. Ct. at 2391.

[101] *Id.* (citing *T.L.O.*, 469 U.S. at 338) (holding that although students may have a legitimate expectation of privacy in certain highly personal items such as photographs and diaries, the importance of maintaining security and order in the schools outweighed T.L.O.'s expectation of privacy in her purse). *See generally* Hudson v. Palmer, 468 U.S. 517 (1984); Rawlings v. Kentucky, 448 U.S. 98 (1980).

[102] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2391 (1995).

[103] *Skinner*, 489 U.S. at 617; *Von Raab*, 489 U.S. at 665.

[104] *Skinner*, 489 U.S. at 618; *Von Raab*, 489 U.S. at 665.

[105] *Skinner*, 489 U.S. at 627.

[106] *Von Raab*, 489 U.S. at 671.

[107] *Id.* at 672.

[108] *Id.* at 671.

In addition to the diminished privacy expectation of individuals, the Court has held that the location of the person can bear on the nature of the privacy intrusion. In *United States v. Ortiz*,[109] the Court held that one's expectation of privacy in an automobile is different from the "traditional expectation of privacy" one has in one's own home.[110] In a later case, *United States v. Martinez-Fuerte*,[111] the Court determined that the intrusion on the privacy of motorists at fixed checkpoint stops was minimal, since motorists traveling on highways were not "taken by surprise" by the checkpoint locations.[112] On the other hand, in *United States v. Brignoni-Ponce*,[113] the Court concluded that random roving-patrol stops could not be tolerated because "such unreviewable discretion would be abused by some officers in the field."[114]

In regard to private residences, however, the Court has generally held that a person's home is "the place that traditionally has been regarded as the center of a person's private life, the bastion in which one has a legitimate expectation of privacy protected by the Fourth Amendment."[115] But in *Griffin*, the Court concluded that, when the individual is a probationer under state supervision, his privacy expectations are diminished, and a warrantless search of the home may be valid.[116]

Compare the protection the Court affords to individuals in private residences with the way the Court has addressed searches in schools.[117]

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[109] 422 U.S. 896 (1975).

[110] *Id.* at 896 n.2.

[111] 428 U.S. 543 (1976).

[112] *Id.* at 559. The Court held that "[a]s the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion to be diverted for the brief questioning involved." *Id.* at 563.

[113] 422 U.S. 873 (1975).

[114] *Id.* at 882-83.

[115] Griffin v. Wisconsin, 483 U.S. 868, 883 (1987). *But cf.* Camara v. Municipal Court, 387 U.S. 523 (1967) (holding that a suspicion requirement for the search of homes for building code violations was impractical because safety problems, such as faulty wiring, are not easily observed from outside of home).

[116] *Griffin*, 483 U.S. at 879. Justice Blackmun wrote a forceful dissent, in which he asserted that even a probationer retains a legitimate privacy interest in his own home and this expectation should be respected. He also rejected the majority's analogy of "closely regulated" businesses to the probation system, concluding that this type of warrant exception doesn't extend to the privacy invasion of a person's home. *Id.* at 884 (Blackmun, J., dissenting).

[117] *See generally* New Jersey v. T.L.O., 469 U.S. 325 (1985).

Children, as individuals, do not possess a lesser expectation of privacy than adults; however, their status as students, and their attendance in state-operated schools has led the Court to conclude that "students within the school environment have a lesser expectation of privacy than members of the population generally."[118] In *Tinker*, the Supreme Court qualified the proclamation that "[s]tudents in school as well as out of school are 'persons' under our Constitution,"[119] by ruling that students as a group are not protected from conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[120]

Recognizing the unique status of children in public schools, Justice White, for the majority in *T.L.O.*, held that "[a]lthough this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy."[121] Students have a legitimate expectation of privacy in certain items of personal property that they bring into schools, such as supplies, keys, money, and necessary personal hygiene articles.[122] Generally, students possess a legitimate expectation of privacy for a variety of legitimate, noncontraband items, "and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds."[123]

The *T.L.O.* Court held that this legitimate interest in privacy must be weighed against the substantial interest in maintaining classroom discipline.[124] The Court then established a modification of the level of suspicion required to justify a search of school children, based upon reasonable grounds of suspicion for the search.[125] In dicta, however,

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[118] *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring).

[119] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969).

[120] *Tinker*, 393 U.S. at 513.

[121] *Id.* at 338.

[122] *Id.* at 339. The search in *T.L.O.* was of a student's purse.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 341. This "reasonable grounds" test consists of a two-part inquiry: the first prong is "whether the . . . action was justified at its inception;" the second is "whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* This test was established in Terry v. Ohio, 392 U.S. 1 (1968) (holding that probable cause was not required when there was reasonable suspicion to conduct the search or seizure). Compare this reasonable suspicion requirement to *Vernonia* in which no reasonable suspicion was required to initiate the suspicionless drug testing program. *See* Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

the Court did set out exceptions to this individualized suspicion requirement:

> [these exceptions] are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field."[126]

Thus the "balancing test" was born, requiring the Court to weigh the privacy interests of the individual against the compelling governmental interest in the search.[127] The Court used this test five years later to justify random, suspicionless drug testing of Customs Service employees in *Von Raab*,[128] and railroad employees in *Skinner*.[129] The Seventh Circuit also used this balancing test to justify a similar drug testing program for athletes in the Tippecanoe School District.[130]

2. The compelling government interest

The second prong requires a finding of a compelling government interest to justify the privacy intrusion.[131] Only when the privacy

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[126] *T.L.O.*, 469 U.S. at 342 n.8 (citing Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

[127] *T.L.O.*, 469 U.S. at 342 n.8.

[128] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (holding that the privacy interests of highly regulated Customs Service employees were minimal because they were required to carry firearms in the line of duty and were expected to remain physically fit).

[129] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (holding that the expectations of privacy of railway employees were diminished because of their participation in an industry that is regulated highly to ensure safety). *Von Raab* and *Skinner* were decided on the same day; both opinions were written by Justice Kennedy with scathing dissents by Justice Marshall, who was joined by Justice Brennan. Two notes, however, bear mention. First, although Justice Scalia joined in the majority opinion in *Skinner*, he wrote a dissenting opinion in *Von Raab*, objecting to the lack of any hard evidence of a drug problem in the Customs Service. Second, Justice O'Connor, the dissenting author in *Vernonia*, joined in the majority opinion in both *Skinner* and *Von Raab*, upholding urine drug testing programs for employees.

[130] Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (1988) (holding that the privacy rights of school children participating in athletic programs were minimal because the testing took place behind a closed stall, and there was no requirement that the monitor actually observe the act of urination). Compare *Tippecanoe* to *Vernonia*, in which male children were required to urinate while being observed by a monitor. *See* Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

[131] A compelling government interest must be more than merely a legitimate or desirable

interest is minimal, and the government interests are compelling, can a search lacking individualized suspicion be reasonable.[132] The Court has generally found a compelling government interest in those cases involving a possible threat to the public's safety. For example, the Court found a compelling interest in the following: the drug testing of railroad employees after certain train accidents;[133] the drug-testing of Customs Service employees who carry firearms, or are involved in the interdiction of illegal drugs;[134] the search of a probationer's home for illegal weapons;[135] and routine checkpoint stops at the border to search for illegal aliens.[136]

In the absence of a public safety interest, the Court has generally required an individualized suspicion before upholding a warrantless search.[137] In *T.L.O.*, the Court upheld the search of a student's purse based on a teacher's observation of the student smoking.[138] Based on this individualized suspicion, the Court did not find it necessary to

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governmental objective. For example, in equal protection cases involving discrimination, strict scrutiny, and the compelling government interest requirement, have been "strict in theory and fatal in fact." *See* Loving v. Virginia, 388 U.S. 1 (1967) (no compelling governmental interest in preserving the racial integrity of citizens by criminalizing interracial marriages); Anderson v. Martin, 375 U.S. 399 (1964) (no compelling interest in requiring candidate's race to appear on the ballot); Brown v. Board of Ed., 347 U.S. 483 (1954) (no compelling governmental interest in segregating school children in public schools). However, the Court has been more likely to find a compelling governmental interest in the Fourth Amendment arena. *See Skinner*, 489 U.S. 602 (compelling governmental interest in deterring drug use by railroad employees); *Von Raab*, 489 U.S. 656 (compelling governmental interest in deterring drug use by customs employees); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (compelling governmental interest in preventing illegal aliens from entering the country).

[132] *Skinner*, 489 U.S. at 624. The Court in *Skinner* made it clear that a showing of individualized suspicion is not a constitutional floor. However, the *Skinner* Court's decision turned on the necessity of a minimal privacy interest combined with a compelling government interest; i.e., the obvious importance of public safety balanced against the privacy interests of a highly regulated railroad employee. *Id.*

[133] *See Skinner*, 489 U.S. 602.

[134] *See Von Raab*, 489 U.S. 656.

[135] *See* Griffin v. Wisconsin, 483 U.S. 868, 874 (1987).

[136] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 551 (1976) (holding that the public interest in reducing immigrants entering the country illegally outweighed the minimal privacy interests involved in a border stop); *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975); *but cf.* Delaware v. Prouse, 440 U.S. 648 (1979) (holding that a stop of an automobile on a public highway to check the operators' drivers license and registration was unreasonable without reasonable suspicion or probable cause).

[137] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2402 (1995) (O'Connor, J., dissenting).

[138] New Jersey v. T.L.O. 469 U.S. 325, 342 (1985).

consider the balancing test used in the previous cases.[139] Justice Powell, in a concurring opinion, suggested that, because of the diminished privacy expectations of students and the compelling interest in educating them, a suspicionless test may have been reasonable.[140]

The Court has declined to fix a minimum standard of governmental concern, focusing instead on the particular facts to determine whether the government's interest is important enough to justify the particular search involved.[141] The Court examines the nature and immediacy of the governmental concern and the efficacy of the means for meeting it.[142] In *Vernonia*, the Court determined that the nature of the government's interest in deterring drug use by school children is at least as important as deterring drug use in Custom Service employees[143] and railway employees;[144] drug testing of school children, in order to deter drug use, thus reaches the requirement of a compelling government interest.[145]

In sum, the Court has generally found a compelling government interest when the public's safety is at stake. In the absence of a public safety interest, the *Vernonia* Court held that the deterrence of drug use by children met the compelling need requirement, when supported by evidence of an "immediate crisis" of drug use.[146]

D. Less Drastic Alternative

Government actions requiring courts to apply strict scrutiny require a showing of both a compelling governmental interest (as discussed

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[139] *Id.* In dicta, however, the Court did imply that a search lacking individualized suspicion might be upheld, but only if the privacy interests are minimal and "other safeguards" are available to ensure that an individual is not subject to an official's discretion. *Id.* n.8.

[140] *Id.* at 348 (Powell, J., concurring) (declaring that "it is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally").

[141] *Vernonia*, 115 S. Ct. at 2394.

[142] *Id.* at 2394.

[143] *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668 (1989) (holding that governmental interest was compelling to deter employees in the drug interdiction field from using drugs).

[144] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989) (holding that maintaining public safety on railroads was sufficient compelling government interest).

[145] *Vernonia*, 115 S. Ct. at 2395. The Court relied upon *Skinner* and *Von Raab*, both of which concerned public safety to justify a "compelling government interest." *Id.*

[146] *Vernonia*, 115 S. Ct. at 2395. However, the evidence of drug use in Vernonia's school district was limited to one first-hand report of drug use. The rest involved hearsay evidence and conclusions by teachers and administrators that disciplinary problems had increased due to a supposed drug use problem. *See* discussion *supra* note 16.

above) and that the action was the least drastic alternative. Recent Supreme Court cases regarding Fourth Amendment challenges, however, have held that a requirement for the "least intrusive search" is *not* required.[147] States, on the other hand, are free to give greater protections to their citizens, either through constitutional provisions, or court interpretations of state law.[148]

IV. Analysis

The *Vernonia* case is one of the most important cases the Court has decided regarding childrens' constitutional rights. The Court, in balancing the governmental interest in maintaining order in the schools against the diminished privacy expectations of school children, held that student athletes could be subject to random drug testing.[149] The Court gave the following reasons for their decision: the diminished privacy expectations of students, and athletes in particular;[150] the compelling governmental interest in maintaining order in the schools;[151] no requirement of the "least intrusive" search;[152] and a suspicion-based drug testing program would be worse, not better than a random scheme.[153]

The majority first contended that the privacy expectations of student athletes are diminished, citing the showering, "suiting up" and "communal undress" inherent in athletic participation.[154] Justice Scalia next fluffed over the intrusiveness of urine testing, emphasizing that the Court has no requirement of the "least intrusive" means possible in

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[147] *Skinner*, 489 U.S. at 629 n.9; Illinois v. Lafayette, 462 U.S. 640, 647 (1983).

[148] *See* Stand. Comm. Rep. No. 69, *reprinted in* 1 Proceedings of the Const. Convention of Haw. of 1978, at 674-75 (1980) (stating that "the State must use the least restrictive means should it desire to interfere with the right" of privacy).

[149] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

[150] *Id.* at 2392-93.

[151] *Id.* at 2395.

[152] *Id.* at 2396.

[153] *Id.*

[154] *Id.* at 2392-93 (citing Schaill by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988)). In *Tippecanoe*, the Seventh Circuit upheld a school district's drug testing program. However, the privacy considerations were considerably more in the Tippecanoe School District, at least for male students, who were allowed to produce their urine sample in a closed stall, away from the eyes of a monitor. *Tippecanoe*, 864 F.2d at 1318.

justifying a warrantless search.[155] In support of this supposition, Justice Scalia proposed that a suspicion-based drug program "would not be better, but worse" than a suspicionless program.[156]

The majority posits that a suspicion-based regime might not be acceptable to parents who are unwilling to accept a program that "transforms the process into a badge of shame."[157] Justice Scalia also contends that a program based on suspicion would "generate the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed."[158] The majority's final justification is that a suspicion-based regime would add to the "ever-expanding diversionary duties of school-teachers the new function of spotting and bringing to account drug abuse."[159] The problem with the preceding assumptions is that a suspicion-based program was not even implemented in the first place; therefore the failure or success of such a program cannot be determined.

Justice O'Connor, in a dissenting opinion, proposed that a suspicion-based program is both achievable and more appropriate to the school environment.[160] Arguing that suspicionless searches would be reasonable only when a suspicion-based program would likely be ineffectual,[161] the

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[155] *Vernonia*, 115 S. Ct. at 2396. *See* Skinner v. Railway Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989) (holding that there has never been a requirement that the government use the least intrusive means to justify a search). However, as Justice O'Connor pointed out in her dissenting opinion, a suspicion-based regime is not "just any run-of-the-mill, less intrusive alternative" and "may not be easily cast aside in the name of policy concerns." *Vernonia*, 115 S. Ct. at 2402-03 (O'Connor, J., dissenting).

[156] *Vernonia*, 115 S. Ct at 2396. Justice Scalia, however, does not elaborate on how a suspicion-based drug program, generally considered to be the rule not the exception, could possibly "be worse" than the District's suspicionless Policy. One might assume he is hypothesizing that a suspicion-based regime would be less effective than a mass, suspicionless regime, or that it might be used as a weapon by teachers against unruly, but drug-free students.

[157] *Id.*

[158] *Id.* The very fact that Justice Scalia is speculating on the number of lawsuits generated by a program that was not even implemented, while facing an actual legal challenge to the present program, tends to diminish his position. Although undoubtedly lawsuits would follow a suspicion-based program, there is no evidence that lawsuits would increase.

[159] *Id.* at 2396. The irony here is that teachers had already become self-appointed mini-drug enforcers; they were the driving force in getting the Policy implemented by their claims of disruptive behavior and alleged drug use by students. Brief of Petitioner at 5, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[160] *Vernonia*, 115 S. Ct. at 2403 (O'Connor, J., dissenting).

[161] *Id.* at 2401 (O'Connor, J., dissenting) (citing Skinner v. Railway Executives' Ass'n,

dissent proposed that the Vernonia School District should have first implemented a suspicion-based program.[162] The dissent next asserted that the Fourth Amendment's requirement of individualized suspicion "may not be easily cast aside in the name of policy concerns."[163]

The dissent next contended that the majority of the evidence of the supposed "drug crisis" used to justify the suspicionless drug testing program in the Vernonia School District, would also justify a suspicion-based program.[164] The dissent, although conceding that a suspicion-based regime may not be as effective as the District's random Policy, asserted that the suspicion-based program would likely protect the students' Fourth Amendment rights as well as control Vernonia's alleged drug problem.[165] More importantly, the dissent maintained, instead of discriminating against athletes only, a suspicion-based program would allow school officials to target all students who demonstrated a reasonable suspicion of drug use.[166]

A. What Has Happened to the Constitutional Rights of Our School Children?

Since *Tinker v. Des Moines Independent Community Sch. Dist.*[167] was decided in 1969, the Supreme Court has retreated from its position

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489 U.S. 602, 631 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989); Bell v. Wolfish, 441 U.S. 520, 559 (1979) (holding that a suspicion requirement for prisoner searches following contact visits would be impractical because the observation needed to gain suspicion would disrupt the confidentiality and intimacy that contact visits afford)).

[162] *Vernonia*, 115 S. Ct. at 2402 (O'Connor, J., dissenting).

[163] *Id.* at 2403 (O'Connor, J., dissenting).

[164] *Id.* (O'Connor, J., dissenting). If substantiated, the evidence of students passing joints back and forth at a nearby restaurant, a student observed by a teacher as being "clearly obviously inebriated," another student dancing and singing at the top of his voice in the classroom, and a wrestling coach's testimony that he smelled marijuana in a hotel room occupied by wrestlers all would likely support a reasonable suspicion to test for drug use. *Id.*

[165] *Id.* at 2404 (O'Connor, J., dissenting).

[166] *Id.* at 2406 (O'Connor, J., dissenting). The District contends that their approach, testing athletes who are role models in the District, will discourage others from using drugs as well. Since two-thirds of the high school students and three-fourths of the junior high school students are athletes, the role model theory loses force when more students are leading than being led. Brief of Respondent at 48, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[167] 393 U.S. 503 (1969).

that school children do not "shed their constitutional rights . . . at the schoolhouse gate."[168] In *Tinker*, the Supreme Court held that the wearing of black armbands by students protesting the participation in Vietnam was constitutionally protected under the First Amendment.[169] The Court emphasized that students are "persons" under the Constitution and therefore possess the same fundamental rights that the rest of society possesses.[170] The Court remarked that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the 'marketplace of ideas.'"[171]

The Supreme Court retreated from its earlier protection of childrens' First Amendment rights under *Tinker* in the more recent case of *Bethel Sch. Dist. No. 403 v. Fraser*.[172] In *Bethel*, a high school student was suspended for delivering a speech at a school assembly which the school claimed was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty at the assembly."[173] The Court held that the school did not violate the student's First Amendment rights, and found no place for vulgar speech and lewd conduct in schools.[174]

In *Hazelwood Sch. Dist. v. Kuhlmeier*,[175] high school students claimed that the school violated their First Amendment rights by deleting a teenage pregnancy article and an article on the effects of divorce on

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[168] *Tinker*, 393 U.S. at 506.

[169] *Id.* at 514. The Court emphasized the lack of evidence that the wearing of armbands "would substantially interfere with the work of the school or impinge upon the rights of other students." Without this type of evidence, the State could not justify enforcing a prohibition on an individual's fundamental right to express a particular opinion. *Id.* at 509.

[170] *Id.* at 511.

[171] *Id.* at 512 (citing Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[172] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[173] *Id.* at 678-79.

[174] *Id.* Justice Burger relied on the statements by teachers that some of the students attending the assembly "hooted and yelled," and others seemed "bewildered and embarrassed by the speech." *Id.* at 677. However, Justice Stevens, in his dissent, pointed out that there was no evidence of disruption of classwork or interference with school activities, similar to the finding in *Tinker*. Without this disruption or interference, it is difficult to understand how an individual's constitutional rights may be impinged upon. *Id.* at 694 (Stevens, J., dissenting).

[175] 484 U.S. 260 (1988).

teenagers from their school newspaper.[176] The Court held that the school was justified in censoring the articles, concluding that the school had a responsibility to control what was printed in the school newspaper.[177] In a vigorous dissent, Justice Brennan disagreed with the majority's conclusion that schools should have control over the speech of students, and chided the majority for beginning its opinion with *Tinker*'s adage that students "do not shed their constitutional rights . . . at the schoolhouse gate."[178] Justice Brennan declared it to be:

> an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system" (citation omitted), "and that our Constitution is a living reality, not parchment preserved under glass" (citation omitted), the Court today "teach[es] youth to discount important principles of our government as mere platitudes."[179]

Justice Brennan[180] is not alone in arguing that the constitutional rights of children should be scrupulously protected: Justice White[181] and Justice O'Connor[182] also have championed the constitutional rights of children.

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[176] *Hazelwood*, 484 U.S. at 274.

[177] *Id.* at 276.

[178] *Id.* at 290 (Brennan, J., dissenting) (citing Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

[179] *Hazelwood*, 484 U.S. at 290-91 (Brennan, J., dissenting).

[180] In addition, Justice Brennan, in his dissent in *T.L.O.*, declared "[i]t would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections." 469 U.S. at 354 (Brennan, J., dissenting).

[181] Justice White, in his majority opinion in *T.L.O.*, stressed "that they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." New Jersey v. T.L.O., 469 U.S. 325, 334 (1995) (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[182] In *Vernonia*, Justice O'Connor quoted James Acton's father on the witness stand: "[suspicionless testing] sends a message to children that they are trying to be responsible citizens . . . that they have to prove that they're innocent . . . and I think that kinds of sets a bad tone for citizenship." 115 S. Ct. 2386, 2405 (1995) (citing Tr. 9, Apr. 29, 1992).

First in *T.L.O.*,[183] and subsequently in *Vernonia*,[184] the Court has restricted childrens' privacy rights and rights against unreasonable search and seizure to the point of near extinction. Although *T.L.O.* involved an individualized suspicion, the Court left the question open of whether to allow a search lacking the individualized suspicion previously required for warrantless searches.[185] *Vernonia* answered that question in the positive, holding that individualized suspicion is not required when the government's interest was compelling and the privacy rights of the school children minimal.[186]

The issue is whether the urine testing of student athletes for drug use is an *unreasonable* invasion of the school children's privacy. The testing of urine is considered a search under the Fourth Amendment.[187] The Supreme Court in *Vernonia* recognized that the collection of urine for testing "intrudes upon an excretory function traditionally shielded by great privacy."[188]

In the next breath, however, the Court determined that the character of the intrusion was such that the privacy interests compromised were negligible.[189] The majority cited the process by which the urine is obtained to support its contention that the privacy rights of the students are minimally compromised.[190] For example, the majority stated that male students remain fully clothed and are only observed from behind, while female students produce their samples in a closed stall.[191] Yet even in *Skinner*[192] and *Von Raab*,[193] all of the employees were allowed

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[183] *T.L.O.*, 469 U.S. 325.

[184] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

[185] *T.L.O.*, 469 U.S. at 342. The Court declined to decide whether individualized suspicion is an essential element of determining reasonableness; however, the Court, citing United States v. Martinez-Fuerte, 428 U.S. 543, 560-561 (1976) and Camara v. Municipal Court, 387 U.S. 523 (1967), implied that the Fourth Amendment imposes no absolute requirement of individualized suspicion, leaving the door open to the holding in *Vernonia* that individualized suspicion is not required. The cases the Court relied upon, however, deal with public safety issues, such as border stops and inspections for building code violations, neither of which concern the privacy interests of school children. *T.L.O.*, 469 U.S. at 342 n.8.

[186] *Vernonia*, 115 S. Ct. at 2396.

[187] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[188] *Vernonia*, 115 S. Ct. at 2393 (citing *Skinner*, 489 U.S. at 626).

[189] *Vernonia*, 115 S. Ct. at 2393.

[190] *Id.*

[191] *Id.*

[192] *Skinner*, 489 U.S. at 626. In *Skinner* the sample was collected in a medical environment,

the privacy to produce the urine sample in a closed environment, away from the watching eyes of a monitor.[194] Arguably, even in a closed stall the students' privacy rights are compromised, as a monitor must stand outside the stall door and listen for the signs of tampering.[195]

The Court compared the drug testing process in the Vernonia School District with the conditions typically encountered daily in public restrooms.[196] The majority failed, however, to adequately explain how the forced collection of urine from school children, while they are being monitored, can be compared to the normal, private function of urination. As Justice Marshall eloquently stated in his dissent in *Skinner*:

> Compelling a person to produce a urine sample on demand also intrudes deeply on privacy and bodily integrity. Urination is among the most private activities.[197] . . . [I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem.[198]

Even Justice Scalia recognized the privacy implications of urine testing, stating in his dissent in *Von Raab*, "I think it obvious that it [urine testing] is a type of search particularly destructive of privacy and offensive to personal dignity."[199]

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by personnel unrelated to the railroad employer. The policy did not require direct observation of a monitor, unlike the testing of male students in *Vernonia*. *Id.*

[193] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 661 (1989). Unlike the policy in *Vernonia*, in *Von Raab* employees produce their sample behind a partition, or in a closed bathroom stall. *Id.*

[194] *See also* Schaill v. Tippecanoe, 864 F.2d 1309, 1318 (7th Cir. 1988). The Seventh Circuit Court of Appeals upheld the random drug testing program in the school district, placing great importance on the fact that the monitors were not visually monitoring the students producing the urine samples. The Seventh Circuit determined that the invasion of privacy was not nearly as severe as would be the case had the monitor been required to observe the student urinate. *Id.*

[195] *See generally Von Raab*, 489 U.S. 680 (Scalia, J., dissenting) (emphasizing that urination is "an excretory function traditionally shielded by great privacy . . . [and when] a monitor of the same sex . . . remains close at hand to listen for the normal sounds [of urination] . . . it is a type of search particularly destructive of privacy and offensive to personal dignity." (citing *Skinner*, 489 U.S. at 626)).

[196] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2393 (1995).

[197] *Skinner*, 489 U.S. at 645 (Marshall, J. dissenting).

[198] *Id.* at 646 (Marshall, J. dissenting) (citing Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

[199] *Von Raab*, 489 U.S. at 680. Justice Scalia's dissent in *Von Raab* focused on the lack

Aside from the obvious privacy invasion of taking the sample itself, the Court glossed over the privacy implications of disclosing the information discovered from the tests.[200] "[C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts about [a person], including whether he or she is epileptic, pregnant, or diabetic."[201] The majority concluded that since the test looks only for drugs, and particularly standard drugs, the information disclosed does not invade the privacy of students.[202]

The Policy does not end its privacy intrusions here; the District also requires students to disclose any prescription medications they may be taking, forcing school children to disclose information commonly kept very private.[203] One of the important factors in upholding the drug testing program in *Von Raab* was the fact that "an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician."[204] Even more troubling about the Policy is that the student does not submit this information to an independent lab; instead the student must submit the sample and medical history to school officials, including both teachers and coaches with whom the students must interact on a daily basis.[205]

The District supports its contention that its drug testing program is not an unreasonable invasion of privacy, by asserting that students as a group have a diminished expectation of privacy, and athletes in particular have even fewer privacy interests.[206] The Court cites *T.L.O.* for the proposition that school children have a reduced expectation of

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of proof of a real drug problem, particularly specific incidents of drug use, among Customs Service employees. Ironically, in *Vernonia*, Justice Scalia takes at face value the testimony of teachers that students are on drugs, and uses these assumptions to support his holding that Vernonia's policy was reasonable and the government's interest compelling. 115 S. Ct. at 2389.

[200] *Vernonia*, 115 S. Ct. at 2393.

[201] *Skinner*, 489 U.S. at 617.

[202] *Vernonia*, 115 S. Ct. at 2393.

[203] *Id.* at 2394. By forcing students to disclose the medications they use, the District is privy to information such as whether a student has AIDS, epilepsy, even whether the student takes birth control pills, all of which should remain private if a student wishes. Brief of Respondent at 28, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[204] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 n.2 (1989).

[205] *Vernonia*, 115 S. Ct. at 2394. *But compare Skinner*, 489 U.S. 602 and *Von Raab*, 489 U.S. 656 (employees' lists of medications were disclosed only to medical personnel).

[206] *Vernonia*, 115 S. Ct. at 2392.

privacy, holding that the schools' tutelary and custodial responsibility allow schools to invade upon students' privacy interests.[207]

This brings up two questions: does the majority's contention that all students have a diminished expectation of privacy justify a future school district imposing a blanket drug testing program on all students, thereby not restricting it to student athletes? And if the Court's contention that the voluntary nature of athletics tipped the balance in *Vernonia*, does this open the door to a program mandating drug testing for all extracurricular activities, including drill teams, academic teams, chess club, and even National Honor Society?[208]

The majority determined that because student athletes must "suit up" before practice or a meet, and shower and change clothes in public locker rooms, they have even less legitimate privacy expectations than the student population as a whole.[209] Citing *Tippecanoe*,[210] the majority asserted that since there was "an element of 'communal undress' inherent in athletic participation," athletes have minimal privacy interests.[211]

This analysis begs the question: why must student athletes submit to forced, compulsory urine collection based on the finding that they dress and shower together in a communal locker room?[212] Although arguably this may support the finding that athletes have diminished privacy interests, it fails to consider the compulsory, forced nature of the testing. Although students must produce a sample with a monitor present for the drug testing program, no complementary requirement exists for the mandatory monitoring of student athletes showering and changing for athletic events.

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[207] *Id.* (citing New Jersey v. T.L.O. 469 U.S. 326, 348 (1985) ("students within the school environment have a lesser expectation of privacy than members of the population generally")).

[208] *See generally* Oral Argument, United States Supreme Court at 28, *Vernonia*, 115 S. Ct 2386 (No. 94-590).

[209] *Vernonia*, 115 S. Ct. at 2392. The Court found that the locker rooms in Vernonia were open and communal, there were no partitions separating the showers, and not even the toilet stalls had doors. *Id.*

[210] Schaill by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (1988).

[211] *Vernonia*, 115 S. Ct. at 2393.

[212] Arguably, if this contention proves reasonable, then all students participating in physical education classes, which in many states are mandatory, would also be subject to the same diminished privacy expectations—and therefore, as the majority determines, mandatory drug testing—based on the fact that they shower and suit up for physical education classes.

The District also contended that because the students voluntarily participate in school athletics, they have the choice to be drug tested, and therefore their invasion of privacy is diminished.[213] However, if, as the District contended, school athletics play a prominent role in the Vernonia's community,[214] the District is, in essence, punishing those that choose not to participate in sports based on their individual privacy interests and expectations.[215] As the Ninth Circuit found, "[p]articipation in athletics is obviously highly desirable and encouraged. . . . The fact is that parents wish to have their children obtain the physical and mental benefits of organized sports. That too, is part of the educational process. . . . "[216] Although the District maintains that the Policy is not meant to be used as punishment by denying students the right to participate in "part of the educational process,"[217] the District is thereby punishing those students who wish to participate in sports—but do not wish to participate in the accompanying mandatory urine testing.[218]

B. Where is the Compelling Government Interest?

The Court emphasized that the State has a compelling interest to deter drug use by students.[219] By emphasizing the "overwhelming" proof of a widespread drug problem, the Court justified a program designed to deter athletes from using drugs.[220] Relying on the district

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[213] *Vernonia*, 115 S. Ct. at 2393. As an interesting side note, the Vernonia School District's original drug testing program, in force from September 1989 to August 1990, applied to all extracurricular participants; however, the District limited the testing program to student athletes in order to assure its legality. Brief of Petitioner at 9, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[214] *See supra* note 3.

[215] *See* Brief of Respondent at 36, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[216] Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1525 (9th Cir. 1994).

[217] *Acton*, 23 F.3d at 1525.

[218] Brief of Respondent at 36, *Vernonia*, 115 S. Ct. 2386 (No. 94-590). Because Vernonia itself is a small town, the punishment of being denied the right to participate in school sports is a public punishment. Community life revolves around the schools and sports in particular; therefore, if a student is denied the right to participate in sports, the entire community will know. *Id.*

[219] *Vernonia*, 115 S. Ct. at 2395.

[220] *Id.* at 2396. As emphasized *supra* in part II, there was little or no proof of any drug use, let alone an overwhelming drug crisis. Although teachers emphasized disruptive behavior, unruly students, and a glamorization of the drug culture, there was only one eyewitness account of drug use, and it was observed from across the street by a teacher who was unsure if the students were smoking a cigarette, or marijuana. Brief of Respondent at 4 n.4, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

court's finding that there was an "epidemic" of disciplinary problems and this epidemic was "fueled by alcohol and drug abuse as well as by the student's misperception about the drug culture," the Court found that the nature of the District's concern was undoubtedly compelling.[221]

As Justice O'Connor noted in her dissenting opinion, however, there was "virtually no evidence in the record of a drug problem at the Washington Grade School, which includes the 7th and 8th grades, and which James Acton attended when this litigation began."[222] And in the high school, Justice O'Connor contended that, although the District did produce evidence of a "drug-related discipline problem in Vernonia," the evidence of a "drug-related sports injury problem at Vernonia" was much weaker.[223] Therefore, if the District's goal was to deter drug use among students as a whole, the choice of testing only athletes, versus testing those students displaying classical disruptive behavior, was too broad a policy to be reasonable under the Fourth Amendment.[224]

Justice O'Connor asserted that a better program would target those students that violate school rules and display disruptive classroom behavior.[225] Additionally, not only would this program deter drug use among those that are likely to be the problem, but it would protect those that are guilty only of wishing to participate in school-sponsored athletics. The drug problem in schools is undeniably a problem that the schools must combat; under the guise of deterrence, however, the ruling in Vernonia has justified mass testing of millions of innocent school children, instead of limiting testing to those that display the types of disruptive behavior schools must eradicate.[226]

Although "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students,"[227] mass testing of mostly innocent student athletes fails to justify these goals. The

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[221] *Vernonia*, 115 S. Ct. at 2395.

[222] *Id.* at 2406 (O'Connor, J., dissenting). Justice O'Connor emphasized that the supposed drug problem was contained at the high school, and was based on testimony of incidents reported by teachers and administrators. Justice O'Connor cited the only evidence of a grade school problem being a "guarantee" by the grade school principal that drug problems start in the elementary schools. *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring).

District contends that the drug testing program is a success; they cite a reduction in disciplinary referrals, and a decrease in drug use as factors favoring the program.[228] The evidence of success, however, was minimal, and possibly misleading.[229]

Substantiated proof is difficult to show; only two students, both in high school, have flunked the test since the program's implementation.[230] One can suggest a few explanations for this finding: one, that the program was a success in deterring drug use among the other tested athletes; two, that athletes dropped out when the program began; and three, that a student athlete drug problem did not exist in the first instance.

The first explanation is hardly likely; that all but two athletes involved in widespread drug use quit using drugs immediately upon implementation of the drug testing program. The second explanation, that the athletes using drugs quit sports when the program began, is not evidenced, since sport participation did not drop off at the program's inception.[231] It is far more likely that there were few athletes taking drugs before the testing began.

If this explanation holds up, the "widespread drug problem," that was at epidemic proportions, was not evidenced; therefore, the "compelling government interest" cannot be demonstrated, and the search would fail to be reasonable under the Fourth Amendment.[232] Following this supposition, the lack of a compelling government interest would fail to justify the search, regardless of how minimal the student's privacy interest is in the first place.

Although the Court has determined that the privacy rights of school children may be diminished, they are not non-existent; school children's constitutional rights are not yet equated with the rights, or lack thereof, of prisoners.[233] Therefore, if school children are to maintain a vestige of their right to privacy, and the government fails to show a compelling interest in a drug testing program targeted at athletes who have not been

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[228] Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1522 (9th Cir. 1994).

[229] Brief of Respondent at 2, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[230] *Id.* at 7, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[231] *Id.* at 8, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

[232] *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

[233] New Jersey v. T.L.O., 469 U.S. 325, 338-39 (1985). Citing Ingraham v. Wright, 430 U.S. 651, 669 (1977), the Court declared that "[the] prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *T.L.O.*, 469 U.S. at 338.

demonstrated to be widespread drug users, then Vernonia's drug program should have failed the reasonability test under the Fourth Amendment.[234]

A final interesting note: the Court emphasized that the "compelling government interest" is to maintain discipline and control in the classroom and keep children from becoming chemically dependent.[235] If the drug problem is targeted at only student athletes, however, then the compelling government interest should be to keep student athletes from getting hurt during athletic events, arguably far from the "compelling government interest" found in *Skinner*[236] and *Von Raab*.[237]

V. Vernonia And Drug Testing In Hawai'i

The Hawaii Constitution has traditionally afforded its citizens greater constitutional privacy protections than the United States Constitution.[238] Article I, section 6 of the Hawaii Constitution reads, "[t]he 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."[239]

The Hawaii Supreme Court, in *State v. Kam*,[240] determined that the Hawaii Constitution article I, section 6:

> affords much greater privacy rights than the federal right to privacy, so we are not bound by the United States Supreme Court precedents.[241]. . . As the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaii Constitution, we are free to give broader privacy protection than that given by the federal constitution.[242]

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[234] *See Skinner*, 489 U.S. at 624.

[235] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2395 (1995).

[236] *Skinner*, 489 U.S. 602 (finding a compelling governmental interest in preventing Railway accidents).

[237] National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (finding a compelling governmental interest in deterring drug use among Customs Service employees involved in drug interdiction). *See also* Respondent's Brief at 41, *Vernonia*, 115 S. Ct. 2386 (No. 94-590) (concluding that "the District's concern for the safety of student athletes, albeit well-intentioned, simply does not rise to the level of the safety concerns that were found sufficiently compelling in *Skinner* and *Von Raab*").

[238] *See* State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988).

[239] Haw. Const. art I, § 6.

[240] 69 Haw. 483, 748 P.2d 372 (1988).

[241] *Kam*, 69 Haw. at 491, 748 P.2d at 377 (quoting State v. Henry, 732 P.2d 9 (Or. 1987)).

[242] *Kam*, 69 Haw. at 491, 748 P.2d at 377 (quoting State v. Kim, 68 Haw. 268, 711

In *Kam*, the issue was whether the Hawaii constitutional provision on the right of privacy protects the sale of pornography.[243] Although acknowledging that the United States Supreme Court had ruled that there is no federal right of privacy to either sell or give pornography to another,[244] the Hawaii Supreme Court held that because of the greater privacy protection afforded under the Hawaii Constitution, the questioned statute prohibiting the sale of pornography did violate constitutionally protected privacy rights.[245]

The Hawaii Supreme Court used the balancing test, requiring a showing of a "compelling state interest," to justify infringing upon an individual's privacy rights.[246] The Hawaii Supreme Court gave effect to the intent of the constitutional provision, looking at the Proceedings of the Constitutional Convention of Hawai'i of 1978, which stated:

> It should be emphasized that this right [privacy] is not an absolute one but . . . it is so important in value to society that it can be infringed upon only by the showing of a compelling state interest. If the State is able to show a compelling state interest, the right of the group will prevail over the privacy rights or the right of the individual. However, in view of the important nature of this right, the *State must use the least restrictive means should it desire to interfere with the right.*[247]

The Hawaii Supreme Court held that a "'compelling state interest' must exist before the government may intrude into those 'certain highly

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P.2d 1291 (1985); State v. Wyatt, 67 Haw. 293, 687 P.2d 544 (1984); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974)). *See also* State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985) (holding that police cannot search opaque, closed trash bags, either located on the street or in a trash bin, without a search warrant). For a thorough discussion of the privacy rights of Hawaii citizens, *see* Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311 (1992).

[243] *Kam*, 69 Haw. at 486, 748 P.2d at 374.

[244] *Id.* at 490, 748 P.2d at 376 (citing United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 128 (1973)).

[245] *Kam*, 69 Haw. at 495, 748 P.2d at 380.

[246] *Id.* at 493, 748 P.2d at 378.

[247] STAND. COMM. REP. NO. 69, *reprinted in* 1 PROCEEDINGS OF THE CONST. CONVENTION OF HAW. OF 1978, at 674-75 (1980) (emphasis added). This stands in marked contrast to the Supreme Court's general contention that there is no requirement of the "least intrusive search." "The reasonableness of any particularly government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989) (citing Illinois v. Lafayette, 462 U.S. 640, 647 (1983)).

personal and intimate affairs of [a person's] life.'"[248] The court extended the protection of viewing or reading pornography to the sale of it, finding that there is no "compelling government interest" in prohibiting the sale of pornography, because the protected privacy right to view it would then become meaningless.[249]

Applying the reasoning in *Kam*, it is likely that a *Vernonia* like drug testing program would fail the "compelling government interest" test, based on the requirement that the State use the "least restrictive means" in infringing upon an individual's privacy rights. As Justice O'Connor noted in her dissent, a less restrictive program would involve at least a requirement of an individualized suspicion of drug use.[250]

Although drug testing in Hawai'i's schools hasn't been challenged in Hawai'i to date, there have been challenges to employee-based drug testing. In *McCloskey v. Honolulu Police Dep't*[251] a police officer challenged the Honolulu Police Department's implementation of a drug testing program, claiming that the policy violated the officer's right of privacy under section 6 of the Hawaii Constitution.[252] The Hawaii Supreme Court upheld the police department drug policy, holding that "the HPD testing program is the necessary means to a compelling state interest."[253] The Court held that, "HPD's drug testing program serves three compelling interests: (1) insuring that individual police officers are able to perform their duties safely; (2) protecting the safety of the public; and (3) preserving HPD's integrity and ability to perform its job effectively."[254] The court also held that the drug testing program was the least restrictive to meet the governmental interests, because "[c]riminally investigating officers suspected of using drugs proved ineffective," and the safety issues involved in deterring officers from drug use clearly outweighed the privacy interests.[255]

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[248] State v. Kam, 69 Haw. 483, 493, 748 P.2d 372, 378 (1988). The Court concluded that the reading or viewing of pornography in one's own home in no way affects the general public, therefore must be afforded constitutional protection. *Id.* at 494, 748 P.2d at 379.

[249] *Id.* at 495, 748 P.2d at 380.

[250] *Vernonia*, 115 S. Ct. at 2402 (O'Connor, J., dissenting).

[251] 71 Haw. 568, 799 P.2d 953 (1990).

[252] *Id.* at 573, 799 P.2d at 956.

[253] *Id.* at 576; 799 P.2d at 957. The court, although deciding that the state did have a compelling interest in conducting drug tests on police officers, failed to determine whether the testing infringed on the officers' privacy interests. *See* Van Dyke, *supra* note 242, at 354.

[254] *McCloskey*, 71 Haw. at 576, 799 P.2d at 957.

[255] *Id.* at 579; 799 P.2d at 959.

Similarly, the Hawaii Intermediate Court of Appeals held that fire fighters of the Honolulu Fire Department (HFD) were also subject to a mandatory drug testing policy initiated by the HFD in response to an alleged increase in drug use in the Department.[256] A firefighter challenged the policy, claiming it violated his constitutional rights under both the United States and Hawaii Constitutions.[257]

The court first weighed the intrusiveness of the drug testing against the compelling state interest, and found that, because the fire fighters have a diminished expectation of privacy, the program was only minimally intrusive.[258] The court determined that because the fire fighters are subjected to annual physical examinations, are required to comply with rules on physical fitness, are subject to recall at all times, and must work irregular hours, the court analogized their employment to that of the highly regulated fields in *Skinner* and *Von Raab*.[259] The court, however, declined to address the Hawai'i requirement of "less intrusive means," instead addressing the United States Supreme Courts' adage that the "reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means."[260] One can speculate that the court assumed that the fire fighter's program would meet the same standards of "less intrusive" means that the police department's program did in *McCloskey*.[261]

The court concluded that "the City here has a compelling interest to ensure that its fire fighters are 'physically fit' and have 'unimpeachable integrity and judgment,'"[262] and that, "[f]ire [fighters] are also uniquely charged with duties to respond quickly and effectively at a moment's notice. Impaired abilities caused by drug use may beget delays in responding to fires or other public emergencies."[263]

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[256] Doe v. City and County of Honolulu, 8 Haw. App. 571, 816 P.2d 306 (1991).

[257] *Doe*, 8 Haw. App. at 576, 816 P.2d at 311.

[258] *Id.* at 583, 816 P.2d at 314.

[259] *Id.* at 584-85, 816 P.2d at 314.

[260] *Id.* at 586, 816 P.2d at 315.

[261] *See* McCloskey v. Honolulu Police Dep't, 71 Haw. 568, 579, 799 P.2d 953, 959 (1990) (holding that police department had no other practical means to detect drug use beyond criminally investigating officers, which had proved ineffective).

[262] *Doe*, 8 Haw. App. at 587, 816 P.2d at 316 (citing *Von Raab*, 489 U.S. at 670).

[263] *Doe*, 8 Haw. App. at 588, 816 P.2d at 316. (citing City of Annapolis v. United Food & Commercial Workers, Local 400, 565 A.2d 672, 681 (1989) (holding that the safety of both police and fire personnel and the public served by them constitute compelling interest of the city, justifying the drug testing program)).

The other drug testing program that the Hawaii Supreme Court has upheld is one involving probationers.[264] In *State v. Morris*, the terms of Morris's probation included a requirement of urinalysis drug testing, to which the probationer objected.[265] The court upheld the program, concluding that "[w]hile probationers have a right to enjoy a significant degree of privacy and liberty . . . there is 'limited freedom afforded someone who but for the grace of the sentencing court would be in prison.'"[266] The obvious distinction between prisoners (and arguably probationers) and school children was accepted by the United States Supreme Court in *T.L.O.*[267]

In the previous cases, the courts emphasized public safety, and the importance of the ability to perform official duties effectively and quickly. They also stressed the diminished expectation of privacy among employees in highly regulated fields, and among probationers. In marked contrast, *Vernonia* concerns itself with keeping student athletes, who have nothing to do with either public safety nor official duties, drug-free.

The Hawaii Supreme Court recently decided a Fourth Amendment challenge to a search of a high school student's purse.[268] The facts were similar to *T.L.O.*; a student was suspected of possessing a substance which was against school policy, and was subsequently searched.[269] The principal discovered marijuana and summoned police.[270] The student moved to suppress the evidence obtained, contending a violation of her Fourth Amendment rights.[271] The Hawaii Supreme Court, however, upheld the search, holding that based on the Supreme Court's decision in *T.L.O.*, there was sufficient reasonable suspicion for the principal to search the student.[272] The requirement of individualized suspicion was ultimately the deciding factor in finding the search reasonable.[273] The court concluded that warrantless searches by school officials are reasonable, "provided that they are supported by a reasonable suspicion that the search will uncover

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[264] State v. Morris, 72 Haw. 67, 806 P.2d 407 (1991).

[265] *Morris*, 72 Haw. at 69, 806 P.2d at 409.

[266] *Id.* at 71-72, 806 P.2d at 410.

[267] New Jersey v. T.L.O., 469 U.S. 325, 338-39 (1985). *See supra* note 87.

[268] In the Interest of Jane Doe, 77 Hawai'i 435, 887 P.2d 645 (1994).

[269] *In re Doe*, 77 Hawai'i at 437, 887 P.2d at 647.

[270] *Id.* at 437, 887 P.2d at 647.

[271] *Id.* at 439, 887 P.2d at 649.

[272] *Id.* at 443, 887 P.2d at 653.

[273] *Id.* at 445, 887 P.2d at 655. Justice Moon emphasized this point by concluding that "individualized suspicion is a necessary element in determining reasonableness." *Id.*

evidence of an infraction of school disciplinary rules or a violation of the law."[274]

The suspicionless search in *Vernonia*, however, would likely not pass muster with the "individualized suspicion" requirement of the Hawaii Supreme Court. There is no "individualized suspicion" that all athletes in the Vernonia School District are violating either the law or school disciplinary rules. Nor is their any reasonable suspicion that a blanket search will uncover evidence of drug use of all the athletes consenting to the drug testing program. Because "individualized suspicion is a necessary element in determining reasonableness"[275] it is quite likely that a "*Vernonia* Policy" would fail in Hawai'i's court system.

One question remains: how would the Ninth Circuit decide a Hawaii Constitution, article 1, section 9 challenge to a school drug testing program in Hawai'i? Based on the legislative intent of the Hawaii Constitution,[276] requiring the State to use the "least restrictive means" before interfering with an individual's right, one would assume the program would have to be struck down.

Based on the Ninth Circuit's refusal to either decide the case based on the Oregon Constitution, or certify the question to the state supreme court, however, the future for similar challenges based on the Hawaii Constitution, at least in federal court, may not be too encouraging. A challenge made in state court might result in striking down a program which clearly violates the "least restrictive means" requirement for government actions which result in constitutional infringements.[277] The same challenge made in federal court, however, may not be so successful, based on *Vernonia*'s demise on remand.[278] It is discouraging, to say the least,

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[274] *Id.* at 444, 887 P.2d at 654.

[275] *Id.* at 445, 887 P.2d at 655.

[276] *See supra* note 249.

[277] A state can always afford more protection to its citizens through its state constitution than the federal constitution affords. Hawai'i, for example, has in a number of cases afforded more privacy protection than the United States Supreme Court. *See* State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988) (holding that although the United States Constitution does not protect the right to sell pornography, United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123 (1973), the Hawaii Constitution does protect this privacy right); State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985) (holding that individuals have a reasonable expectation of privacy in their trash). "This result provides greater protection of privacy than federal courts currently provide." Van Dyke, *supra* note 242, at 358.

[278] *See also* Moule v. Paradise Valley Unified Sch. Dist. No. 69, 1995 U.S. App. Lexis 25187 (9th Cir. 1995) (unpublished opinion). The Ninth Circuit court held that,

that the court failed to take up the challenge on remand to strike down *Vernonia*'s random, suspicionless drug testing program.[279]

VI. Conclusion

If children do not "shed their constitutional rights . . . at the schoolhouse gate,"[280] the Supreme Court has, at the very least, determined that they shed their Fourth Amendment rights at that same gate. The Supreme Court, in an opinion written by Justice Scalia, has in one ruling allowed schools to invade the privacy of millions of students who can now be subjected to a mass suspicionless search regime.[281]

Although purportedly limited to student athletes, who voluntarily participate in school-sponsored sports, the repercussions of this ruling go far beyond its seemingly narrow ruling.[282] Justice Scalia, whether by mistake, or deliberately, failed to foreclose the possibility of a constitutionally valid drug testing program for all students. Although Justice Scalia stressed that athletes have even less legitimate privacy expectations, he first emphasized the minimal expectation of privacy among students as a whole.[283]

Justice Ginsburg, in her concurring opinion, stressed the importance of limiting the opinion to student athletes who voluntarily participate in school sports.[284] It is likely that Justice Ginsburg wished to forestall a

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in light of the Supreme Court's decision in *Vernonia*, a drug testing policy in an Arizona school district would be upheld. The court also dismissed the appellee's state constitutional claims without prejudice because the state claim was insufficiently briefed. However, the court made it clear that the appellees were free to raise the state constitutional claims in the Arizona courts, presumably because the Arizona constitution gave its citizens more protections. *Id.* at 2.

[279] Consider a recent decision handed down by the Ninth Circuit regarding the First Amendment right of freedom of religion of school children, Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995). In *Cheema*, the Ninth Circuit affirmed a district court order allowing the children to wear kirpans (knives) to school. The Sikh children carry kirpans for religious reasons and argued that the school violated their right to freedom of religion by prohibiting the knives. Undeniably, the school has a compelling interest in keeping its schools and school children safe from dangerous weapons; however the Ninth Circuit upheld the preliminary injunction, holding that the school district failed to produce evidence demonstrating the lack of a less restrictive alternative. *Id.* at 885.

[280] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).

[281] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2397 (1995) (O'Connor, J., dissenting).

[282] *Id.* at 2397 (Ginsburg, J., concurring).

[283] *Id.* at 2392.

[284] *Id.* at 2397 (Ginsburg, J., concurring).

future claim that the majority opinion intended to look favorably on a drug testing program aimed at all students.[285] Justice Ginsburg, however, concurred alone, leading to the unfortunate conclusion that the majority deliberately left the opinion open to interpretation allowing widespread drug testing for all students. Justice Scalia commented on the diminished constitutional rights of children versus the rights of adults, and analogized the control teachers and administrators have over children to parental control.[286] The phrase "[f]or their own good"[287] is used to justify a mandatory drug testing policy, based not on reasonable suspicion, but on a student's desire to participate in a normal part of school such as athletics.

Justice Scalia, writing for the Court's majority, speaks in platitudes: "for their own good," the "duty [of schools] to inculcate the habits and manners of civility," and the "custodial and tutelary" power of schools over school children.[288] Although the objective of drug-free schools is commendable, the process by which the Vernonia School District intends to achieve this goes against all that the Constitution stands for.

The demise of school children's constitutional rights began in the 1980's with *T.L.O.*,[289] *Bethel*,[290] *Hazelwood*,[291] and continues into the 1990's with

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[285] *Id.*

[286] *Id.* at 2391.

[287] *Id.* at 2392. Justice Scalia contended that since children must submit to routine physical examinations and vaccinations "[f]or their own good," students have a lesser expectation of privacy. Therefore, he rationalized that a mass, suspicionless drug testing program should also pass Fourth Amendment muster. *Id.*

[288] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386, 2392 (1995). Justice Scalia first justified the holding by emphasizing the diminished expectation of privacy that *all* school children possess. *Id.* The Court cited *T.L.O.* for the proposition that "students within the school environment have a lesser expectation of privacy than members of the population generally." *Id.* Although Justice Scalia doesn't go so far as to say that all school children could be subjected to mass, suspicionless drug testing, he didn't foreclose the possibility. This leaves an opening for a school district to implement a drug testing plan for all students, based on Justice Scalia's finding that students have a diminished expectation of privacy in general, and the compelling government interest in maintaining drug free schools outweighs this privacy interest. Note that the "compelling government interest" is not to keep student athletes from getting hurt, but to maintain order and discipline in the schools. On the other hand, Justice Ginsburg, in her concurrence, agreed with the majority opinion only so far as it applied to student athletes. *Id.* at 2397 (Ginsburg, J., concurring).

[289] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[290] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

[291] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Vernonia.[292] Surprisingly, Justice Scalia objected to the mandatory, randomless drug testing program in *Von Raab*, declaring that a urine test is the type of search "particularly destructive of privacy and offensive to personal dignity."[293] It is difficult to comprehend how a urine test that is particularly offensive to the personal dignity of Custom Service employees, would, on the other hand, be a reasonable method to deter young school children from drug use.

Also quite interesting is the fact that Justice O'Connor, who authored the stinging dissent in *Vernonia*, joined the majority opinion in both *Von Raab* and *Skinner*, upholding employee drug testing programs. One can assume that she disagreed with Justice Scalia's protection of Custom Service employees from the offensive urine tests, and chose instead to protect our nation's school children from mass, suspicionless urine testing.

If we are to instill the values of the Constitution and its many personal protections, we should respect the very Constitutional protections that we teach. School children are the future; if we wish them to hold up the Constitution as the "law of the land" then we must teach by example.[294] By allowing a suspicionless drug testing program that infringes upon the privacy rights we attempt to teach them, we take away the very rights that we emphasize as important.[295] Although the deterrence of drug use in schools is justifiably an important interest, it is arguably far from the "compelling government interest" used to justify the Vernonia district's mass drug testing program.[296]

Julie A. Tappendorf[297]

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[292] Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

[293] National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting).

[294] *See Hazelwood*, 484 U.S. at 290-91 (Brennan J., dissenting).

[295] *See T.L.O.*, 469 U.S. at 334 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[296] Brief of Respondent at 49, *Vernonia*, 115 S. Ct. 2386 (No. 94-590).

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Babbitt v. Sweet Home: Will the Endangered Species Act Survive?

I. INTRODUCTION

The Endangered Species Act of 1973 (ESA) is recognized as one of our country's most important and powerful environmental laws.[1] However, much controversy has surrounded the ESA lately as it has come under increasing attack from landowners, developers and industry for interfering with constitutionally protected property rights and economic development.[2]

A central issue of the controversy involves whether the ESA prohibits a private landowner from modifying the habitat of an endangered species.[3] The ESA prohibits the "taking" of an endangered species within the United States.[4] "Take" under the ESA means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct;"[5] however, the ESA does not specify exactly what activities constitute a "taking."

The controversy of whether "take" includes habitat modification manifested itself at the judicial level where two circuits differed in their interpretation of whether the ESA prohibited private landowners from significantly modifying the habitat of endangered species. The Court of Appeals for the Ninth Circuit held that, in accordance with a federal

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[1] M. Lynne Corn, *Endangered Species: Continuing Controversy*, Congressional Research Service Issue Brief, Dec. 8, 1995, at introductory page.

[2] *Id.*

[3] Albert Gidari, *The Endangered Species Act: Impact of Section 9 On Private Landowners*, 24 ENVTL. L. 419, 419 (1994).

[4] 16 U.S.C. § 1538(a)(1)(B) (1988) ("[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States . . . to take any such species within the United States or the territorial sea of the United States").

[5] 16 U.S.C. § 1532(19) (1988).

regulation,[6] some types of habitat modification can constitute a "taking" under the ESA.[7] The Court of Appeals for the D.C. Circuit, on the other hand, held that habitat modification does not amount to a "taking" under the ESA.[8]

On June 29, 1995, the United States Supreme Court settled this difference of interpretation between circuits with its ruling in *Babbitt v. Sweet Home Chapter of Communities*.[9] It overturned the D.C. Circuit's ruling that the ESA barred only direct threats such as hunting, shooting or killing. The Court instead ruled in favor of protecting endangered species by holding that the federal government can prohibit private landowners from modifying the habitat of endangered species.[10]

While considered a "landmark" decision and a victory for environmentalists,[11] the impact of the holding may be minimal and short-lived.[12] Because the holding affirms the existing federal regulation that includes habitat modification in the definition of "take," it will have little immediate impact on how the government enforces the "taking" provision.[13] Furthermore, the *Babbitt* holding will likely motivate Congress to revise the ESA to minimize its effects on private landowners.[14]

This casenote examines the United States Supreme Court's recent holding in *Babbitt*. Part II discusses pre-Endangered Species Act legislation regarding wildlife protection and the structure and provisions of the current ESA. Part III sets forth *Babbitt's* procedural history. Part IV analyzes the United States Supreme Court's reasoning in *Babbitt*.

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[6] 50 C.F.R. § 17.3 (1985) ("*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering").

[7] Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988).

[8] Sweet Home Chapter of Communities v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994). *See also* Sweet Home Chapter of Communities v. Lujan, 806 F. Supp. 279 (D.D.C. 1992); Sweet Home Chapter of Communities v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993); Sweet Home Chapter of Communities v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).

[9] 115 S. Ct. 2407 (1995).

[10] *Id.* at 2418.

[11] Beth S. Ginsberg, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: A Clarion Call for Property Rights Advocates*, 25 ENVTL. L. REP. 10478, 10478 (1995).

[12] Tom Kenworthy, *Justices Affirm Wide Power to Protect Wildlife Habitat*, WASH. POST, June 30, 1995, at A1.

[13] *Id.*

[14] *See id.*; Ginsberg, *supra* note 11, at 10478; Margaret Kriz, *Caught in the Act*, NAT'L L. J., Dec. 16, 1995, at 3093.

Finally, Part V comments on the possible impacts of the *Babbitt* decision.

II. BACKGROUND

A. Pre-1973 Legislation

In the United States, the states generally governed wildlife law.[15] Federal protection of wildlife did not begin until 1900 with the passage of the Lacey Act of 1900.[16] The Lacey Act prohibited the transportation among states of "any wild animals or birds killed in violation of state law."[17] However, the Lacey Act was not very effective in protecting wildlife, because prior to the enactment of the ESA in 1973, there were few state laws regulating interaction with wildlife.[18]

In 1918, the federal government took a further step to protect wildlife by enacting the Migratory Bird Treaty Act which gave the Department of Agriculture the power to regulate the hunting of migratory birds protected by a 1916 treaty between the United States and Great Britain.[19] The act made it unlawful to "to hunt, take, capture, kill or attempt to take, capture or kill . . . any migratory bird protected by the treaty."[20]

Over the following fifty years, Congress enacted a variety of other laws which expanded the federal government's power to protect species in danger of extinction.[21] These legislative efforts, however, were largely piecemeal, "focusing on either specific species or issues rather than a comprehensive preservation plan."[22] By the 1960's, that Congress recognized more extensive legislation was needed.[23]

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[15] Frederico M. Cheever, *An Introduction to the Prohibition Against Takings In Section 9 of the Endangered Species Act Of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109, 122 (1991).

[16] LINDELL L. MARSH & PETER L. LALLAS, WILDLIFE AND HABITAT PROTECTION § 24.03[1][a] (citing Ch. 553 of the Lacey Act, 31 Stat. 187 (1900), codified at 16 U.S.C. §§ 701, 3371 and 18 U.S.C. § 42).

[17] *Id.*

[18] TVA v. Hill, 437 U.S. 153, 175 n.20 (1978).

[19] Cheever, *supra* note 15, at 123 (citing the Act of July 3, 1918, ch. 128, 40 Stat. 755, codified, as amended, at 16 U.S.C. §§ 703-711 (1988)).

[20] *Id.* at 121 n.66.

[21] *Id.* at 123.

[22] John L. Weston, *The Endangered Species Committee and the Northern Spotted Owl: Did the "God Squad" Play God?*, 7 ADMIN. L.J. AM. U. 779, 782 (1994).

[23] *Id.*

In 1966, Congress passed the Endangered Species Protection Act, which was the first law designed to protect endangered species from extinction.[24] The act authorized the Secretary of the Interior to identify "the names of the species of native fish and wildlife found to be threatened with extinction"[25] and to purchase land for the "conservation, protection, restoration, and propagation of 'selected species' of 'native fish and wildlife' threatened with extinction."[26] The act also included a prohibition against taking, but it only applied on national wildlife refuge land and to "any fish, bird, mammal, or other wild vertebrate or invertebrate animals" that happened to be on that land, regardless of whether or not it was in danger of extinction.[27]

In 1969, Congress increased federal involvement in the preservation of species by enacting the Endangered Species Conservation Act of 1969.[28] The act expanded the 1966 act by outlawing the importation of endangered species of fish and wildlife into the United States, enlarging the definition of "wildlife" to include vertebrates and invertebrates, and authorizing the federal government's purchase of private lands that would aid the preservation of endangered species.[29]

Despite its efforts in passing the 1966 and 1969 legislation, Congress recognized that the laws did not adequately protect endangered wildlife.[30] Wildlife supporters informed Congress that due to causes outside the normal process of natural selection, species were still being lost at a rate of one per year.[31] Realizing that it needed to correct previous legislation that "did not go far enough,"[32] Congress "was soon persuaded that a more expansive approach was needed if the newly declared national policy of preserving endangered species was to be realized."[33]

B. The Endangered Species Act: General Structure and Provisions

In 1973, Congress enacted the ESA[34] for the following purposes:

> [T]o provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a

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[24] *Id.* at 783.
[25] TVA v. Hill, 437 U.S. 153, 175 (1978).
[26] *Id.*
[27] Cheever, *supra* note 15, at 123-24.
[28] *TVA*, 437 U.S. at 175 (citing 83 Stat. 275, repealed 87 Stat. 903).
[29] Weston, *supra* note 22, at 783.
[30] *TVA*, 437 U.S. at 176.
[31] *Id.*
[32] 119 Cong. Rec. 30,162 (1973) (statement of Rep. Sullivan).
[33] *TVA*, 437 U.S. at 176.
[34] 16 U.S.C. §§ 1531-1544 (1988).

> program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.[35]

"In sweeping terms, the 1973 Act extended the federal sphere of influence over wildlife beyond the provinces of federal lands and interstate or international commerce to include every parcel of land or stretch of ocean in the United States . . . ."[36] Congress identified the two major causes of extinction as hunting and the destruction of natural habitat.[37] The provisions of the ESA, along with its amendments, address these concerns.

Under Section 4 of the ESA, the Secretary of Interior and the Secretary of Commerce are authorized to designate species of fish, wildlife or plants as "endangered" or "threatened."[38] In deciding whether to list a species, the Secretary may not consider the economic impacts of the listing. Instead, factors used in determining whether a species should be declared "endangered" or "threatened" are limited to:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.[39]

Section 4 also provides for the Secretary to designate "to the maximum extent prudent and determinable"[40] the critical habitat for a species when such species is listed as endangered or threatened.[41]

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[35] 16 U.S.C. § 1531(b) (1988).

[36] Cheever, *supra* note 15, at 125-26.

[37] S. REP. No. 307, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

[38] 16 U.S.C. § 1533 (1988). "Endangered species" means "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (1988). "Threatened species" means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (1988).

[39] 16 U.S.C. § 1533(a)(1) (1988).

[40] 16 U.S.C. § 1533(a)(3) (1988).

[41] *Id.* Under 16 U.S.C. § 1532(5)(A), "critical habitat" means "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II)

The Secretary must designate critical habitat on the "basis of the best scientific data available" and must also consider the economic impact of specifying a particular area as critical habitat.[42]

Section 5, entitled "Land Acquisition," authorizes the Secretary to carry out conservation programs for endangered and threatened species through land acquisitions.[43] It allows the Secretary to use funds from the Land and Water Conservation Act of 1965 to acquire lands, waters or interests therein.[44]

Section 7 makes species protection a priority for federal agencies by requiring all federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of the any endangered or threatened species or result in the destruction or adverse modification of habitat of such species."[45] Before acting, a federal agency must consult with the Fish and Wildlife Service to determine whether any endangered or threatened species are present in the project area.[46] If the Secretary advises that such species may be present, the agency must conduct a biological assessment to identify any species that such action would likely affect.[47] If the Fish and Wildlife Service determines that the action will not jeopardize the existence of any endangered or threatened species, or that reasonable and prudent alternatives exist, the acting agency issues a statement setting forth measures it will take to minimize the impact of its acts.[48] "Any taking approved by the consultation process is denoted an 'incidental taking', . . . and is exempted from the provisions of the Act."[49]

On the other hand, if the Fish and Wildlife Service does find that the agency's actions jeopardize the existence of endangered or threat-

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which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential to for the conservation of the species."

[42] 16 U.S.C. § 1533(b)(1)(B) (1988).

[43] 16 U.S.C. § 1534 (1988).

[44] 16 U.S.C. § 1534(b) (1988).

[45] 16 U.S.C. § 1536(a)(2) (1988).

[46] 16 U.S.C. § 1536(a)(3) (1988).

[47] 16 U.S.C. § 1536(c)(1) (1988).

[48] David P. Berschauer, *Is the "Endangered Species Act" Endangered?*, 21 Sw. U. L. Rev. 991, 995 (1992) (citing 16 U.S.C. § 1536(b)(3)(A) (1988)).

[49] *Id.* at 995-96 (citing 16 U.S.C. § 1536(b)(4)(B)(i) (1992)).

ened species, the federal agency may not act without an exemption from the Endangered Species Committee.[50] In a 1978 amendment to the ESA, Congress created the Endangered Species Committee to resolve conflicts between the ESA's mandate to protect endangered and threatened species and other legitimate national goals such as energy, agriculture, and water development.[51]

Section 10 provides three exceptions to the general prohibition against takings set forth in Section 9.[52] First, the Secretary may grant an exemption "for scientific purposes or to enhance the propagation or survival of the affected species"[53] or any taking that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[54] The "incidental taking" permit provision was added to the ESA largely to provide private landowners with the incidental taking immunity previously available only to federal agencies or private landowners who needed federal permits to develop their land.[55] Under this provision, any taking that complies with the terms and conditions of the incidental take permit is not prohibited under Section 9.[56] To obtain an incidental taking permit, a party must submit a habitat conservation plan that specifies the impact that will result from the taking and the steps it will take to minimize and mitigate such impacts.[57] If the taking will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild[,]" the government must issue the permit.[58]

Second, the Secretary may allow an exemption if the listing of an endangered species "will cause undue economic hardship" to a person who subsisted on the species prior to the listing.[59] Third, under Section 10, "any Indian, Aleut, or Eskimo who is an Alaskan native or who resides in Alaska" or "any non-native permanent resident or an Alaskan native village" is exempted from the ESA provisions if the taking is primarily for subsistence purposes.[60]

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[50] *Id.* at 996 (citing 16 U.S.C. § 1536(g)-(h) (1988)).

[51] 125 CONG. REC. 14,576 (1979) (statement of Sen. Randolph).

[52] 16 U.S.C. § 1539 (1988).

[53] 16 U.S.C. § 1539(a)(1)(A) (1988).

[54] 16 U.S.C. § 1539(a)(1)(B) (1988).

[55] Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 374 n.30 (1994).

[56] 16 U.S.C. § 1536(o)(2) (1988).

[57] 16 U.S.C. § 1539(a)(2)(A) (1988).

[58] 16 U.S.C. § 1539(a)(2)(B) (1988).

[59] 16 U.S.C. § 1539(b) (1988).

[60] 16 U.S.C. § 1539(e) (1988).

Section 11 provides for civil and criminal penalties for non-compliance with the ESA.[61] In addition to federal enforcement of the ESA, private citizens may bring an action to enforce it.[62]

Finally and most relevant to this casenote, Section 9 makes it unlawful for any person, including non-federal actors, to "take any [endangered] species within the United States."[63] The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[64] While the ESA does not further define the terms within the definition of "take," the Secretary of the Interior has set forth regulations which define "harass" and "harm."[65]

The Secretary's regulation defines "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."[66] "Harm" is defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[67]

Initially, the federal government used Section 9 "primarily to prosecute individuals who hunt[ed] or collect[ed] endangered species."[68] This scheme changed in 1979 when the District Court for the District of Hawaii held in *Palila v. Department of Land and Natural Resources*[69] that habitat modification which adversely affects an endangered species can constitute a "taking" prohibited by Section 9.[70]

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[61] 16 U.S.C. § 1540 (1988).

[62] 16 U.S.C. § 1540(g) (1988).

[63] 16 U.S.C. § 1538(a)(1)(B) (1988).

[64] 16 U.S.C. § 1532(19) (1988).

[65] 50 C.F.R. § 17.3 (1985).

[66] *Id.*

[67] *Id.*

[68] Jonathan Durrett & Christopher Yuen, *Palila v. Department of Land and Natural Resources: "Taking" Under Section Nine of the Endangered Species Act of 1973*, 4 U. HAW. L. REV. 181, 183 (1982).

[69] Palila v. Hawaii Dep't of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

[70] *See* Durrett & Yuen, *supra* note 68, at 183.

C. *The Palila Decisions*

The potential for Section 9 to become "an extremely powerful wildlife law" became clear with the series of cases involving the *palila* bird[71] in Hawaii.[72] The *palila* has been listed as an endangered species since 1967.[73] In 1978, the Sierra Club and others filed an action for declaratory and injunctive relief in the name of the *palila*, claiming that the State of Hawaii Department of Land and Natural Resources (DLNR) was "taking" the *palila* in violation of the ESA by maintaining destructive populations of feral sheep and goats in the *palila's* critical habitat.[74] The Federal District Court for the District of Hawaii found that by consuming seedlings and shoots of the *mamane-naio*[75] forest, the feral animals prevented regeneration of the forest upon which the *palila* depended for survival.[76] Relying on the initial "harm" regulation which was in place at that time,[77] the district court further found that because the *palila* was endangered by the maintenance of the animals in the area, the activity constituted an unlawful "taking" of the *palila*.[78] Moreover, the district court ordered the DLNR to adopt a program to eradicate the feral sheep and goats from the *palila's* critical habitat.[79] The Court of Appeals for the Ninth Circuit affirmed.[80]

In 1986, the Sierra Club filed a similar action on behalf of the *palila* against the DLNR for destruction of the *mamane-naio* forest by mouflon

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[71] The *palila* (*psittirostra bailleui*) is a six-inch long finch-billed Hawaiian Honeycreeper found only in Hawaii. *See Palila*, 471 F. Supp. at 988.

[72] Cheever, *supra* note 15, at 150.

[73] *Palila*, 471 F. Supp. at 988.

[74] *Id.* at 987.

[75] "The range of the entire known [*palila*] population coincides with and is limited to the remaining mamane (Sophora chrysophylla) and naio (Myoporum sandwicense) forests on the slopes of Mauna Kea of the Island of Hawaii between the elevations of 6,400 feet and 9,500 feet." *Id.* at 988.

[76] *Id.* at 990.

[77] Initially, in 1975, "harm" was defined as "an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included in the meaning of 'harm'". 40 Fed. Reg. 44,412, 44,416 (1975) (codified at 50 C.F.R. § 17.3 (1985)).

[78] *Palila*, 471 F. Supp. at 995.

[79] *Id.* at 999.

[80] Palila v. Hawaii Dep't of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981).

sheep maintained by the DLNR for hunting purposes.[81] Like the feral sheep and goats, the mouflon sheep fed on *mamane*, which caused lower abundance and growth rates of the *mamane* trees.[82] In interpreting the redefined and now current "harm" regulation, the district court stated:

> A finding of "harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under Section 9 of the Act.[83]

The court thus found that the habitat degradation caused by the mouflon sheep was "*actually presently injuring* the *Palila* by decreasing food and nesting sites"[84] and was therefore "harming" the *palila*.[85]

Again, the Ninth Circuit affirmed the district court.[86] It found that the Secretary's redefinition of "harm" included "not only direct physical injury, but also injury caused by impairment of essential behavioral patterns via habitat modification that can have significant and permanent effects on a listed species."[87] Furthermore, it found that the Secretary's "harm" regulation follows the plain language of the ESA "because it serves the overall purpose of the Act, which is to 'provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.'"[88]

This broad interpretation of "harm" was challenged by the *Sweet Home* series of cases.[89] Ultimately, in *Babbitt v. Sweet Home*, the United States Supreme Court upheld the regulation and the validity of its broad interpretation of "take."[90]

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[81] Palila v. Hawaii Dep't of Land and Natural Resources, 649 F. Supp. 1070, 1071 (D. Haw. 1986).

[82] *Id.* at 1078.

[83] *Id.* at 1075.

[84] *Id.* at 1080.

[85] *Id.*

[86] Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988).

[87] *Id.* at 1108.

[88] *Id.*

[89] Sweet Home Chapter of Communities v. Lujan, 806 F. Supp. 279 (D.D.C. 1992); Sweet Home Chapter of Communities v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993); Sweet Home Chapter of Communities v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994); Sweet Home Chapter of Communities v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994).

[90] 115 S. Ct. 2407 (1995).

III. FACTS AND PROCEDURAL HISTORY OF BABBITT V. SWEET HOME

In 1991, a group of small land owners, logging companies, and families dependent on the forest products industry in the Pacific Northwest and Southeast brought a declaratory judgment action against the Secretary of the Interior and Director of the Fish and Wildlife Service to challenge the Secretary's harm definition.[91] They claimed that the Fish and Wildlife Service's enforcement of the regulation with respect to red-cockaded woodpecker[92], an endangered species, and the northern spotted owl[93], a threatened species, injured them economically.[94] Specifically, the plaintiffs asserted that the Fish and Wildlife Service's restrictions on timber harvesting forced them to "lay off employees, limited their income from trust lands, reduced the timber supply and

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[91] *Sweet Home*, 806 F. Supp. at 282.

[92] Adult red-cockaded woodpeckers are "about 8 1/2 inches tall, zebra-backed with white cheek patches and small red cockade . . . . They prefer trees that are 80 to 100 years old because those are often diseased, making the wood softer and easier to chip." *Forest Bird Plan Ires Both Sides of Debate. Some Say the Plan to Help the Red-Cockaded Woodpecker Is Not Enough. Some Disagree*, ORLANDO SENTINEL, July 21, 1995, at C5.

> Their preferred habitat has substantial openings, and is maintained by recurring fires that prevent succession to hardwoods. These birds live in colonies, composed on one breeding pair and up to several offspring serving as helpers, that occupy an annual home range averaging about 215 acres in which they forage for insects . . . . The total size of the breeding population was recently estimated to be 6000 individuals . . . . The species has been listed as federally endangered since the passage of the Endangered Species Act in 1973, but subsequently has declined rapidly throughout its range as a result of fire prevention and logging of suitable, unoccupied habitat, which has severely fragmented the remaining suitable habitat.

Russell Lande, *Genetics and Demography in Biological Conservation*, 241 SCIENCE 1455, 1459 (1988).

[93] Listed as "threatened" in 1990, the northern spotted owl is "confined largely to the 250 + year old forests ('old growth' or 'ancient' forests) from British Columbia to northern California." Corn, *supra* note 1, at 11. As one commentator describes the owl's habitat:

> Pairs maintain home ranges of roughly 1 to 3 square miles of conifer forest . . . below an elevation of about 4000 feet. They usually nest in old hollow trees and require an open understory, characteristic of old-growth forests, for effective hunting of small mammalian prey that compose the bulk of their diet . . . . Recent estimates put the total population size of the northern spotted owl at 2500 pairs.

Lande, *supra* note 92, at 1458-59.

[94] *Babbitt*, 115 S. Ct. at 2410.

placed some of the plaintiffs in the position of being unable to support their families."[95]

Primarily, the plaintiffs challenged the Secretary's "harm" regulation as "contrary to the ESA and void for vagueness."[96] The plaintiffs presented three arguments to support their claim that the "harm" regulation contradicts the ESA.[97] First, they pointed out that the original ESA bill defined "take" to include "destruction, modification, or curtailment of its habitat or range"[98] and that the Senate's deletion of the terms from the final version of the ESA indicated Congressional intent not to include habitat modification in "take."[99] Second, plaintiffs argued that Congress intended to address the problem of habitat modification solely through land acquisition and not under the take provision.[100] Third, they argued that because the Senate added the term "harm" to the ESA definition of "take" in a floor amendment without a debate, it should not be interpreted expansively.[101]

The D.C. District Court rejected each of these arguments and cited the *Palila* cases in stating that courts have consistently upheld the Secretary's definition of "harm." Concluding that "Congress intended an expansive interpretation of the word 'take,' that encompassed habitat modification,"[102] the court ruled that the regulation was a reasonable interpretation of the ESA.[103]

Plaintiffs appealed.[104] The D.C. Circuit Court of Appeals initially affirmed the district court's judgment upholding the regulation.[105] In a

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[95] *Sweet Home*, 806 F. Supp. at 282.

[96] *Id.* The district court found that the regulation "is not impermissibly vague." *Id.* It noted that the terms of the regulation "clearly provide more than 'minimal guidelines' and are sufficiently clear to put a party on notice of prohibited conduct." *Id.* The court substantiated this finding by noting that:

> the definition of 'harm' found at § 17.3 clearly limits prohibited conduct to that which 'actually kills or injures wildlife' . . . . Furthermore, the regulation prohibits only '*significant* habitat modification or degradation' . . . . Moreover, the regulation itself requires a finding that actual death or injury to a species has occurred.

Id. at 286.

[97] *Id.* at 283-84.

[98] *Id.* at 283.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 284.

[102] *Id.* at 285.

[103] *Id.*

[104] Sweet Home Chapter of Communities v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993).

[105] *Id.* at 2.

split decision, it concluded that the regulation defining harm was not an unreasonable interpretation of the ESA and that it was not "vague on its face."[106]

Upon granting the plaintiffs' petition for a rehearing, the D.C. Circuit Court of Appeals reversed its prior decision.[107] Judge Williams, who previously voted to uphold the regulation, authored the majority opinion.[108] While acknowledging that "the potential breadth of the word 'harm' is undisputable,"[109] the court concluded that the immediate context of the word in the statute argues against construing it broadly. The court explained that under the maxim of statutory construction called *noscitur a sociis*,[110] the term "harm" should only be read to apply to "the perpetrator's direct application of force against the animal taken[.]"[111] According to the court, the forbidden acts proscribed by the ESA's definition of "take" "fit, in ordinary language, the basic model 'A hit B'."[112]

In applying its *noscitur a sociis* analysis, the D.C. Circuit cited the Ninth Circuit's decision in *United States v. Hayashi*[113] as precedent for the proposition that the terms used to define "take" only encompass direct acts against protected species.[114] In *Hayashi*, the Ninth Circuit Court narrowly construed the word "harass" in the Marine Mammal Protection Act to entail a "direct and sustained intrusion" because it appeared with the words "hunt" "capture" or "kill" in that act's definition of "take."[115] The D.C. Circuit Court of Appeals also cited the legislative history of the ESA,[116] the ESA's Section 5 (land acquisition) and Section 7 (federal agency restriction) provisions,[117] and the 1982 amendment to Section 10 of the ESA[118] as evidence that Congress did not intend "harm" to include habitat modification.

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[106] *Id.* at 8.

[107] Sweet Home Chapter of Communities v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).

[108] *Id.*

[109] *Id.* at 1464.

[110] *Noscitur a sociis* means a word is known by its associates. BLACK'S LAW DICTIONARY 1060 (6th ed. 1990).

[111] *Sweet Home*, 17 F.3d at 1465.

[112] *Id.*

[113] 5 F.3d 1278, 1282 (9th Cir. 1993).

[114] *Sweet Home*, 17 F.3d at 1465.

[115] *Id.* (citing *Hayashi*, 5 F.3d at 1282).

[116] *Id.* at 1466.

[117] *Id.*

[118] *Id.* at 1467.

The D.C. Circuit subsequently denied the Secretary's request for a rehearing en banc.[119] In upholding its position, the court explained how the "harm" regulation violated the ESA:

> [T]he statute, fairly read in light of the 'traditional tool of statutory interpretation', manifests a clear determination by Congress that the prohibitions of § 9 should not reach habitat modifications as defined by the Department [of the Interior], where there is no direct action by the defendant against any member of the species. Extending the word 'harm' to reach habitat modification as so conceived carries § 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly imposed on federal government agencies; and it ignores the plausible inferences from the Senate's deletion of the phrase 'habitat modification' from the draft bill.[120]

The Court of Appeals' decision created a split between the D.C. Circuit and the Ninth Circuit. Despite the evident conflict between its holding and the Ninth Circuit's, the D.C. Circuit did not cite, distinguish, or reconcile its decision with the Ninth Circuit's *Palila* decision.[121]

On January 6, 1995, the United States Supreme Court granted certiorari to resolve this conflict.[122] Through "consideration of the text and structure of the [ESA], its legislative history, and the significance of the 1982 amendment," the Court reversed the D.C. Circuit Court of Appeals' judgment and concluded that the Secretary's "harm" regulation is reasonable.[123]

IV. Analysis

A. The Secretary's Definition of Harm is Valid

The United States Supreme Court's analysis in *Babbitt* reveals its strong support for species protection, and its deference to the Secretary in interpreting the ESA. Its reasoning emphasizes the Court's commitment to uphold the basic purpose of the ESA: to protect endangered and threatened species.[124]

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[119] Sweet Home Chapter of Communities v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994).
[120] *Id.* at 193.
[121] Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407, 2412 (1995).
[122] *Id.*
[123] *Id.*
[124] *See infra* part II.B.

In applying the rules for reviewing an agency's construction of a statute set forth in *Chevron USA v. Natural Resources Defense Council*,[125] the Court held that the Secretary reasonably construed Congressional intent in including habitat modification in the definition of "harm".[126] Specifically, the majority found that 1) the text of the ESA supports the Secretary's definition of "harm";[127] 2) the D.C. Circuit Court of Appeals erred in finding that "harm" in the definition of "take" must refer to the direct application of force;[128] 3) the structure of the ESA does not conflict with the Secretary's definition of "harm";[129] and 4) the legislative history of the ESA supports the Secretary's definition of "harm."[130]

1. The text of the ESA supports the Secretary's definition of "harm"

The majority found that the text of the ESA provides three reasons for preferring the Secretary's definition of "harm." First, the Court rejected the plaintiffs' argument that the Secretary should limit "harm" to mean direct applications of force against a protected species. The majority pointed out that the dictionary meaning of "harm"[131] "does not include the word 'directly' or suggest in any way that only direct or willful action that leads to injury constitutes 'harm.'"[132] The Court

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[125] 467 U.S. 837 (1984).

[126] *See Babbitt*, 115 S. Ct at 2418. *Chevron* established a two-step process for reviewing an agency's construction of a statute which it administers. First, one must determine whether Congress directly addressed the issue. If Congress' intent is clear, the court and agency "must give effect to the unambiguously expressed intent of Congress." If, on the other hand, the court determines that the statute is "silent or ambiguous with respect to the specific issue," it must determine whether the "agency's answer is based on a permissible construction of the statute." Moreover, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Thus, to find a regulation valid, a court must determine Congress' intent, and if not clear, whether the agency's interpretation is reasonable. Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 842-44 (1984).

[127] *Babbitt*, 115 S. Ct. at 2412-14.

[128] *Id.* at 2414-15.

[129] *Id.* at 2415-16.

[130] *Id.* at 2416-18.

[131] The majority cites WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966) which defines "harm" as "to cause hurt or damage to: injure." *Babbitt*, 115 S. Ct. at 2412.

[132] *Babbitt*, 115 S. Ct. at 2412.

noted that in order to avoid treating "harm" as surplusage, the term must encompass direct and indirect injuries; otherwise, "harm" merely duplicates the meaning of the other words used to define "take."[133]

In his dissent, joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia argued that the common use of the term "take," along with the meaning of the other nine words used to define "take," imply that Congress intended "harm" to refer to "affirmative conduct intentionally directed against a particular animal."[134] The majority's apparently conscious choice to apply the surplusage principle reveals its intent to interpret the specific provisions of the ESA consistently with the ESA's broad purpose.

Indeed, the majority noted as its second point that the broad purpose of the ESA supports the Secretary's definition of harm.[135] It reaffirmed its interpretation of the purpose of the ESA set forth in *TVA v. Hill* nearly twenty years earlier.[136] In *TVA*, the Court carefully examined the history and structure of the ESA and concluded that "Congress intended endangered species to be afforded the highest of priorities."[137] The *TVA* Court found that Congress was unmistakably concerned about the ramifications of losing any endangered species[138] and that "Congress was informed that the greatest [cause of extinction] was destruction of habitat."[139] Summarizing its findings, the *TVA* Court stated "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected . . . in literally every section of the statute."[140]

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[133] *Id.* at 2413 (the majority cites Mackey v. Lanier Collection Agency & Service, 486 U.S. 825, 837 n.11 (1988) for the proposition that there should be a reluctance to treat statutory words as surplusage).

[134] *Id.* at 2424 (Scalia, J., Rehnquist, J., and Thomas, J., dissenting). The dissent bases this argument on the principle that "the fact that several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Id.* (citing Beecham v. United States, 511 U.S. ____, ____, 114 S.Ct. 1669, 1671 (1994)).

[135] *Id.* at 2413 (citing Section 2 of the ESA (16 U.S.C. § 1531(b)) which states that among the Act's central purposes is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.").

[136] *Id.* (discussing its analysis in TVA v. Hill, 437 U.S. 153 (1978)).

[137] *TVA*, 437 U.S. at 174.

[138] According to the Court in *TVA*, "[t]he legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of *any* endangered species." *TVA*, 437 U.S. at 177.

[139] *Id.* at 179.

[140] *Id.* at 184.

In reaffirming this interpretation of Congress' intent, the *Babbitt* majority found the Secretary's definition of harm to be reasonable in light of "Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife[.]"[141] This finding is not surprising in light of the Court's implied acceptance of the "harm" definition in its *TVA* opinion. Although the "take" prohibition was not at issue in *TVA*, the Court briefly addressed Section 9, noting that "harm" could occur by significant habitat modification or degradation of a species.[142]

The dissent severely criticized the majority for referring to the broad purpose of the ESA to justify the Secretary's interpretation. Justice Scalia remarked, "I thought we had renounced the vice of 'simplistically . . . assum[ing] that whatever furthered the statute's primary objective must be the law.'"[143] Again, the majority's choice of analysis reveals its support for species protection.

Third, the Court found that Congress' 1982 amendment which authorizes the Secretary to issue permits for incidental takings strongly suggests that Congress understood Section 9 to prohibit indirect as well as deliberate takings.[144] According to the Court, indirect takings would include habitat modification. The 1982 amendment to the ESA added Section 10(a)(1)(B), which authorizes the Fish and Wildlife Service to issue permits for "any taking otherwise prohibited by section [9] of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[145] Noting that "the permit process requires the applicant to prepare a 'conservation plan' that specifies how he intends to 'minimize and mitigate' the 'impact' of his activity on endangered and threatened species," the Court inferred that Congress was thinking of foreseeable rather than accidental effects on listed species.[146] According to the majority, the Fish and Wildlife Service would certainly not issue "incidental" permits for direct and deliberate acts against an endangered or threatened species.[147] Consequently, "Congress' addition of the Section 10 permit provision sup-

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[141] *Babbitt*, 115 S. Ct. at 2414.

[142] *See id.* at 2413.

[143] *Id.* at 2426 (Scalia, J., Rehnquist, J., Thomas, J., dissenting) (citing Rodriguez v. United States, 480 U.S. 522, 526 (1987)).

[144] *Id.* at 2414.

[145] 16 U.S.C. § 1539(a)(1)(B) (1988).

[146] *Babbitt*, 115 S.Ct. at 2414.

[147] *Id.*

ports the Secretary's conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them."[148]

In finding that Section 10 implies that Section 9 prohibits indirect takings such as habitat modifications, the Court rejected the D.C. Circuit Court of Appeals' interpretation of the 1982 amendment.[149] The D.C. Circuit had argued that although the added section implies that some prohibited takings can be incidental to otherwise lawful activities, it does not follow that such incidental takings necessarily include habitat modification.[150] The D.C. Circuit had pointed out that the problem of incidental takings is instead posed by harms involving the direct application of force, such as the incidental trapping of an endangered animal by a trap set for a nonendangered species.[151]

The dissent's criticism of the majority's argument is misplaced. Justice Scalia contended that the majority's reasoning would be valid if habitat modification were the only substantial "otherwise lawful activity" that might incidentally cause a prohibited "taking".[152] Offering examples of many other "otherwise lawful activities" that incidentally take a protected species, he argued that the 1982 amendment does not support the regulation.[153] This is not convincing. The existence of other examples of "otherwise lawful activities" does not necessarily imply that Congress did not consider habitat modification as an activity that might incidentally cause a taking. Moreover, none of Justice Scalia's examples fall within the scope of foreseeable incidental effects for which an actor would secure an incidental permit.

As evidenced by the difference in interpretation between the majority and dissent, the text of the ESA is ambiguous as to whether "harm" includes habitat modification. Through resolving the ambiguities in support of the Secretary's interpretation, the Court clearly affirms it commitment to species protection.

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[148] *Id.*

[149] *See Sweet Home*, 17 F.3d at 1467.

[150] *Id.*

[151] *Id.*

[152] *Babbitt*, 115 S.Ct. at 2428 (Scalia, J., Rehnquist, J., Thomas, J., dissenting).

[153] Justice Scalia's examples of otherwise lawful activities that incidentally take a protected species include the incidental taking of an endangered species of salmon when fishing for unprotected salmon, of sea turtles in the course of harvesting shrimp, of marine mammals in the course of commercial fishing operations. *Id.*

2. The Court of Appeals erred in finding that "harm" must refer to the direct application of force.

Next, the Court scrutinized the definition of "take" and concluded that the D.C. Circuit Court of Appeals made three errors in finding that "harm" must refer to the direct application of force. First, the Court found that contrary to the court of appeals' premise, not all of the other words in the definition of "take" involve the direct application of force.[154] It noted that "harass," "pursue," "wound," and "kill" refer to actions that do not require the direct application of force.[155] Second, it found that the D.C. Circuit Court of Appeals incorrectly inferred a requirement of intent or purpose in the words used to define "take." The majority pointed out that Section 9 expressly provides that a "knowing" action alone can violate the ESA, implying that an intent requirement would make the knowing requirement redundant.[156]

Third, the Court found that the court of appeals erroneously applied the doctrine of *noscitur a sociis*;[157] doing so gave "harm" essentially the same function as the other words in the definition and denied it an independent meaning.[158] The majority speculated that Congress instead meant the term to serve its own particular function in the statute, "consistent with but distinct from the functions of the other words used to define take."[159] Including "habitat modification" in the definition of "harm" gives it a "character of its own."[160]

The dissent offered alternative forms of "harm" that provide an independent meaning to "harm" without straying from the character of the other words.[161] While well articulated, the dissent's argument is at most as equally speculative as the majority's argument.

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[154] *Id.* at 2415.

[155] *Id.*

[156] *Id.*

[157] *See infra* note 110.

[158] *Babbitt*, 115 S. Ct. at 2415.

[159] *Id.*

[160] *Id.*

[161] As Justice Scalia commented:

> To feed an animal poison, to spray it with mace, to chop down the very tree in which it is nesting, or even to destroy its entire habitat in order to take it (as by draining a pond to get at a turtle), might neither wound nor kill, but would directly and intentionally harm.

Id. at 2424 (Scalia, J., Rehnquist, J., Thomas, J., dissenting).

Congress did not clearly address whether habitat modification could constitute a prohibited taking. Thus, the Court again resolved an apparent ambiguity in favor of species protection.

3. The structure of the ESA supports the secretary's definition of "harm"

Sweet Home attempted to show that the structure of ESA conflicts with the "harm" regulation. Plaintiffs argued that if the Court interpreted Section 9 to bar the destruction of habitat that harms listed species, the federal government would have little incentive to acquire habitat areas from private landowners to protect such species.[162] Consequently, Section 5 of the ESA would have no purpose.[163]

The Court addressed this argument by pointing out that the government would continue to have incentive to use land acquisitions as a method to protect listed species.[164] According to the Court, purchasing habitat lands could in many circumstances cost the federal government less money than pursuing civil or criminal penalties.[165] Additionally, the Court noted that the government could use Section 5 to protect a species' habitat *before* a landowner's activities has harmed an endangered animal.[166] Under Section 9, on the other hand, the government cannot enforce the prohibition until *after* an animal has been killed or injured.[167]

With respect to Section 7, Sweet Home argued that including "habitat modification" in the definition of "harm" would also "subsume all the significant aspects of Section 7."[168] They claimed that if Section 9 already prohibits *anyone* from harming even one member of a listed species through modifying any habitat, then Section 7 which specifically prohibits "adverse modifications of habitat" through federally funded actions or on federal lands is mere surplusage.[169] Sweet Home also pointed out that if Section 9 creates a duty for *everyone* to avoid inadvertently injuring a listed species, the Section 7 federal duty

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[162] Brief for Respondents at 24, Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407 (No. 94-859).

[163] *Id.*

[164] *Babbitt*, 115 S. Ct. at 2415.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] Brief for Respondents at 26, *Babbitt* (No. 94-859).

[169] *Id.* at 25.

to avoid actions that "jeopardize the continued existence" of the species has no additional purpose.[170] The Court responded to this argument by dismissing any overlap that Sections 5 or 7 may have with Section 9 as "unexceptional".[171] The overlap "simply reflects the broad purpose of the Act set out in [Section] 2 and acknowledged in *TVA v. Hill*."[172]

The Court also attempted to point out purposeful distinctions between Sections 7 and 9. It noted that Section 7 imposed an affirmative duty on the federal government to avoid habitat modification not contained in Section 9.[173] Furthermore, Section 7 does not limit its directive to avoid habitat modification that "actually kills or injures wildlife."[174] Additionally, while Section 7 applies only to actions "likely to jeopardize the continued existence of any endangered species," Section 9 applies to a single member of a protected species.[175]

Sweet Home indeed pointed out troublesome redundancies within the ESA. By overlooking these redundancies, the Court appears to be intent on interpreting the ESA in favor of species protection.

4. Legislative history supports the Secretary's definition of harm

In addition, the Court noted that Congress, in passing the ESA in 1973, intended "take" to broadly cover indirect as well as purposeful actions.[176] It cited a convincing passage from the House Report that indicates the intended breadth of the "take" definition: the report stated that the definition of "harassment" "would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young."[177] The majority observed that

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[170] *Id.*

[171] *Babbitt*, 115 S. Ct. at 2415-16.

[172] *Id.* at 2416.

[173] *Id.* at 2415.

[174] *Id.*

[175] *Id.*

[176] *Babbitt*, 115 S. Ct. at 2416. The majority noted that the Senate Report stressed that "'[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Id.* (citing S. REP. No. 307, 93d Cong., 1st Sess. (1973)). The majority also noted that the House Report stated that "the broadest possible terms" were used to define the restrictions on takings. *Id.* (citing H.R. REP. No. 412, 93d Cong., 1st Sess. (1973)).

[177] *Babbitt*, 115 S. Ct. at 2416 (citing H.R. REP. No. 412, 93d Cong., 1st Sess., at 15 (1973).

"these comments support the Secretary's interpretation that the term 'take' in § 9 reached far more than the deliberate actions of hunters and trappers."[178]

Interestingly, the Ninth Circuit had cited this same passage in *Palila*.[179] It reasoned that the "[i]f the 'harassment' form of taking includes activities so remote from actual injury to the bird as bird-watching, the 'harm' form of taking should include more direct activities, such as the mouflon sheep preventing any mamane growing to maturity."[180]

The Supreme Court then addressed Sweet Home's claim that "harm" should not be read expansively because of the lack of debate about the amendment which added "harm" to the definition of "take."[181] Plaintiffs argued that "it would require a remarkably jaundiced view of the legislative process to believe that the most expansive and intrusive aspect of the ESA became law through stealth, rather than debate."[182] The Court rejected this argument, asserting that "harm" deserves instead a "respectful reading" because the "Senate went out of its way to add it to an important statutory definition."[183]

In response to Sweet Home's argument that the Commerce Committee's removal of references to habitat modification in the original ESA bill's definition of "take" clearly indicates Congress' intent not to include habitat modification, the Court stated that it did not find that fact "especially significant."[184] Explaining that the deleted habitat provision would have applied more broadly than the current "harm" regulation,[185] the Court asserted that it did not believe that rejectment of the broader habitat modification provision should undermine the

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[178] *Id.*

[179] Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106, 1108 (9th Cir. 1988).

[180] *Id.* at 1108-09.

[181] *Babbitt*, 115 S. Ct. at 2416-17. According to the majority, "harm" was added to the definition of "take" in a floor amendment that was adopted without debate. *Id.*

[182] Brief for Respondents at 34, *Babbitt* (No. 94-859).

[183] *Babbitt*, 115 S. Ct. at 2417.

[184] *Id.* at 2416. The definition of "take" that appeared in the original ESA bill "included 'the destruction, modification, or curtailment of [the] habitat or range' of fish and wildlife." *Id.*

[185] The Court noted that the deleted provision would have made adverse modification a "categorical violation" of the "take" provision; it would not have been limited to habitat modification that actually kills or injures wildlife. *Id.* at 2417.

validity of the Secretary's more moderate "harm" regulation.[186]

Finally, the Court pointed out that the legislative history behind the 1982 amendment that gave the Secretary authority to grant permission for "incidental" takings further supports the "harm" regulation.[187] To show that Congress "had habitat modification directly in mind" when it adopted the "incidental" taking provision, it persuasively cited the Senate and House conference reports that used as the model for the permit process a case where a development project threatened incidental harm to a endangered butterfly by modification of its habitat.[188] The majority concluded that "Congress in 1982 focussed squarely on the aspect of the 'harm' regulation at issue in this litigation."[189]

The Court certainly approached its task of determining whether the Secretary's "harm" regulation violated the ESA with great deference to the Secretary.[190] Indeed, in its conclusion, the majority appeared to explain the rationale behind its analysis, stating that "[w]hen Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our view of wise policy for his."[191]

B. The Court Left the Scope of Actual Injury Undecided

In determining that the Secretary reasonably interpreted the meaning of "harm," the majority concluded that the "definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species."[192] The Court, however, failed to specify the requisite scope of "actual injury." Must a plaintiff present evidence of an actual occurrence of injury or death to members of a species? Or, can a plaintiff instead show "harm" with evidence that the habitat modification poses a substantial threat of injury or death? The *Babbitt* decision leaves room for interpretation in determining what constitutes "actual injury."

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[186] *Id.*

[187] *Id.*

[188] *Id.* at 2418.

[189] *Id.*

[190] The majority stated: "When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. The task of defining and listing endangered and threatened species requires and expertise and attention to detail that exceeds the normal province of Congress." *Id.* (citations omitted).

[191] *Id.*

[192] *Id.* at 2412-13.

The scope of "actual injury" was an issue in *Forest Conservation Council v. Rosboro Lumber Co.*[193] In *Rosboro*, the Court of Appeals for the Ninth Circuit rejected the defendant's argument that the term "actually" in the harm regulation "requires a plaintiff to show that a challenged action already has caused, or presently is causing, an injury" and that "claims of a future injury, no matter how imminent, are foreclosed."[194] Instead, the Ninth Circuit concluded that the "ESA's language, purpose, and structure authorize citizens to seek an injunction against an imminent threat of harm to a protected species."[195]

The *Babbitt* majority did not address the *Rosboro* decision. Moreover, because it evaluated Sweet Home's claim as a facial challenge to the regulation,[196] *Babbitt* does not provide a specific fact pattern that could suggest what the majority would consider an acceptable scope of actual injury.

The scope of actual injury did appear to be an issue for Justices O'Connor and Scalia. In her concurrence, Justice O'Connor asserted that "harm" regulation applies "where significant habitat modification, by impairing essential behavior, proximately (foreseeably) causes actual death or injury to identifiable animals."[197]

Justice O'Connor explained that her agreement with the majority was based on the understanding that the "harm" regulation is limited to habitat modification "that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals;"[198] and the ESA's incorporation of "ordinary principles of proximate

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[193] 50 F.3d 781 (1995). In *Rosboro*, an environmental group sought an injunction under the ESA to prevent a logging company from modifying the habitat of a pair of spotted owls. Specifically, the proposed clear cutting of timber was to occur on land adjacent to a nesting site of a pair of Northern Spotted Owls. The plaintiffs alleged that the proposed clear cutting was reasonably certain to injure the owls by significantly impairing their essential behavioral patterns. *Id.*

[194] *Id.* at 784.

[195] *Id.* The Ninth Circuit Court explained that:

> [t]he Secretary's use of the term "actually" was not intended to foreclose claims of an imminent threat of injury to wildlife. Rather, because the Secretary was concerned that the old definition of "harm could be read to mean habitat modification alone, the Secretary inserted the phrase "actually kills or injures wildlife" to preclude claims that only involve habitat modification without any attendant requirement of death or injury to the protected wildlife.

Id.

[196] *See Babbitt*, 115 S. Ct. at 2414.

[197] *Id.* at 2420 (O'Connor, J., concurring).

[198] *Id.* at 2418 (O'Connor, J., concurring).

causation, which introduce notions of foreseeability.''[199] She explained,

> In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable under 1540(1) only if their habitat-modifying actions proximately cause death or injury to protected animals.[200]

Under this interpretation, Justice O'Connor questioned the application of the "harm" regulation in the *Palila* line of cases.[201] In her opinion, destruction of the mamane seedlings "did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of the forest land not currently inhabited by actual birds.''[202] Thus, under Justice O'Connor's reasoning, a plaintiff would have to show more than just an imminent threat of injury to claim that the habitat modification harmed the species.

The dissent proposed an even narrower scope of "actual injury." According to Justice Scalia, "take" refers to a "class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).''[203] While it is highly unlikely that the majority would concur with the dissent, the requisite scope of "actual injury" nevertheless remains undefined.

V. IMPACT

In upholding the harm regulation currently in place, the *Babbitt* ruling will have little significant impact on how the government will enforce the ESA to protect imperiled wildlife.[204] However, the decision will likely create strong political repercussions in Congress where the ESA is up for reauthorization and is already under attack by the Republican majority in Congress.[205]

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[199] *Id.* (O'Connor, J., concurring).

[200] *Id.* at 2420 (O'Connor, J., concurring).

[201] *Id.* at 2420-21 (O'Connor, J., concurring). *See infra* part II.C. for the United States District Court for the District of Hawaii's conclusion that habitat destruction that prevents recovery of a species causes actual injury to the species.

[202] *Id.* at 2421 (O'Connor, J., concurring).

[203] *Id.* at 2423 (Scalia, J., Rehnquist, J., Thomas, J., dissenting).

[204] Kenworthy, *supra* note 12, at A1.

[205] *Id.*; Ginsberg, *supra* note 11, at 10483 (citing H.R. 9 "which generally would require the infusion of risk assessment, cost benefit analysis, and compensation allowances in all major environmental regulatory schemes.").

A. Impact on Enforcement of the ESA

The *Babbitt* decision affirms the Court's commitment to the protection of the environment and its interpretation of congressional intent behind the ESA. It sets the stage for other courts to resolve future habitat modification challenges in favor of the environment. For the Department of the Interior, the decision means that it can continue to enforce the regulation which bans land uses that would harm protected wildlife.[206] With *Babbitt* indicating that the Court is willing to broadly interpret the definition of "harm", however, the Fish and Wildlife Service may adopt a more aggressive approach in enforcing the habitat modification provisions of the regulation.[207]

Private landowners have found ways to avoid being confined by the restrictions set forth by the "harm" regulation. For example, landowners in California and the Pacific Northwest have maintained uses of their land that would be otherwise restricted by Section 9 through securing Section 10 incidental taking permits.[208] The process involves negotiating a habitat conservation plan for a development area with the Fish and Wildlife Service.[209] In exchange for a landowner's commitment to mitigate the adverse impacts of its development, the federal government can agree to allow landowners to modify or destroy the habitat of a protected species.[210] While the expense of preparing a habitat conservation plan may be prohibitive for smaller landowners,[211] it is possible for them to join together in a class action incidental take permit application.[212]

Indeed, use of Section 10 incidental taking permits has increased dramatically in the last year.[213] At the beginning of 1994, the Fish and

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[206] *Top Court Gives Endangered Species More Protection*, HONOLULU ADVERTISER, June 30, 1995, at A8.

[207] Telephone Interview with Steve Middleton, Special Agent, Fish and Wildlife Services Law Enforcement Division, in Honolulu, Haw. (Sept. 29, 1995).

[208] William H. Rodgers, Jr., Professor of Law, University of Washington School of Law, Remarks at Law Seminars International Private Property and Government Takings Seminar, Honolulu, Haw. (Sept. 7, 1995).

[209] Interview with William H. Rodgers, Jr., Professor of Law, University of Washington School of Law, in Honolulu, Haw. (Sept. 28, 1995).

[210] Ginsberg, *supra* note 11, at 10480.

[211] *See* Meltz, *supra* note 55, at 377.

[212] Interview with William H. Rodgers, Jr., Professor of Law, University of Washington School of Law, in Honolulu, Haw. (Sept. 28, 1995).

[213] *Id.*

Wildlife Service reported that it had approved 21 permits and accompanying habitat conservation plans since the program's inception in 1982.[214] As of September 1995, a total of 35 habitat conservation plans were in place, with 130 currently in development nationwide.[215]

Considering that Hawaii houses more endangered species than any other state[216] and that a third of the birds and plants on the endangered and threatened species list live in the islands,[217] it would appear that there would be a large demand to mitigate the potential conflict between man's inhabitation of the islands and that of wildlife.[218] However, Section 10 incidental take permits are not a viable solution to landowners in Hawaii as Hawaii state law continues to prohibit takings of *any* kind.[219]

Other means of avoiding Section 9 prohibitions include taking precautions to prevent listed animals from inhabiting a private landowners property.[220] For example, a California family that was prohibited from plowing a quarter of their grain ranch for three years when the endangered kangaroo rat inhabited 800 fallow acres of the ranch has resorted to annually tilling every acre of the ranch to eliminate all natural habitat for wildlife.[221] In Texas, observations that real estate values declined in areas near where the endangered golden-cheeked warbler live have prompted landowners to destroy potential warbler habitats to avoid potential Section 9 taking situations.[222]

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[214] Meltz, *supra* note 55, at 382.

[215] Telephone Interview with Karen Rosa, Recovery Coordinator for the Pacific Island Ecological Region, Fish and Wildlife Service, in Honolulu, Haw. (Sept. 28, 1995).

[216] *See* William K. Stevens, *Future of Endangered Species Act in Doubt as Law is Debated*, N.Y. TIMES, May 16, 1995, at C4.

[217] Elizabeth Royte, *On the Brink: Hawaii's Vanishing Species*, NAT'L GEOGRAPHIC, Sept. 1995, at 14.

[218] *See* Durrett & Yuen, *supra* note 68, at 183 n.6. The authors note that the extinction of many of Hawaii's endemic species (found only in Hawaii) was due primarily to environmental modifications that occurred since the arrival of Europeans in the islands 200 years ago. At least 24 species of birds in Hawaii have become extinct in the last two centuries.

[219] Interview with Karen Rosa, Recovery Coordinator for the Pacific Island Ecological Region, Fish and Wildlife Services, in Honolulu, Haw. (Sept. 28, 1995). *See* HAW. REV. STAT. § 195D-4(e)(2).

[220] *See* Marla Cone, *Endangered Species Act is Looking to Save Itself*, L.A. TIMES (Wash. Edition), June 28, 1995, at B3.

[221] *Id.*

[222] Stevens, *supra* note 216, at C4.

Private landowners may also attempt to seek relief through fifth amendment constitutional takings challenges.[223] While it is not certain whether the courts will ever consider the protection of endangered or threatened species a compensable taking under the fifth and fourteenth amendments,[224] the "door is now open, most particularly in the environmental regulation area, for more and more landowners to challenge the regulation."[225]

B. Impacts in Congress

Private landowner efforts to avoid the Section 9 prohibition against habitat modification reflect property rights advocates' dissatisfaction with the current ESA.[226] Commentators suggest that the *Babbitt* decision will ultimately motivate Congress to amend the ESA to alleviate economic concerns of private landowners and businesses.[227]

Indeed, a significant majority in Congress agrees with the dissent's view that the ESA should merely prevent direct forms of "harm" such as hunting, trapping, shooting, or killing as opposed to indirect forms of the term such as habitat modification.[228] The Republican majority appears intent on rewriting the ESA to respond to the economic concerns of private property owners and businesses.[229]

There are several proposals currently before Congress that clearly indicate that the Republican majority intends to reduce the scope of the Section 9 "take" provision.[230] For example, H.R. 2275, introduced by Representative Don Young (Alaska), would broadly amend the ESA

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[223] *See* Paula C. Murray, *Private Takings of Endangered Species as Public Nuisance: Lucas v. South Carolina Coastal Council and the Endangered Species Act*, 12 UCLA J. ENVTL. L. & POL'Y 119, 146-47 (1993); Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 304 (1995).

[224] Murray, *supra* note 223, at 150.

[225] *Id.* at 151.

[226] *See* Ginsberg, *supra* note 11, at 10478.

[227] *See* Corn, *supra*, note 1, at 5 ("Virtually all observers assume that the *Sweet Home* decision will add to the pressure to amend the ESA to give greater recognition to immediate economic concerns of landowners, developers, and commercial interests"); Kenworthy, *supra* note 12, at A1 ("Even strong supporters of the act conceded yesterday that the political effect of the court's ruling might be to lessen government's grip on privately owned wildlife habitat."); Ginsberg, *supra* note 11, at 10478.

[228] Ginsberg, *supra* note 11, at 10478.

[229] Kenworthy, *supra* note 12, at A19.

[230] Ginsberg, *supra* note 11, at 10483.

by requiring the government to compensate landowners for lost property value caused by ESA restrictions and would provide incentives to protect species voluntarily.[231] It would also redefine "harm" to encompass only "direct action" against a species.[232]

Similarly, S. 768, introduced by Senator Slade Gorton (Washington), would extensively amend the ESA to restrict Section 9 prohibitions.[233] It would require the Secretary of the Interior to consider human, economic, social, and cultural factors in determining how to protect an endangered species and would invalidate the "harm" regulation by redefining "take" to exclude habitat modification on private property.[234]

H.R. 490, introduced by Representative Lamar S. Smith (Texas) would, among other things, require the federal government to compensate landowners for the loss in market value of land that has been designated as critical habitat.[235] H.R. 925, introduced by Representative Charles T. Canady (Florida), clearly favors protecting property rights by requiring, upon the owner's request, federal purchase of land at fair market value if the land loses more than 50% of its value due to federal regulations under the ESA.[236] H.R. 925 was incorporated into H.R. 490 and passed the House on March 2, 1995.[237]

H.R. 1714, proposed by Representative Calvin M. Dooley (California), would broadly amend the ESA by allowing the Secretary of the Interior to avoid listing a new species if it is certain to become extinct.[238] It also would require peer review, including economic analysis, of all listing decisions and recovery plans and would exempt certain state and local government actions from prohibitions on takings.[239] Finally, Senator Dirk Kempthorne's (Idaho) bill S. 1364 would extensively amend the ESA by limiting the definition of "take" and giving agency heads more authority in resolving conflicts between the ESA and other laws.[240]

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[231] *House GOP Targets Species Protection*, WASH. POST, Sept. 8, 1995, at A15.

[232] *Id.*

[233] Corn, *supra* note 1, at 14.

[234] Ginsberg, *supra* note 11, at 10484.

[235] Corn, *supra* note 1, at 12.

[236] *Id.* at 13.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* at 14.

Thus, while *Babbitt* may constitute the judiciary's last word on the issue of whether habitat modification can amount to a punishable taking, it appears that the issue will not be ultimately resolved until Congress responds to the Court's ruling.[241]

VI. Conclusion

In finding that the Secretary reasonably interpreted the ESA's "harm" provision to include habitat modification, the Supreme Court renewed its commitment to protecting the environment. It emphasized that protection of endangered and threatened species is paramount to other concerns.

However, this strong stance by the Court may have little practical effect in protecting wildlife. Determined landowners will likely continue to find ways to avoid the prohibition against habitat modifications. Furthermore, by increasing the ESA's power with respect to private landowners, the Court may have provided a sympathetic Congress with adequate motivation and justification to minimize the effects of the *Babbitt* holding on private landowners.

Diane S.L. Yuen[242]

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[241] *See* Ian L. Sandison and Jennifer Ulveling, *Swimming Upstream: The Endangered Species Act After Sweet Home v. Babbitt*, Law Seminars International (Private Property and Government Takings, Honolulu, Haw.), Sept. 7, 1995, at 32.

[242] Class of 1997, William S. Richardson School of Law.

Adarand Constructors Inc. v. Pena: A Color-blind Remedy Eliminating Racial Preferences

> Today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence.
>
> —Thurgood Marshall, dissenting in *City of Richmond v. Croson*[1]

I. INTRODUCTION

Justice Marshall's prophetic warning in his *Croson* dissent was confirmed in the Supreme Court's 1995 decision in *Adarand Constructors Inc. v. Pena*.[2] In *Adarand*, the United States Supreme Court addressed whether a Congressionally authorized federal subcontracting program assisting "socially disadvantaged minorities" could use race as a predominant factor in granting federal subcontracts. The petitioner, a White business firm, alleged that a program favoring "disadvantaged" businesses in the granting of federal subcontracts constituted a deliberate attempt to discriminate on the basis of race, in violation of the federal government's Fifth Amendment equal protection obligation.[3] The government responded that the program was based on disadvan-

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[1] 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).

[2] 115 S. Ct. 2097 (1995).

[3] *Id.* at 2102. The Fifth Amendment of the United States Constitution does not explicitly contain an equal protection clause but is implicitly deemed to have an equal protection component. *Id.* at 2107 (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975) (stating explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to the equal protection claims under the Fourteenth Amendment.")). The Fifth Amendment states:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

tage, not race, and thus did not violate the equal protection obligation of the Constitution.[4]

Writing the majority opinion[5] for the Court, Justice O'Connor framed the issue in terms of the appropriate standard of review whenever government classification involves race. The Court failed to determine the constitutionality of the program, and instead declared that all racial classifications by federal, state, or local governmental actors must be reviewed under the strict scrutiny standard.[6] The judgment of the Court of Appeals was vacated and the case was remanded for further proceedings consistent with the strict scrutiny standard.[7] The Court's new standard thus equates all racial groups as one and the same by subjecting racial classifications—benign or invidious—to the same standard of review. The practical result is a retreat from racial preferences and affirmative action, because the stringent evidentiary strict scrutiny standard makes it difficult for racial classifications to pass the test.[8]

Adarand, however, is much more than a case about standards of review. The case is about the tension between the courts and Congress in remedying historic oppression and continuing discrimination against people of color. And, perhaps most importantly, *Adarand* is about competing conceptions of racial justice in America and the value choices the Court made in embracing one conception over the other.

This note will examine the choices the *Adarand* Court made about racial justice in America and its attempt to effectuate a race-neutral treatment of the Fourteenth Amendment. The note is divided into six parts. Part II begins by briefly examining the history of the equal protection clause and the purposes of the Fourteenth Amendment.[9] It

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[4] Respondent's Brief at 23, Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097 (No. 93-1841).

[5] O'Connor's opinion should cautiously be called a majority opinion because Justice Scalia concurs only insofar as it is consistent with his separate opinion—and he does not identify what is or is not consistent.

[6] *Adarand*, 115 S. Ct. at 2113.

[7] *Id.* at 2118.

[8] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down city ordinance requiring contractors to set-aside sub-contracts for minority owned businesses based on strict scrutiny review). *See also* Kirwan v. Podberesky, 38 F.3d 147 (4th Cir. 1994) (striking down merit scholarships for black students based on strict scrutiny review).

[9] This discussion is not included to suggest that examination of history or framer's intent is conclusive. Rather, the discussion establishes an historical basis for interpreting the fourteenth amendment.

then reviews several Supreme Court opinions addressing the state of the equal protection analysis prior to *Adarand*. Part III analyzes the *Adarand* decision by examining the competing narratives and value choices about race in America as articulated in the majority, concurring, and dissenting opinions. These opinions include several broad themes underlying the affirmative action debate: individual versus group rights, "reverse racism," resentment, inferiority and merit. Part IV examines the legal rationale of the Court's new standard and its color-blind approach to race issues. Next, part V critiques the concept of color-blindness and explores the impact such an approach will have in the Court's advocacy for a race-neutral America. Finally, part VI concludes that by the Court adopting a color-blind position over legitimate efforts to redress race discrimination, the *Adarand* decision sustains the racial inequities and avoids finding a workable solution to America's race problems.

Before delving into the specifics of the *Adarand* decision, it is important to note that all Supreme Court decisions addressing race serve two important functions. First, they provide doctrine to guide (or confuse) lawyers and judges. Second, they tell stories or provide narratives about our social relationships and institutions that shape how people think about those relationships and institutions. A judicial opinion is a Justice's story: one of choice, restricted to values, experiences, perspectives, and images of those in power.[10] Each choice connects the Justice's ideology of affirmative action and allows the reader to make the abstract text concrete and vivid.[11] When issues of race are involved, Justices often resort to avoiding the issue and validate their stories through abstract principles and rules which only serve to perpetuate the discriminatory practices the Court is supposed to redress.[12]

"Although legal narratives influence and shape behavior, they often ring false when applied to individuals and groups about whom the narratives are supposedly told,"[13] especially when they involve people

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[10] Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 396 (1989).

[11] *Id.*

[12] Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L. J. 861, 870-73 (1992).

[13] *Id.* In his article, Gilkerson takes on a storytelling approach to poverty law practice and "conceptualizes law as both: a social institution through which people tell stories about their relationships with others and with the state; and an authoritative language, or discourse, with the power to suppress stories and experiences not articulated in accepted forms." *Id.* at 865-866.

of color. In this context, the counter-narrative is introduced as an attempt to give meaning to the master narrative so that the "law becomes not merely a system of rules to be observed, but a world in which we live."[14] The counter-narrative represents alternative voices and perspectives challenging the majority's assumptions and viewpoint.[15] The counter-narrative may be expressed through a judge's dissenting opinion, but most often it comes from those affected by the narratives. Thus, in viewing the courts as "storytelling institutions" we not only obtain answers to legal questions, but we also receive "moral guidance on our most troubling social and political issues."[16]

II. History of Equal Protection and Affirmative Action Cases

> One wonders whether the majority [of the Court] still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was.
>
> —Harry Blackmun, dissenting in *Wards Cove Packing Co. v. Antonio*[17]

Constitutional challenges to race conscious affirmative action programs fall under the protection of the Fourteenth Amendment equal protection clause.[18] For more than two decades, the Supreme Court has failed to agree upon the relevant legal standard of review, creating

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[14] Robert M.Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 5 (1983).

[15] *See* Eric K. Yamamoto, Moses Haia, and Donna Kalama, *Courts and the Cultural Performance: Native Hawaiian's Uncertain Federal and State Law Rights to Sue*, 16 U. Haw. L. Rev. 1, 17-28 (1994) (describing the Court process and cultural performance for indigenous people).

[16] Alan Freeman, "Antidiscrimination Law: The View from 1989", *in* The Politics of Law: A Progressive Critique: A Progressive Critique, 121-150 (David Kairys ed., 1990). Freeman points out the important role of the Supreme Court as a "storytelling institution" where the cases "serve as instructive moral parables, presented to most people as stark, melodramatic media distillations." *Id.* at 122-23.

[17] 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).

[18] U.S. Const. amend. XIV., section 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; no deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

a body of case law marked by confusion and inconsistency of result.[19] What is missing from recent constitutional review of race conscious affirmative action measures is any reference to the original intent of the framers of the Fourteenth Amendment.[20] An early United States Supreme Court case interpreting the Fourteenth Amendment declared that: "the Fourteenth Amendment cannot be understood without keeping in view the history of the times when [it] was adopted, and the general object[ives] they plainly sought to accomplish."[21]

The concept of race remedies was first created by Congress with the adoption of the Civil War Amendments.[22] The Thirteenth,[23] Fourteenth,[24] and Fifteenth Amendments[25] were "designed to provide Blacks with freedom from slavery, citizenship privileges, due process and equal protection rights, and the right to vote."[26] Specifically, the Fourteenth Amendment was enacted to outlaw racial subordination of African-Americans by unfriendly state action,[27] and it was designed to assure the freedom of African-Americans by assuring them the equal protection of all civil rights enjoyed by White persons.[28] The Supreme Court

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[19] *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980).

[20] Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

[21] Strauder v. West Virginia, 100 U.S. 303, 306 (1879).

[22] L. Darnell Weeden, *The Status of Affirmative Action in 1986 and Beyond*, 31 How. L.J. 33, 35 (1988).

[23] U.S. CONST. amend XIII (forbidding slavery).

[24] U.S. CONST. amend XIV (set out in footnote 19). In referring to the equal protection clause, the Court in *Strauder* also stated:

> all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.

Strauder, 100 U.S. at 307.

[25] U.S. CONST. amend. XV (forbidding denial of the right to vote on the basis of race).

[26] Weeden, *supra* note 22, at 34-5.

[27] *See* Schnapper, *supra* note 20, at 754 (reviewing Congress' intent in enacting the Fourteenth Amendment through an examination of race-conscious legislation and suggesting that "the framers of the amendment could not have intended [the Fourteenth Amendment] generally to prohibit affirmative action for blacks or other disadvantaged groups.").

[28] *See* Strauder v. West Virginia, 100 U.S. at 306. The Court also observed that:

> [a]t the time when [the fourteenth amendment was] incorporated into the Constitution . . . State laws might be enacted or enforced to perpetuate the

initially interpreted the equal protection clause of the Fourteenth Amendment with the framers' intent to "protect the rights of the freed slaves and limited its application to state law which discriminated against Blacks as a class."[29] Later, the equal protection clause was expanded to include a broader range of circumstances.[30]

In the past, affirmative action decisions decided by the Supreme Court have been ambiguous and inconclusive when addressing the constitutionality of race conscious remedies. The difficulty with which the Court has decided affirmative action cases has been described by Justice Thurgood Marshall: "Agreement upon a means for applying the [e]qual [p]rotection [c]lause to an affirmative action program has eluded [the members of the] Court every time the issue has come before [them]."[31] By focusing on the relevant legal standards applied to race conscious programs, the Court devoted much of its analysis to the *means* employed for applying equal protection to race conscious programs and often overlooked the history and purpose of the equal protection clause itself. This choice implicitly engages in a formal approach to race and affirmative action without any substantial historical review of the Fourteenth Amendment and the race-based measure.[32]

In order to understand the impact of *Adarand's* decision in applying a single standard to all racial classifications, a brief review of prior

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> distinctions that had before existed . . . [The emancipated slaves] especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations [that] the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by [W]hite persons . . . .

Id.

[29] Lori Jayne Hoffman, *Fatal in Fact: An Analysis of the Application of the Compelling Governmental Interest Leg of Strict Scrutiny in City of Richmond v. J.A. Croson Co.*, 70 B.U. L. Rev. 889, 893 (1990). *See also* The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 81 (1873) (stating that any state action "not directed by way of discrimination against negroes as a class" probably would fall outside the scope of the equal protection clause).

[30] Hoffman, *supra* note 29 (citing United States v. Carolene Products, 304 U.S. 144, 152, n. 4 (1938) (arguing that the Fourteenth Amendment extends to many areas of law, but that different levels of scrutiny may apply depending on the kind of interest protected)).

[31] Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 301 (1986) (Marshall, J., dissenting).

[32] *See* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 728 (1974) (arguing the Fourteenth Amendment "cannot be applied without a sense of its historical meaning and function.").

equal protection case law is necessary. *Regents of University of California v. Bakke*[33] was the first constitutional challenge of a race-based affirmative action program. In *Bakke*, the Supreme Court struggled with the validity of a University of California medical school program reserving a set number of seats for "disadvantaged" minority students.[34] Allan Bakke was a White applicant to the medical school who claimed that the university's admissions program favoring minority applicants denied him a place in the entering class because of his race in violation of the Fourteenth Amendment equal protection clause.[35]

Justice Powell, delivering the opinion for the Court, addressed the question of the level of judicial scrutiny applicable to the program. For Powell, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[36] Because racial or ethnic distinctions were "inherently suspect," the standard of review called for "the most exacting judicial examination."[37] Justice Powell was the only Justice to advocate a strict scrutiny standard of review for the race-based program, while four other Justices concurring in Powell's opinion avoided the constitutional issue of race and instead affirmed the Court's judgment on the basis of a Title VI statutory violation.[38] Justice Brennan, joined by Justices White, Marshall, and Blackmun, advocated in concurrence a less stringent standard of review,[39] rejecting Powell's assertion "that the Constitution must be color-blind."[40]

Although the framers of the Fourteenth Amendment intended to "bridg[e] the vast distance between the Negro race and the [W]hite 'majority,'"[41] Justice Powell extended the equal protection clause to other classes of individuals without regard to race.[42] This assured all

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[33] 438 U.S. 265 (1978).

[34] *Id.* at 272-76.

[35] *Id.* at 277-78. The petitioner also claimed that the program violated the California Constitution, and Title VI of the Civil Rights Act of 1964. *Id.*

[36] *Id.* at 289-90.

[37] *Id.* at 291.

[38] *Id.* at 408 (Stevens J., concurring) (joined by Chief Justice Burger, and Justices Stewart, Rehnquist).

[39] *Id.* at 356-62 (Brennan, J., concurring) (joined by Justices White, Marshall, Blackmun).

[40] *Id.* at 357.

[41] *Id.* at 293.

[42] *Id.* at 291-94.

persons equal protection under the law and enabled the White majority to claim protection of laws designed to benefit minority groups. [43] As a result, a series of "reverse discrimination" cases were brought to the courts by White individuals claiming that affirmative action programs benefiting minorities were in turn discriminating against them.[44]

Two subsequent "reverse discrimination" cases affecting the contracting industry decided by the Supreme Court produced two drastically different outcomes. In *Fullilove v. Klutznick*,[45] several associations of construction contractors and subcontractors claimed they had sustained economic injury due to enforcement of a minority contract set-aside program established by Congress.[46] The program required applicants receiving federal funds for state and local building projects to spend at least ten percent of the federal funds for buying goods and services from minority business enterprises.[47] Undecided over the means of judicial review applicable, the Court sustained the constitutionality of the set-aside program based upon Congressional reports, hearings, and agency studies documenting nationwide discrimination in the construction industry.[48] The Court acknowledged that Congress' efforts to solve problems associated with discrimination against minority businesses provided an "abundant historical basis" upon which it could have reasonably determined that such action was necessary to ensure equal protection of the laws.[49]

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[43] *Id.* at 293-97.

[44] *But see* Stanley Fish, *Reverse Racism or How the Pot Got to Call the Kettle Black*, THE ATLANTIC, Nov. 1993, at 128, 130 (contending that affirmative action is not really racism or discrimination).

[45] 448 U.S. 448 (1980).

[46] *Id.* at 448-49.

[47] *Id.* at 454 n.1.

[48] *Id.* at 463-68. A 1975 Report by the House Committee on Small Business concluded:

> The effects of past of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system . . . .
>
> The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.

Id. at 465-6.

[49] *Id.* at 478.

The plurality opinion written by Chief Justice Burger did not use or adopt any "formulas" of review articulated in cases such as *Bakke*.[50] Burger, however, suggested race-based preference programs be reviewed under "close examination."[51] Justice Powell, who joined in the Burger opinion, contended race based classifications to be assessed under the "most stringent level of review. . . ."[52] While Justice Marshall, joined by Justices Brennan and Blackmun, argued that governmental racial classifications for remedial purposes should not be subjected to strict scrutiny.[53] Instead, Marshall concluded that racial remedial classifications are constitutional only if they are reviewed under an intermediate level of scrutiny.[54]

Despite the Court's unwillingness to adopt a particular standard of review for Congressionally mandated race-based programs, the Court agreed that it was compelled to give appropriate deference to Congress.[55] While the Court admitted Congress' constitutional authority to enact remedial legislation directed at racial discrimination,[56] it also rejected the contention that Congress must act in a color-blind fashion in exercising its remedial power.[57] "[J]ust as race . . . must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."[58]

The next Supreme Court review of a race-conscious program in construction contracting was in the 1989 case of *City of Richmond v.*

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[50] *Id.* at 492.

[51] *Id.* at 472.

[52] *Id.* at 496. Powell asserted that the provision could be upheld only if it constituted a necessary means of advancing a compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress. A legitimate interest in remedying the effects of identified discrimination would meet the standard if three other requirements were met. First, the governmental body that established the racial classification "must have the authority to act in response to identified discrimination." Second, the governmental body "must make finding that demonstrate, the existence of illegal discrimination." Third, the means chosen is permissible for redressing identifiable past discrimination. *Id.* at 496-498.

[53] *Id.* at 519 (Marshall, J., concurring) (joined by Justices Brennan and Blackmun).

[54] *Id.* A racial classification must have "an important and articulated purpose for its use" and not be one that "stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a beginning program." *Id.* (quoting Regents of University of California v. Bakke, 438 U.S. 265, 361 (1978)).

[55] *Id.* at 472.

[56] *Id.* at 473-477.

[57] *Id.* at 482.

[58] *Id.* at 482 (quoting North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 46 (1971)).

J.A. Croson Co.[59] The decision in *Croson* also represents the first case in which a majority of Justices validated strict scrutiny as the judicial standard of review for affirmative action measures adopted by state or local governmental actors.[60] In *Croson*, the City of Richmond attempted to follow the Congressional lead addressing nationwide discrimination in the construction industry by enacting an ordinance aimed at remedying historical race discrimination in the city's construction industry.[61] The ordinance required prime contractors awarded city construction contracts to "subcontract at least 30% of the dollar amount of each contract to one or more Minority Business Enterprises."[62] Furthermore, the ordinance was enacted by city officials following a careful study demonstrating widespread discrimination and exclusion based on race in the local construction industry.[63] The constitutionality of the set-aside program was rejected in *Croson* because, unlike the findings in *Fullilove*, the Court found that the city's evidence of past discrimination consisted of "generalized assertions"[64] and "amorphous claims"[65] which failed to provide a "strong basis in evidence for its conclusion that remedial action was necessary."[66] The Court in *Croson*, however, did not overrule *Fullilove*; the Court distinguished *Fullilove* by acknowledging that Congressional powers to remedy race discrimination were greater than those of the state and local governments.[67] The Court also recognized that racial classification programs were within a state or local government's power when it could properly establish findings of prior discrimination, or where race-neutral measures would accomplish the same goals.[68]

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[59] 488 U.S. 469 (1989).

[60] *Id.* at 493-506. *See also* Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2110 (1995).

[61] *Id.* at 477-86.

[62] *Id.* at 477.

[63] *Id.* at 479-81.

[64] *Id.* at 498. "A generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Id.*

[65] *Id.* at 499. "An amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.*

[66] *Id.* at 500 (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277 (1986)).

[67] *Id.* at 521-22 (inferring Congress is allowed to adopt a remedial action without specific findings of discrimination).

[68] *Id.* at 490.

The *Croson* Court thus invalidated the city ordinance by applying strict scrutiny review to state and local affirmative action programs.[69] In justifying their application of strict scrutiny, the Court explained that the application of strict scrutiny was to "smoke out" illegitimate uses of race.[70] In their view, applying strict scrutiny assured that the legislature was pursuing important goals that warranted the use of racial classifications.[71] The Court's declaration of a concrete rule for the judicial standard applied to affirmative action measures sought to remove the confusion and inconsistency created by prior Supreme Court decisions. In *Croson*, however, the circumstances did not require the Court to declare the proper standard of judicial review for *Congressionally mandated* race conscious measures. Therefore *Croson* fell short of requiring strict judicial review for *all* race conscious affirmative action measures.[72]

Justice Marshall's dissent characterized the decision in *Croson* as "a deliberate and giant step backward in this Court's affirmative action jurisprudence."[73] He found it ironic that the Court's decision "second guess[ed]" the judgment of a city which as "the former capital of the Confederacy knows what racial discrimination is."[74] Marshall criticized the majority for ignoring the city council's evidence demonstrating the impaired position of minority owned businesses in the nation's construction industry.[75] For Marshall, there existed enough evidence to establish a record of discrimination. In particular, he relied upon statistical proof that minority owned businesses had received essentially no city contracting dollars and rarely belonged to trade associations in the area;[76] testimony from city officials with regard to the exclusionary history of the local construction industry; and awareness of the Supreme Court's decision in *Fullilove*.[77] On these points, Marshall maintained

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[69] *Id.* at 511.

[70] *Id.* at 493.

[71] *Id.* (the "test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.").

[72] *See* Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2110 (1995).

[73] *Croson*, 488 U.S. at 529 (Marshall, J., dissenting).

[74] *Id.* at 528.

[75] *Id.* at 530. Statistics offered into evidence in *Croson* showed that while the population of Richmond was approximately 50% Black, in the five-year period extending from 1978 to 1983 only 0.67% of the city's prime construction contracts were awarded to minority-owned businesses. *Id.* at 479-80.

[76] *Id.* at 529.

[77] *Id.*

that *Croson* was far from the generalized social discrimination the majority condemned as a basis for remedial action.[78] Parallelling Marshall's dissent was Justice Blackmun expressing his disappointment that "[the] Court, the supposed bastion of equality . . . [had acted] as though discrimination had never existed or was not demonstrated . . . ."[79] Like Marshall, Blackmun perceived the Court as regressing in their equal protection jurisprudence, but remained confident that one day the Constitution's promises would be fulfilled.[80]

Justice Blackmun's assurance in *Croson* came true a year later when the Supreme Court held benign race conscious measures mandated by Congress to a lenient level of judicial scrutiny in *Metro Broadcasting, Inc. v. Federal Communication Commission*.[81] In *Metro Broadcasting*, the Court upheld two federally adopted policies affording minorities an advantage in comparative broadcasting licensing proceedings and offering incentives for financially distressed licensees to sell their radio or television properties to minorities.[82] The FCC adopted both policies to increase minority participation and enhance programming diversity.[83] The Court determined that the policies were a "critical means of promoting broadcast diversity" to which great weight was given to the decision of Congress and the expertise of the Commission.[84] In distinguishing *Croson*, the Court explicitly rejected *Croson*'s embrace of strict scrutiny as being applicable to benign racial classifications employed by Congress.[85] The dissenters in *Metro Broadcasting*[86] called "benign classification" a "contradiction in terms."[87] In their view, all racial classifications are invidious because they "endorse race-based reasoning and the conception of a Nation divided into racial blocs."[88] For Justice O'Connor, the Court's decision departed from the traditional strict scrutiny standard of review suggesting a renewed tolerance for race-based measures.[89] Although the dissent disagreed with the standard of

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[78] *Id.* at 540.
[79] *Id.* at 561 (Blackmun, J., dissenting).
[80] *Id.* at 562 ("So the Court today regresses.").
[81] 497 U.S. 547 (1990).
[82] *Id.* at 547.
[83] *Id.* at 555-56.
[84] *Id.* at 579.
[85] *Id.* at 565.
[86] Justices O'Connor, Scalia, Kennedy.
[87] *Id.* at 609 (O'Connor, J., dissenting).
[88] *Id.* at 603.
[89] *Id.* at 602.

review applied to Congressionally mandated racial classifications, the holding in *Metro Broadcasting* sustained the broad power of Congressional authority, as did *Fullilove*, to validate subjecting Congressionally mandated affirmative action programs to a lenient standard of judicial review.

III. THE ADARAND DECISION

A. *Facts and Procedural History*

In *Adarand Constructors Inc. v Pena*,[90] the Supreme Court reviewed another constitutional challenge to a Congressionally authorized affirmative action program included in highway construction contracts. In 1989, the Central Federal Lands Highway Division (CFLHD), a regional division of the Department of Transportation's Federal Highway Association, awarded a prime federal highway construction contract to Mountain Gravel Construction Company (Mountain Gravel).[91] Included in the prime contract was a federal Subcontracting Compensation Clause (SCC) which provided financial incentives to general contractors who hire subcontractors certified as a disadvantaged business enterprises (DBE) based upon certain race-based presumptions.[92]

The petitioner was Adarand Constructors Inc., a White-owned business. Adarand challenged the SCC clause after losing a subcontract bid for guardrail work on a highway construction project.[93] Mountain Gravel awarded the contract to Gonzales Construction Co, a Hispanic-American-owned business presumed to be socially disadvantaged.[94] In hiring Gonzales, Mountain Gravel received additional compensation because of the SCC clause included in Mountain's prime contract.[95]

To qualify as a DBE, a subcontractor could be certified through the Small Business Act (SBA)[96] or by a state or local government agency. Section 502 of the SBA established a five percent government wide goal for disadvantaged business participation in government contracting and subcontracting, and required each federal agency to implement

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[90] 115 S. Ct. 2097 (1995).
[91] *Id.* at 2102.
[92] *Id.* at 2102-05.
[93] *Id.* at 2101-02.
[94] *Id.* at 2102.
[95] *Id.*
[96] Small Business Act, 15 U.S.C. § § 631-660 (1988 & Supp. V 1993).

that goal through subsidiary agency goals.[97] The principal means used by agencies to meet the five percent participation goal has been through SBA's 8(a) and 8(d) program.[98] To participate in either program, a general or subcontractor must demonstrate that the business is a small, socially and economically disadvantaged business.[99]

The SBA's definition of a small disadvantaged business applied to both programs and defined a small business as an enterprise independently owned and operated, not dominant in its field of operation, with annual gross receipts not in excess of the level set by regulation for the industry in which the business operates.[100] A small business is disadvantaged if it is at least 51% owned and controlled by an individual who is both socially and economically disadvantaged.[101] A "socially disadvantaged" person is one who has been subjected to "racial or ethnic prejudice or cultural bias because of [his or her] identity as member of a group without regard to [his or her] individual qualities."[102] An "economically disadvantaged" person is a socially disadvantaged person who also demonstrates that his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[103]

Congress discovered that "many persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control."[104] Therefore, the SBA's subcontracting provision authorized prime contractors to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration . . . ."[105] Based on this presumption, individuals belonging to those minority groups were presumed to be eligible for the SCC. In Adarand's case, Mountain

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[97] 15 U.S.C. § 644(g)(1) (1988 & Supp. V 1993).
[98] *Adarand*, 115 S. Ct. at 2102.
[99] 15 U.S.C. § 644(g)(1) (1988 & Supp. V 1993).
[100] 15 U.S.C. § 632 (a)(1)-(3) (1988 & Supp. V 1993).
[101] 15 U.S.C. § 637 (1988 & Supp. V 1993).
[102] 15 U.S.C. § 637(a)(5) (1988 & Supp. V 1993); 13 C.F.R. § 124.105 (1994).
[103] 15 U.S.C. § 637(a)(6)(A) (1988 & Supp. V 1993).
[104] 15 U.S.C. § 631 (f)(1)(B) (1988 & Supp. V 1993).
[105] 15 U.S.C. § 637 (d)(3)(C)(ii) (1988 & Supp. V 1993).

Gravel's contract was authorized pursuant to the Surface Transportation and Uniform Relocation Assistance Act of 1987[106] which contained social and economic racial presumptions similar to those of the SBA.

Adarand claimed that the presumptions set forth in the SCC discriminated against him on the basis of race, thus violating his right to equal protection of the laws.[107] After reviewing the program under a lenient judicial standard established in *Fullilove* and *Metro Broadcasting*, the District Court for the District of Colorado granted the government's motion for summary judgment.[108] Although Congress made no specific findings of past discrimination in this case, the district court was satisfied that here, as in *Fullilove*, Congress had an "abundant historical basis" to support the challenged program and to demonstrate the important governmental objectives justifying the program.[109]

The Tenth Circuit affirmed, holding that under *Fullilove*, a court must apply a lenient standard of review, resembling intermediate scrutiny, when assessing a Congressionally mandated race-conscious programs.[110] The court rejected Adarand's argument that a particularized finding of past discrimination was required to justify the program because the program was created and designated by an agency and not Congress.[111] The court maintained that to justify a race conscious program, a federal agency must make independent findings of discrimination.[112] Particularized aspects of the program were declared by the

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[106] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1988). The Court in *Adarand* noted that "STURRA adopts the Small Business Association's definition of 'socially and economically disadvantaged individual' including applicable race-based presumptions. . . ." *Adarand*, 115 S. Ct. at 2103.

[107] *Adarand*, 115 S. Ct. at 2102.

[108] Adarand Constructors Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992) (summary judgement for government) [hereinafter Adarand I], *aff'd*, 16 F.3d 1537 (10th Cir. 1994) [hereinafter Adarand II], *vacated*, Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995).

[109] *Adarand* I, 790 F. Supp. at 244. The court found that the Clause was not "over inclusive," because the annual certification process ensures that only legitimately disadvantaged subcontractors participate in the program. It is also not "under inclusive," because disadvantaged firms that are not presumptively disadvantaged may apply for certification and become qualified to participate. *Id.* Furthermore, the court noted the waiver mechanism properly relieves federal agencies of their disadvantaged business obligations when there are not enough qualified disadvantaged businesses available to achieve the agency's goal. *Id.*

[110] *Adarand* II, 16 F.3d at 1537.

[111] *Id.* at 1544.

[112] *Id.* at 1545.

court to have been specifically authorized by Congress, and therefore, in including the SCC in prime contracts, the CFLHD "did exactly what Congress explicitly directed it to do" under the SBA.[113] Subsequently, Adarand petitioned for writ of certiorari to the United States Supreme Court, and certiorari was granted.[114]

B. Majority, Concurring, and Dissenting Opinions

> When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.
>
> —Justice Stevens dissenting in *Adarand v. Pena*[115]

1. Majority opinion

Justice Stevens' warning in his *Adarand* dissent highlighted the majority's preoccupation with abstract standards. Justice O'Connor, writing for five Justices, engaged in a formal means-oriented approach to race by declaring strict scrutiny the standard applicable to all racial classifications imposed by federal, state, or local governments.[116] This approach reflected a vision of race unconnected to the historical and social realities of minorities, thereby hindering Congress' ability to redress discriminatory practices.[117] O'Connor's "story" declined to

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[113] *Id.*

[114] 115 S. Ct. 41 (1994).

[115] Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2122 (1995) (Stevens, J., dissenting).

[116] *See, e.g,* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1059 (1978) (describing strict scrutiny as a means oriented review of the equal protection clause).

[117] *See, e.g,* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991). Professor Gotanda asserted that the Supreme Court has historically relied on four different concepts of race: status-race, formal-race, historical-race, and cultural-race. For this note, the concepts of formal-race and historical-race are most important.

> [F]ormal race refers to socially constructed formal categories. Black and [W]hite are seen as neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin. Formal-race is unrelated to ability, disadvantage, or moral culpability. Moreover, formal-race categories are unconnected to social attributes such as culture, education, wealth or language . . . .
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> * * *
>
> Historical-race does assign substance to racial categories. Historical-race embodies past and continuing racial subordination, and is the meaning of race that the Court contemplates when it applies 'strict scrutiny' to racially disadvantaging government conduct.

Id. at 4.

apply strict scrutiny to the program at issue, and instead vacated the judgment of the Court of Appeals and remanded the case for further proceedings consistent with the Court's opinion.[118] Thus, the Court's decision to apply strict scrutiny to all racial classifications not only represented a major departure from the Court's previous decisions on Congressionally mandated racial classification, but it also reflected a limitation on all racial classification programs.

Justice O'Connor's narrative began by reconciling the Court's ruling with past decisions, employing a highly formal method of analysis. She justified this approach in terms of the propositions of skepticism, consistency, and congruence.[119] The first proposition was skepticism—that the Court treated any racial preferences with the "most searching examination."[120] Second was the notion of consistency—that "the standard of review under the equal protection clause is not dependent on the race of those burdened or benefitted by a particular classification."[121] Finally, Justice O'Connor's last proposition was congruence—that regarded the same equal protection examination under both the Fifth and Fourteenth Amendment.[122]

O'Connor's propositions is problematic for several reasons. First, the consistency in applying strict scrutiny equates race conscious programs that burden and benefit minorities as the same.[123] As a result, O'Connor rendered a colorblind approach to race permitting a single standard of strict scrutiny to apply to fundamentally different situations. Next, O'Connor's proposition of congruence equated the Fifth Amendment equal protection with the Fourteenth Amendment equal protection analysis.[124] Consequently, the Court presumed that there is no difference between a decision by Congress to adopt an affirmative action program and that of the State or local municipality.[125] These differences, however, have consistently been identified in several prior opinions authored by the Court. For example, in *Fullilove*, the Court agreed

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[118] *Adarand*, 115 S. Ct. at 2118.

[119] *Id.* at 2111.

[120] *Id.* at 2111 "[A]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." *Id.*

[121] *Id.* at 2114.

[122] *Id.* at 2111.

[123] *Id.* at 2111. Strict scrutiny is "not dependent on the race of those burdened or benefited by a particular classification." *Id.* (quoting City of Richmond v. Croson, 488 U.S. 492, 494,(1989)).

[124] *Id.* at 2111.

[125] *See id.* at 2123-26 (Stevens, J. dissenting).

that the task of evaluating a federal race-based classification owed "appropriate deference to Congress . . . ."[126] We are also reminded that in *Croson*, the Court relied upon the distinction between state and federal programs.[127] Without the Court providing a direct explanation for its sudden departure from past cases, the difference between Congress' institutional competence and Constitutional authority to overcome historic subjugation and the States lesser power to do so cannot be erased.[128]

By relying on the propositions of skepticism, consistency and congruence, the Court ignored precedents that applied a "more lenient standard" of review to Congressionally mandated racial classifications to explicitly and implicitly overrule *Metro Broadcasting*,[129] and *Fullilove*[130] respectively. Justice O'Connor rejected the *Fullilove* opinion insofar as the plurality failed to produce a majority opinion as to the standard of review applicable to federal racial classifications.[131] She drew upon Justice Powell's concurrence in *Fullilove*, suggesting that the plurality applied the "strict scrutiny" review to all governmental racial classifications.[132] This reasoning is overreaching. In *Fullilove*, Powell was the only Justice to argue for strict scrutiny of the Congressional race based classification. The remaining Justices either did not advocate a judicial standard or upheld the program based on intermediate scrutiny.[133] Thus, *Adarand* abandoned the principle of stare decisis and articulated "special justifications"[134] for their departure from precedent.

According to the majority, the Court's "special justification" for their departure from the precedent set in *Metro Broadcasting* is distin-

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[126] Fullilove v. Klutznick, 448 U.S. 448, 472 (1980).

[127] Justice O'Connor's plurality opinion in *Croson* emphasized "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." 488 U.S. 469, 490 (1989).

[128] *Adarand*, 115 S. Ct. at 2123-26 (Stevens, J., dissenting).

[129] *Id.* at 2101. "To the extent that Metro is inconsistent with the ruling [of the Court] it is overruled." *Id.*

[130] *Id.* "[T]o the extent that *Fullilove* held racial classification subject to less rigorous standard, it no longer controlling." *Id.*

[131] *Id.* at 2108.

[132] *Id.* at 2109 (citing Fullilove v. Klutznick, 448 U.S. at 496 (1980) (Powell, J., concurring)).

[133] *See supra* notes 50-54 and accompanying text.

[134] *Id.* at 2115-16.

guishable. First, Justice O'Connor criticized the application of intermediate scrutiny in *Metro Broadcasting* and asserted that *Metro Broadcasting* departed from precedent in rejecting the Court's principles of skepticism, consistency, and congruence.[135] The Court explained that *Metro Broadcasting* lacked congruence in relation to the standard of review applicable to federal and state race-based actions, thereby as a result, the Court in *Metro Broadcasting* also undermined the "skepticism of all racial classifications, and consistency of treatment irrespective of the race the burdened or benefitted."[136] In discussing the doctrine of stare decisis, Justice O'Connor believed that staying true to an "intrinsically sounder" doctrine established in previous cases served the "values" of the doctrine more than following a recent case inconsistent with the decisions that came before it.[137] Subsequently, O'Connor characterized *Metro Broadcasting* as a departure from "prior cases" and concluded "[b]y refusing to follow *Metro Broadcasting*, [because] then, [the Court does] not depart from the fabric of the law; [it] restore[s] it."[138]

Adarand, apparently, claimed to restore *Croson* as the leading precedent. In *Croson*, the Court applied strict scrutiny review to race-based affirmative action programs implemented by state and local governments.[139] Adopting strict judicial scrutiny for federal racial classifications, the decision extends federal programs to the same strict standard held by *Croson* for state and local programs and presumably levels the playing field when racial remedies are challenged in the courts. However, *Adarand* fell short of demonstrating how strict scrutiny may be applied to federal racial classifications and also failed to determine the constitutionality of the SCC program at issue.[140] For further guidance on the application of strict scrutiny to federal racial classifications, one needs to look to *Croson* for guidelines.

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[135] *Id.* at 2112.

[136] *Id.*

[137] *Id.* at 2114-15.

[138] *Id.* at 2116.

[139] City of Richmond v. Croson, 488 U.S. 469, 493 (1989). The *Croson* Court noted that:

> the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen fit this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id.

[140] *Adarand*, 115 S. Ct. at 2118.

Under *Croson*, in order to demonstrate a compelling state interest, the government is required to specifically identify the discrimination to be remedied.[141] This is because in the absence of specific findings of discrimination, racial classifications could be "ageless in their reach into the past, and timeless in their ability to affect the future."[142] In addition, a history of general societal discrimination,[143] and "amorphous"[144] claims of discrimination in particular areas and industries are insufficient. Such generalized claims lack direction for the government to determine the exact scope of the injury it seeks to remedy and would have "no logical stopping point."[145] *Croson* further indicated that "a strong rational basis in evidence" is required in order to support governmental race-based remedial action, thus mandating a prima facie showing of discrimination against minorities to uphold governmental race-based classifications.[146]

In addition to advancing a compelling governmental interest, any governmental use of race must also be "narrowly tailored" to advance that interest.[147] The narrowly tailored inquiry focuses on the means employed in seeking to meet the governmental objective of the racial classification.[148] The *Adarand* Court did not address the question of

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[141] *Id.* at 499. In *Bakke*, Justice Powell stated that the government only has a compelling interest in favoring one race over another if the governmental interest in remedying past discrimination is triggered by "judicial, legislative, or administrative findings of constitutional or statutory violations must be made." 438 U.S. 265, 307-309 (1979) (opinion of Powell, J.).

[142] *Croson*, 488 U.S. at 498 (quoting Wygant v. Jackson Bd. of Ed., 476 U.S. 276, 276 (1986)).

[143] *Id.* at 499. ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota . . . ."). Furthermore, "[t]o accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group." *Id.* at 505.

[144] *Id.* "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.*

[145] *Id.* at 498.

[146] *Id.* at 501 "There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.'" *Id.* (quoting Hazelwood School Dist. v. United States, 433 U.S. 299, 307-308 (1977)).

[147] *Id.* at 506.

[148] In determining whether race conscious remedies are narrowly drawn, several

narrow tailoring, but referred to previous affirmative action decisions and mentioned the Court of Appeals failure to address race neutral alternatives or the duration of the program.[149]

In adding little to what was said in *Croson* regarding the application of strict scrutiny, the majority concluded by announcing that the application of strict scrutiny will ensure that all racial classifications are examined thoroughly, and that only narrowly tailored racial classifications based on a compelling government interest will be allowed.[150] Furthermore, the majority sought to dismiss the notion that strict scrutiny is "strict in theory, fatal in fact"[151] by acknowledging the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups" as an "unfortunate reality."[152] As a result, this leaves the door open for the possibility of affirmative action but only in specific circumstances.[153]

Justice O'Connor's narrative is ambiguous and contradictory on key points. She employed abstract principles of colorblindness, strict scrutiny, and stare decisis to confuse her audience and elude the problem of race in America. Her value choices endanger the future of all race conscious programs not only because of her advocacy of a colorblind position, but also because she permits the concurring opinions of Justices Scalia and Thomas to emerge as persuasive.

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factors may be relevant: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the effect of the remedy upon innocent parties; (iv) the flexibility, and duration of relief, including the availability of waiver provisions; (v) the comparison of any numerical target to the number of qualified minorities in the industry; (vi) the degree and type of the burden caused by the program. *See* United States v. Paradise, 480 U.S. 149, 171 (1987). *See also* Memorandum from Walter Dellinger, Assistant Attorney General, on *Adarand Constructors v. Pena*, 19 (June 28, 1995) (on file with author).

[149] Justice O'Connor implied that the program would be constitutional if "a race neutral means to increase minority business participation" were considered. Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2118 (1995).

[150] *Id.* at 2117 (citation omitted).

[151] *Id.* at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

[152] *Id.*

[153] As an example, Justice O'Connor mentioned *United States v. Paradise* where the Court upheld a court order for preferential hiring and promotion of African-Americans in Alabama Highway Patrol following a twenty year history of "pervasive, systematic, and obstinate discriminatory conduct" by White officials refusing to hire or promote African-Americans. *Id.* (citing United States v. Paradise, 480 U.S. 149, 167 (1987)).

2. Concurring opinions: Justices Scalia and Thomas

The mixed messages in O'Connor's opinion about the use and role of race-based measures in government may be a result of an effort to formulate an opinion acceptable to other Justices joining the decision.[154] This allows the concurring opinions of Justices Scalia and Thomas to communicate the principles of racial justice O'Connor failed to express.

Justice Scalia joined the opinion of the Court except where it is inconsistent with his belief the government can *never* have a compelling interest in adopting race based measures.[155] Consequently, Scalia's narrative is very significant. Scalia admitted that individuals wronged by racial discrimination "should be made whole."[156] From this perspective, our Constitution is based on the rights of the individuals and not on "such thing as either a creditor or debtor race."[157] The focus on individual rights as contrasted with group rights is the most prominent theme of Justice Scalia's concurring opinion.

The individual rights concept of equal protection "views the individual as the object of fundamental rights."[158] In contrast, the group rights perspective "sees groups—ethnic, cultural, gender—as having a status independent of and even superior to that of the individual group members."[159] Thus, Scalia believes all racial classifications imposed by government actors are unconstitutional because, in his view, the Constitution provides equal protection for individuals, but not for groups.[160] Scalia's argument advocated prohibiting all affirmative action programs because, in his view, a group-based remedy can never be constitution-

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[154] *See* Rex V. Van Middlesworth, *Affirmative Action: What's Next For Affirmative Action?: Because Of Justice Day O'Connor's Mixed Signals, The Supreme Court Raised More Questions Than It Answered In Adarand*, TEX. LAW, June 26, 1995, at 26.

[155] *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring).

[156] *Id.*

[157] *Id.*

[158] Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 108 (1990). *See also* Regents of University of California v. Bakke, 438 U.S. 265, 299, 308-309 (1979) (opinion of Powell, J.) "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, the constitutional standards may be applied consistently." *Id.*

[159] Fried, *supra* note 158, at 109.

[160] *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring) (noting the language of the Fourteenth Amendment stresses "Nor shall any State . . . deny to any person").

ally legitimate.[161] For Scalia, the Constitution speaks only to the individual and looks toward making the individual whole.[162] Scalia is not alone in his assertion. Justice O'Connor, in her majority opinion, insisted the Fifth and the Fourteenth Amendment protect individuals and not groups.[163] Likewise, Justice Thomas also presumed the equality of individuals underlies the Constitution.[164]

The compensation for victims of specific instances of discrimination through the "make-whole" relief advocated by Justice Scalia is difficult, if not impossible, to reconcile directly conflicts with what affirmative action is understood to be. Generally, affirmative action is "a group remedy for a group wrong."[165] The notion "of 'individuals, not groups' is more a slogan than a concrete principle."[166] This is because in a general sense no one is ever judged as an individual. Generalizations place individuals into some form of group trait: short or tall, smart or dumb. Even those who score well on entrance exams are judged as a group, and given rankings accordingly.

> Race does not function in our culture as does eye color. Eye color is an irrelevant category; . . . it is not an important cultural fact . . . . It is important to see that race is not like that at all . . . . In our culture to be nonwhite—and especially to be black—is to be treated and seen to be a member of a group that is different from and inferior to the group of standard, fully developed persons, the adult white males.[167]

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[161] *Id.*

[162] *Id.*

[163] *Id.* at 2112-2113 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)) (race is "a group classification has long been recognized in most circumstances irrelevant and therefore prohibited.").

[164] *Id.* at 2119 (Thomas, J., concurring) ("the equal protection principle reflect our Nation's understanding that such [racial] classification ultimately have a destructive impact on the individual and of society.").

[165] Gerald Horne, excerpted from *The Spoils of Victimhood: The Case Against The Case Against Affirmative Action*, THE NEW YORKER, March 27, 1995 at 64, 69 *in* THE SALT EQUALIZER, Summer 1995, at 5. *See also* James Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 903 (1985) (defining affirmative action programs as "public or private policies or programs which provide, or seek to provide, opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups.").

[166] Horne, *supra* note 165, at 5.

[167] Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 586 (1977) (footnote omitted).

Only when race becomes a deciding factor in benefitting group affinity does the notion of individuality become important.[168]

The most notable remark in Scalia's narrative is his declaration that "in the eyes of the government, we are just one race here. It is American."[169] Equality is in the eye of the beholder. In Scalia's eyes race is fungible, neutral and color-blind.[170] He assumes that America has become a true melting pot to the degree that we have moved beyond our racial differences to treat each other as equals.[171]

Justice Scalia concerned himself with the fungibility of race while Justice Thomas, in his separate concurrence, was primarily concerned about race-based programs being inherently discriminatory.[172] Through his narrative, he employed the concepts of reverse discrimination, resentment, inferiority and merit. For Thomas, race-based programs have the capacity to be as "poisonous" and "pernicious" as any other form of discrimination where, inevitably, they create attitudes of "superiority" or "provoke resentment" among racial groups contributing to the racial prejudice they serve to eliminate.[173] Thomas proclaimed that "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[174] From this view Thomas sees affirmative action programs as discriminatory implying the notion of reverse racism. The underlying premise of reverse racism maintains that, if it was wrong before 1964 to discriminate on the basis of race, it is equally wrong today to prefer individuals on the basis of race.[175] This notion gives rise to a class of innocent persons who do

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[168] Further discussion of individuality is beyond the scope of this article. *But see* John E. Morrison, *Colorblindness, Individuality and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 329 (1994) (discussing how "[i]ndividuality allows Euro-Americans to acknowledge the racial polarization of society while ironically shifting the blame and guilt from a racist society to affirmative action programs.").

[169] Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring).

[170] *See infra* section IV. B.

[171] *But cf.* Thurgood Marshall's comment that "[a]s to this country being a melting pot—either the Negro did not get into the pot or he did not get melted down." Tony Mauro, *Back to Bakke: The Recently Released Thurgood Marshall Papers Cast New Light On California's Affirmative Action Supreme Court Case*, 14 CAL. LAW. 50, 51 (Jan 1994).

[172] *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring) ("there can be no doubt that racial paternalism and its unintended consequence can be seen as poisonous and pernicious as any other form of discrimination.").

[173] *Id.*

[174] *Id.*

[175] Stanley Fish, *Affirming Affirmative Action*, in THE SALT EQUALIZER, Summer 1995, at 7, 8.

not consider themselves personally responsible for the conditions associated with racial discrimination and feel resentment for having to sustain the burdens of remedying past discrimination.[176] Thus, Thomas sees affirmative action as the source of resentment that divides society.[177]

The problem with Thomas' perspective is that he sees resentment as a reaction purely to affirmative action. In his view, preferential policies cause discernable harm to white individuals who are themselves "innocent victims."[178] This perspective is illusory. It is rooted in the notion that racism is in the past and that White persons are not racist. Therefore, Whites have burdens imposed upon them that they are not responsible for. The White majority, however, can never be seen as victims, let alone innocent, because as a group have benefitted from advantages obtained at the expense of minorities.[179] Furthermore, it is unrealistic to think that affirmative action is the primary cause of racial tension and resentment because the inequities and exclusion of racial minorities is precisely what affirmative action is a response to not a cause of.[180]

Justice Thomas also alleged affirmative action programs have potential harmful effects on its beneficiaries.[181] He maintained "[affirmative action] programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or adopt an attitude that they are 'entitled' to preferences."[182] These notions are false because affirmative action programs were not designed to admit or hire persons who are unqualified or undeserving. Rather, minority status is a consideration taken into account when selecting a qualified applicant.[183] Furthermore, racial grouping had stigmatized minorities well before affirmative action measures were ever conceived.[184] Therefore, it is society and not the

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[176] Freeman, *supra* note 116, at 1055. *See also generally* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990).

[177] *See* Ken Feagins, *Wanted—Diversity: White Heterosexual Males Need Not Apply*, 4 WIDENER J. PUB. L. 1 (1994).

[178] *See* Ross, *supra* note 176, at 300.

[179] *Id.* at 301.

[180] *See* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 (1986).

[181] *Id.* at 2119 (Thomas, J., concurring).

[182] *Id.*

[183] *See* Benjamin L. Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043, 1058 (1987) ("Affirmative action is simply a method to choose among those qualified.") *See also* Fish, *supra* note 175, at 7.

[184] *E.g.*, U.S. CONST. art. I, § 9 (protecting slave trade until 1808).

affirmative action programs that "stamp minorities with a badge of inferiority . . . ."[185]

3. Dissenting opinions: Justices Stevens, Souter, and Ginsburg

Three of the four dissenting Justices wrote separately to express their strong disagreement with the majority's reasoning and the application of strict scrutiny review to race conscious programs. Their counter-narratives admonish the majority's departure from controlling precedent and the principle of stare decisis giving Congress the ability to adopt a race-based remedy to racial discrimination. More importantly, their counter-narratives emphasize the historical importance of the past and recognize the realities of continuing racial subordination.

a. Justice Stevens

Justice Stevens, in his dissent, engaged in a doctrinal review of the majority's opinion and began by describing the Court's decision as a "disconcerting lecture about the evils of governmental racial classification,"[186] which ignored the continuing reality of a racial caste system in the United States. He then proceeded to discount the Court's propositions of skepticism, consistency, and congruence. Stevens accepted the concept of skepticism as "a good statement of law and of common sense," and acknowledged that racial classifications may be potentially harmful, where agreement on a standard does not necessarily result in agreement of the case outcome.[187] Accordingly, Stevens reviewed the propositions of "consistency" and "congruence" with the same skepticism the Court advocated.[188]

Justice Stevens attacked the majority's notion of "consistency" for a standard applied to all race-based governmental action. He argued that consistency overlooked the difference between a "policy designed to perpetuate a caste system and one that seeks to eradicate racial subordination."[189] For Stevens, an obvious distinction existed between a classification reflecting a presumption of racial inferiority and one

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[185] *Id.*
[186] *Id.* at 2120 (Stevens, J., dissenting).
[187] *Id.*
[188] *Id.*
[189] *Id.*

designed to remedy the effects of discrimination.[190] Therefore, by applying a single standard to different situations, the Court treated those differences as though the were the same, disregarding the "difference between a 'No Trespassing' sign and a welcome mat."[191] Moreover, the consistency between different classes of individuals is not supported by the current law because 'intermediate scrutiny' rather than strict scrutiny is applied to cases of gender discrimination.[192] Thus, consistency in equal protection is not advanced when the government can easily enact affirmative action programs to remedy discrimination against women, but it cannot enact affirmative action programs to remedy affirmative action programs against African-Americans despite the fact that the primary purpose of the equal protection clause of the Fourteenth Amendment was to end discrimination against former slaves.[193]

Next, Justice Stevens criticized the proposition of congruence as ignoring the practical and legal difference between "Congress' institutional competence of constitutional authority to overcome historic racial subjugation and the states' lesser power to do so."[194] These differences were addressed in prior decisions which gave greater deference to Congress than to a local law making body in remedying race discrimination.[195] Greater deference for federal affirmative action programs needs to be maintained because the Congressionally mandated affirmative action programs portray the disposition of our country's elected representatives.[196] Furthermore, the language of the Fourteenth and Fifth Amendments empowers Congress to enforce appropriate legislation, while it limits the power of the states.[197] These amendments

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[190] *Id.*

[191] *Id.* at 2121.

[192] *Id.* at 2122.

[193] *Id.*

[194] *Id.* at 2125.

[195] *Id.* at 2124. Stevens especially recalls the opinions of Chief Justice Burger and Justice Powell in *Fullilove* explaining that deference to Congress was appropriate in light of their "institutional competence" as the National Legislature, and the unique powers granted to Congress under the Commerce Clause, the Spending Clause, and the Civil War Amendments. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 472 (1980)). He also indicated that Congressional deference was recognized in *Croson* and *Metro* such that Congressional consideration on race-based measures should be granted greater deference than state or local governments. *Id.* at 2126.

[196] *Id.* at 2125.

[197] *Id.*

also represent the "[n]ation's consensus, achieved after hard experience throughout our history of sorry race relations,"[198] that entrusts the federal government to be the "primary defender of racial minorities against the States."[199]

In addition to taking a historical glance at the original purpose of the Fourteenth Amendment, Stevens also evaluated the affirmative action program at issue.[200] He examined the discriminatory practices of the contracting industry, and concluded that if the rigid race-conscious program the Court upheld in *Fullilove* was constitutional, then the more flexible program at issue in *Adarand* must be constitutional as well.[201]

b. Justice Souter

Justice Souter's dissent, opposed the majority's departure from precedent. He urged instead that the Court remain faithful to the guidelines as originally conceived in *Fullilove*.[202] Souter denied that *Fullilove* had failed to afford adequate guideline to the Court. On the contrary, in Souter's view, *Fullilove* had provided a workable approach to determine the constitutionality of Congressionally mandated race-based programs. In neglecting to take into account *Fullilove*'s analysis applying past discrimination in the construction industry, the Court failed to adequately assess the "facts about the current effects of past discrimination, the necessity for a preferential treatment remedy, and the suitability of this particular preferential scheme."[203] This departure restricted Congress' power to eliminate the effects of past racial discrimination and serves to perpetuate the racial caste system that society worked to dismantle.

In the past, the Supreme Court accepted the concept of affirmative action as an appropriate means of catching up with the effects of past

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[198] *Id.* at 2126.

[199] *Id.*

[200] *Id.* at 2130.

[201] *Id,*

[202] *Id.* at 2131 (Souter, J., dissenting). "The statutory scheme must be treated as constitutional if *Fullilove* is applied, and petitioners did not identify any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided." *Id.* (citations omitted).

[203] *Id.* at 2132. Souter suggested that on remand the parties need to address "anew the facts upon which statutes like these must be judged on the Government's remedial theory of justification." *Id.*

discrimination. As Justice Souter asserted, however, when such measures are used to eradicate the lingering effects of discrimination innocent persons may consequently be "hurt."[204] The price paid is seen to be reasonable in light of the temporary status of the remedial devices and the effect the measure should have on eliminating the effects of past discriminatory practices.[205] Accordingly, Souter choose to view affirmative action not in terms of individual blame or responsibility, but as a group responsibility. This notion attacks the majority's conception that the Constitution protects individuals and not groups. As a group, Americans especially those in the White majority, are responsible for the direct subordination inflicted on individual belonging to minority groups. It is this group responsibility that should be acknowledged rather than viewing the problem as one of individual blame.

c. Justice Ginsburg

In her dissenting story, Justice Ginsburg noted that "for most of our Nation's history, the idea that 'we are just one race' was not embraced."[206] Ginsburg countered the [majority's] wisdom by reprimanding the Court for their endorsement of the oppressive practice of racial segregation because of their reluctance to state that there was no one dominant race in America.[207] Her story is rooted in the historical neglect of the Court to embrace the concept of colorblindness. Given this history, Ginsburg endorsed race-based measures adopted by Congress as a justified response to such an "unfortunate reality."[208] She urged that "[t]he divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract the lingering effects."[209] In acknowledging the current and social realities of discriminatory practices in employment, consumer purchases, housing and minority business opportunities,[210] Ginsburg choose to tell the story of

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[204] *Id.* at 2133 (Souter, J., dissenting).

[205] *Id.*

[206] *Id.* at 2134 (Ginsburg, J., dissenting).

[207] *Id.*

[208] *Id.*

[209] *Id.* at 2135

[210] *Id.* at 2134 Ginsburg noted that:

Job applicants with identical resumes, qualifications, and interview styles still

how historical neglect in remedying racial subordination has impacted the continued oppression and present treatment of minorities.[211] From her perspective, remedying racial subordination is not just an institutional undertaking, but also an individual and group responsibility. O'Connor maintained that "[b]ias both conscious and unconscious reflect[ed] traditional and unexamined habits of thought, [which] keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."[212]

Everyone plays a role in the remediation of racial subordination and oppression, however, Ginsburg maintained that it is not an issue for the Court to weigh in light of the attention the political branches are giving the matter of affirmative action.[213] Rather, Ginsburg stressed the Court should review the preferences but the improvements to programs should be left to the political branches.[214]

The counter-narrative of racial justice in America is suppressed, except subtly through the dissenting opinions of Justices Stevens, Souter, and Ginsburg. Instead, the master narrative of the majority and concurring opinions dominate the case with their stories based upon abstract rules and principle that disregard human experiences of racial subordination, thereby taking the narrative out of social context. The content of the narratives of each Justice reveal their stories of choice. First, Justice O'Connor chose to engage in a formal procedural approach preoccupied with abstract principles and themes that are detached from social context and moral realties. Next, concurrences by Justices Scalia and Thomas expressed the Court's endorsement of the abstract color-blind principle. Both Justices voice their strong objection to a group based approach to remedying discrimination, and through their stories the future of affirmative action is imperiled. Finally, the dissenting opinions of Justices Stevens, Souter, and Ginsburg remind

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experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.

Id. (footnotes omitted).

[211] *Id.*

[212] *Id.* at 2135.

[213] *Id.* at 2136.

[214] *Id.* at 2136.

us that the historical and contemporary realities of racial discrimination are pervasive and should not be excluded. Their stories place the problem of race in the context of reality and serve to counter the viewpoint of the majority and concurring opinions.

The *Adarand* Court engaged in more than just competing and conflicting narratives. The Court embraced a concept of racial justice that will undoubtedly both endanger the future of race based affirmative action measures and alter the way racial classifications are viewed and treated.

IV. THE COLOR-BLIND POSITION OF ADARAND

The dominant concept of racial justice embraced by *Adarand* is the notion of a color-blind nation. The concept of a color-blind Constitution was first introduced by Justice Harlan in *Plessy v. Ferguson*.[215] According to Harlan, the color-blind theme was used to envision equal treatment among all races, and invoked to remove racially discriminatory barriers preventing equality for minority groups.[216] Cases following *Plessy* used the color-blind approach to invalidate race-based affirmative action measures created to remedy racial subordination against minorities.[217] Today, colorblindness permits courts to be neutral and objective avoiding any consideration of race to "treat everyone equally without reference to context, situation, history or culture."[218] In *Adarand*, the Court embraced the concept of colorblindness in two ways: first through the formal test of strict scrutiny, and second through Justice Scalia's comment that "we are one just race."[219]

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[215] 163 U.S. 537 (1896) (Harlan, J., dissenting). Justice Harlan observed:

> The [W]hite race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens.

Id. at 559. Laurence Tribe describes Harlan's statement as a "short hand for the concept that the Fourteenth Amendment prevents our law from enshrining and perpetuating [W]hite supremacy." Laurence H. Tribe, *In What Vision of the Constitution Must the Law be Color-Blind?*, 20 J. MARSHALL L. REV. 201, 203 (1986).

[216] *Id.*

[217] *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265 (1978).

[218] John A. Powell, *An Agenda For The Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 890 (1995).

[219] *Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring).

A. Strict Scrutiny: A Colorblind Test

For governmental racial classifications to be constitutionally permissible, the courts must review the programs under strict scrutiny. Strict judicial scrutiny requires racial classifications to be necessary and narrowly tailored to achieve a compelling state interest.[220] The application of a strict scrutiny standard of review for racial classifications employs an ends and means inquiry:

> The compelling interest inquiry centers on "ends" and asks why the government is classifying individuals on the basis of race or ethnicity; the narrow tailoring inquiry focuses on "means" and asks how the government is seeking to meet the objective of the racial or ethnic classification.[221]

Although ends/means rhetoric is employed, strict scrutiny is predominantly a "means oriented procedural abstraction."[222] In addition, the application of strict scrutiny review is an implicit value choice made by the court about racial discrimination where stringent evidentiary standards are paralleled to a "strong version of color-blind constitutionalism" referred to as "formal race".[223] When applying formal-race strict scrutiny, courts deny racial history and existing racial subordination and "fail to recognize the connections between the race of an individual and the real social conditions underlying [the] litigation."[224] In *Adarand*, the Supreme Court blinded itself to any connection between

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[220] *Id.* at 2113.

[221] Memorandum from Walter Dellinger, Assistant Attorney General, on *Adarand Constructors, Inc. v. Pena*, 10 (June 28, 1995) (on file with author).

[222] *See* Freeman, *supra* note 116, at 1059; *see also* Morrison, *supra* note 168, at 322. Morrison states that :

> [u]sing ends/means rhetoric cannot bridge the difference between colorblindness and the competing [affirmative action] rhetorics. For example, supporters of affirmative action would make anti-caste or reparations policies a means to the end of a colorblind society. Opponents of affirmative action would make colorblind policies a means to the end of a society without racial castes.

Id.

[223] *See* Gotanda, *supra* note 117, at 36-48 (discussing the limitation formal race has on the range of constitutionally permissible governmental remedies for racial subordination); *see also* Barbara Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 960 (1994) ("Colorblindness is the dominant principle in constitutional doctrine today, and is embodied in . . . the 'strict scrutiny' rule for government 'affirmative action.'").

[224] Gotanda, *supra* note 117, at 7.

race and the realities of the social conditions underlying the contracting industry. Instead, the Court left the determination to the lower court, taking the issue of racial discrimination in the contracting industry out of context and focusing rather on the appropriate standard of review.

The notion of colorblindness is advanced through strict judicial scrutiny because the stringent evidentiary standards makes it difficult for racial remedies to pass the test.[225] Courts favor the concept of race neutrality because it dictates formal equality and procedural fairness, permitting them to avoid considerations of race.[226] Nevertheless, by embracing a purely procedural method, the Court blinded itself to remedying conditions associated with racial discrimination and instead advanced a remedy aimed to disadvantage those it sought to benefit.

B. "[W]e are just one race. American."[227]

Justice Scalia, concurring in the *Adarand* decision wrote that "[i]n the eyes of the government, we are just one race."[228] His pronouncement explicitly appealed for a neutral treatment of race rejecting all governmental remedies based on race. Consequently, because Scalia's vote was conditioned upon his concurring opinion, this is as close as the Court gets to adopting a pure color-blind approach to race conscious programs.

Justice Scalia's advocacy for a race neutral America treats race as fungible. Professor Alan Freeman describes "ethnic fungibility" as "the notion that each of us bears an 'ethnicity' with an equivalent legal significance and with an identical claim to protection against 'discrimination,' despite the grossly disproportionate experience that generated the legal intervention in the first place."[229] Ethnic fungibility treats discrimination against Whites the same as discrimination against Blacks. It assumes colorblindness is the "key principle" in eliminating remedial race programs and concludes that race is irrelevant.[230] Ad-

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[225] See, *e.g.*, Kirwan v. Podberesky, 38 F.3d 147 (4th Cir. 1994) (striking down merit scholarships for black student based on strict scrutiny review); Arrington v. Wilks, 20 F.3d 1525 (11th Cir. 1994) (striking down preferential promotion programs for black firefighters because the program failed to pass the strict scrutiny test).

[226] Powell, *supra* note 218, 891 (1995).

[227] Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring).

[228] *Id.*

[229] Freeman, *supra* note 116, at 125.

[230] *Id.* at 125-26.

hering to this view presumes that racial discrimination and racial differences have been eliminated, thus, promoting equality as a process, but not equality as a result.[231] From this view, racial classifications injure those whose individuality it ignores.[232] The problem with focusing on equality of process is that it fails to eradicate the societal conditions of racial inequality. Furthermore, the choice of a color-blind strategy denies the contribution race conscious remedies have made toward racial equality and avoids examining the problem of racial subordination simply by declaring a diagnosis and an easy cure.[233]

V. CRTIQUE OF COLORBLINDNESS

> To read the Fourteenth Amendment to state an abstract principle of colorblindness is itself to be blind to history.
>
> —Justice William J. Brennan[234]

> To be blind to race today . . . is to be blind to reality.[235]

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[231] Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341-42 (1988). Professor Crenshaw calls this the tension between the expansive and restrictive view.

> The expansive view stresses equality as a result, and looks to the real consequences for African Americans. It interprets the objective of antidiscrimination law as the eradication of the substantive conditions of Black subordination and attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression.
>
> The restrictive vision . . . treats equality as a process, downplaying the significance of actual outcomes. The primary objective of antidiscrimination law, according to this vision, is to prevent future wrongdoing rather than to redress present manifestations of past injustice.

Id.

Crenshaw further cites the following authors as also identifying the tension between equality of process and result.: Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531, 539-41(1981) (characterizing the tension as between means and ends); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN L. REV. 1049, 1052-53) (characterizing the tension as conflict between 'victim' and 'perpetrator' perspectives); Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1 (characterizing the tension as between a model of group justice and a model of individual justice).

[232] Charles R. Lawrence, *Forward: Race: Multiculturalism and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824 (1995).

[233] *See* Morrison, *supra* note 168, at 324.

[234] Memorandum to the Conference regarding Regents of the University of California v. Bakke (November 23, 1977) in BERNARD SCHWARTZ, BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 228 (1988).

[235] Statement made by Solicitor General Wade McCree during his oral argument

The abstract principle of colorblindness regards race as irrelevant by maintaining that "the law must treat all groups, including historically excluded groups without reference to race or color."[236] It is blind to the racial subordination that is rooted in our country's sorry history of race relations,[237] and it is blind to the contemporary social realities faced daily by people of color.

The allure of colorblindness is strong, at least at the surface. It seems to argue for equality as a process in decisonmaking rather than equality as a result.[238] In this vision, decisionmakers "[treat] equality as a process, downplaying the significance of actual outcomes. The primary objective . . . is to prevent future wrongdoing rather than to redress present manifestations of past injustice."[239] The focus here is not on the eradication of social inequities, instead, it is that "we judge one another by the 'content of our character' rather than the color of our skin."[240] From this perspective, decisionmakers focus on individual merit rather than skin color, whereby merit also emphasizes efforts rather than results.[241]

The allure of colorblindness is in its superficial appearance of racial equality.[242] There are two reasons for this. First, the principle of colorblindness rests on faulty assumptions, including assumptions that decisionmakers can notice race but not consider race so that racial minorities are placed on a level playing field.[243] Second, the impact of

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before the Supreme Court in Regents of the University of California v. Bakke. Tony Mauro, *Back to Bakke: The Recently Released Thurgood Marshall Papers Cast New Light on California's Affirmative Action Supreme Court Case*, CAL LAWYER, 53 (Jan. 1994).

[236] Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, CAL. L. REV. 787, 795 (1994). *See also* ALEXANDER BICKEL, THE MORALITY OF CONSENT 133 (1975) (noting that we are "a society striving for an equality that will make race irrelevant."); Fullilove v. Klutznick, 448 U.S. 448, 547 (Stevens, J., dissenting) ("The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race.").

[237] Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2126 (1995) (Stevens, J., dissenting).

[238] *See* Crenshaw, *supra* note 231.

[239] *See* Crenshaw, *supra* note 231, at 1342.

[240] Lawerence, *supra* note 232, at 823 (quoting Martin Luther King's "I Have a Dream" speech) (footnote omitted).

[241] Morrison, *supra* note 168, at 331.

[242] Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 171 (1994).

[243] *See* Gotanda *supra* note 117, at 16. This idea is a technique Gotanda labels non-recognition of race. *Id.*

the application of colorblindness tends to perpetuate rather than rectify the status quo of racially subordinate individuals.[244] This is because the principle of colorblindness "rests on the notion that America no longer has a duty to act affirmatively in order to overcome the legacy of slavery and government sanctioned segregation . . . ."[245] For these reasons, many scholars have observed that "the notion of colorblindness is a myth"[246] that is perpetrated by the White majority in order to retain their power and perpetuate racial inequalities.

A. Adarand's Color-blind Assumptions

In *Adarand*, the Supreme Court fell victim to the myth of colorblindness and advanced a conception of racial justice that is superficial and misleading. First, by declaring strict scrutiny review for all racial classifications, the *Adarand* Court essentially adopted the principle of colorblindness and race neutrality thereby treating racial differences as one and the same. In doing so, the Court offers a simple solution without any substantive results to the social conditions which create the problem in the first place. Colorblindness is a simple rule to implement because it allows judges to decide complex issues without proposing any solutions. By its own terms, colorblindness is neutral. It requires ignoring the social context and effects of race to select equal opportunity over equality of results.[247] In reality, however, colorblindness is not neutral. The concept is created and defined by White males who have historically controlled American institutions and processes ultimately wanting to protect their status quo as members of a powerful dominant group.[248] Thus, by favoring the racialist status quo, racial minorities are left at the bottom of the social, economic and political ladder.[249]

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[244] *See* Culp, *supra* note 242, at 171-72.

[245] DONALD E. LIVELY, THE CONSTITUTION AND RACE, 162 (1992) (citing *Panel Attacks Bush on Civil Rights Work*, MIAMI HERALD, April 18, 1991, at 17A).

[246] Athornia Steele, *The Myth Of A Color-Blind Nation: An Affirmation Of Professor Derrik Bell's Insight Into the Permanence Of Racism In Society*, 22 CAP. U. L. REV. 589 (1993). *See generally* Culp, *supra* note 242 (describing colorblindness as a policy argument rather than a moral requirement); David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (1986) (describing why colorblindness is a myth).

[247] Morrison, *supra* note 168, at 344-45.

[248] Steele, *supra* note 246, at 596. *See also* Culp, *supra* note 242, at 172.

[249] Culp, *supra* note 242, at 172.

The second assumption made by the *Adarand* Court is revealed through Scalia's vision that "we are just one race."[250] This view essentially erases all traces of race and treats race as irrelevant. It is impossible, however to eliminate race from any discussion or analysis because "[r]ace is real and pervasive: our very perception of the world . . . are filtered through a screen of 'race'."[251] In addition, for many individuals, group membership based on race is an important part of their individuality.[252] Moreover, racial identity influences conscious and perhaps unconscious choices of whom to associate with, what church or school to attend, and which neighborhood to live in.[253] The presence and power of race is so apparent that it influences public as well as private decisionmaking.

Race has also played an integral part of America's history, and "America's history has given meaning to race."[254] For example, African-Americans were uprooted from their ancestral homes and sold into a condition of slavery endorsed by a Constitution that promised everyone else freedom.[255] Japanese Americans were imprisoned in internment camps by the President of the United States because they belonged to the "enemy" race.[256] America's history was not color-blind, neither should America's present be color-blind. If we proceed to eliminate race through the color-blind principle, such action will have the force and effect of erasing history. But "if one accepts [the] concept of race, unmoored from history and social reality, then the Court's color-blind claim seems reasonable and even necessary."[257] However, this vision

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[250] Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring).

[251] Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 774 (1994).

[252] Morrison, *supra* note 168, at 329.

[253] *See* Charles R. Lawerence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing unconscious racism).

[254] Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 32; *see also* Gotanda, *supra* note 117, at 39-40 (discussing historical definition of race).

[255] *See generally* Anthony R. Chase, *Race, Culture & Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1 (1995).

[256] *See* Executive Order No. 9066, Pub. L. No. 77-503, 56 Stat. 173 (1942). The order was later upheld as constitutional by the Supreme Court in Korematsu v. United States, 323 U.S. 214 (1944); *see also generally* Roger Daniels, Concentration Camps USA: Japanese Americans and World War II (1972); Frank Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

[257] Powell, *supra* note 218, at 895 n.55.

simply ignores reality. Specifically it ignores that, as unfortunate as it may be, society has not totally eliminated racial discrimination. The past is a part of the present and explains how America has arrived at its current situation.[258] But, in spite of anti-discrimination laws, people of color continue to experience exclusion, oppression, and derogatory stereotyping every day of their lives. They are constantly victims of discriminatory practices in employment hiring,[259] government contracting,[260] and housing.[261] These conditions are real and it is unrealistic and irresponsible for the Supreme Court to endorse a principle that ignores our country's history of race relations, especially when society has historically treated identifiable groups differently to which the effects continue into the present.

B. Impact

The Supreme Court's endorsement of a color-blind position in *Adarand* purports to lead us into a race-neutral society rather than a race conscious one. Although *Adarand* involved government contracting, it is clear from the Court's decision that strict scrutiny standard of review applies whenever any governmental body adopts a racial classification as a basis for decision making. Thus, the impact of the decision will reach beyond government contracting presumptively to negate race-based programs in health, education, and employment.

Adarand may be the beginning of the end for affirmative action because the case has provided just the right fuel for opponents of affirmative action to re-evaluate race conscious programs and initiate

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[258] *See* Morrison, *supra* note 168, at 363.

[259] *See, e.g.,* United States v. Paradise, 480 U.S. 149 (1987) (upholding a court order for preferential hiring and promoting of African-Americans in Alabama Highway Patrol); Memphis Firefighters v. Stotts, 104 S. Ct. 2576 (1984) (rejecting a court order for preferential hiring and promoting of African-American Firefighters).

[260] *See, e.g.,* City of Richmond v. Croson, 488 U.S. 469 (1988) (rejecting minority set aside program compensating black contractors for the City's past discrimination); Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a Congressionally mandated set aside program for minority contractors or subcontractors).

[261] *See, e.g.,* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (upholding an exclusionary zoning ordinance); United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981).

race-neutral policies.[262] Even President Clinton has involved himself by supporting affirmative action as being "good for America."[263] He also emphasized "the *Adarand* decision did not dismantle affirmative action . . . . [but] it actually reaffirmed the continuing existence of systemic discrimination in the United States."[264] Despite the President's assurance, he ordered a government-wide review of all affirmative action programs. As a result, the Department of Defense repealed their "Rule of Two," which allowed contracting officers to close off bidding to white-owned businesses if at least two qualified, minority-owned firms were available to do the work.[265] In addition, the Clinton Administration placed a three-year moratorium on all federal set-aside programs that reserved federal contracts exclusively for minority and women owned companies.[266]

The limitation on racial preferences endorsed by the *Adarand* desion has prompted many States and Congress to follow the lead of the Supreme Court. In California, Californians have proposed the California Civil Rights Initiative that would eliminate race-preference policies through a state-wide vote.[267] In addition, the University of California Board of Regents has already voted to end any sort of affirmative action that would allow race, gender, or ethnicity to be considered in admissions or employment. Even California's Governor Pete Wilson has eradicated most gender and race-preference programs by executive order.[268] Similarly, in Colorado, an Equal Opportunity Initiative is

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[262] *See* Tena Jamison, *Is it the Beginning of the End for Affirmative Action?*, 22 FALL HUM. RIT. 14 (1995). Although *Adarand* articulates general principles, its holding specifically adresses affirmative action in federal government contracting. *Adarand* does not overrule *Bakke*. Thus, Justice Powell's opinion in *Bakke* remains controlling on the legitimacy of race as a factor in achieving diversity in public education. *Cf. Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (invalidating a state university's admissions program giving substantial racial preferences).

[263] *Presidential Address: Clinton: Mend, Don't End, Affirmative Action*, CONG. Q. WKLY. REP., July 24, 1995, at 2208-09.

[264] *Id.*

[265] *See* David S. Savage, *Pentagon Repealing Minority Job Rule*, HONOLULU ADVERTISER, Oct. 22, 1995, at A18.

[266] *See White House Halts Set-Asides for Minority Contractors; Return of Programs Termed Doubtful After Morattorium; Other Preferences Allowed*, BALTIMORE SUN, Mar. 8, 1996, at 2C.

[267] *See* Mark Johnson, *Pendulum Swings on Affirmative Action*, BUFFALO NEWS, July 23, 1995, at F7.

[268] *See* Virgina Ellis, *Wilson Defies U.S., Cuts Hiring Goals for Road Contracts; Affirmative*

being considered that would require "all public employment, public education and public contracting decisions be made without regard to race, color, ethnicity, national origin, gender or religion."[269] And in Congress, Senate Majority leader Bob Dole and House Representative Charles Candy have introduced the Equal Opportunity Act of 1995 which "prohibits the federal government from discriminating against, or granting preferences to individuals based in whole or in part on their race, color, national origin or sex."[270]

With affirmative action policies being abolished legally and politically, and replaced with race-neutral alternatives, the future for affirmative racial remedies is slim. Nonetheless, color-blind race-neutral policies is not the solution to our country's race problem. The color-blind approach avoids examining history and current social conditions underlying race relations in America. In doing so, colorblindness only serves to perpetuate racial discrimination rather than remedy it. The solution is not as simple as being race-neutral. America needs to reaffirm the principles of affirmative action by remembering "[t]o get beyond racism, we must first take account of race . . .[a]nd . . . to treat some persons equally, we must . . . treat them differently."[271]

V. Conclusion

Given the different narratives in *Adarand*, the Court advocated a color-blind position over legitimate efforts to redress race discrimination. Significant value choices were made favoring the racial status quo and protecting the White majority over rectifying systemic inequalities and harsh racial conditions. By making the choice and sanctioning values, the Court leads a three way assault on affirmative action in the courts, Congress, and at the grassroots level. It is important to recognize that the choices the Court made were not natural, inevitable or objective. They were clearly based on their perception of society and how race relations should be structured. By treating racial differences as one and the same the Court sustains the racial inequities and avoids finding a workable solution to America's problems of race.

Action: The governor reduces the target level of women and minority firms to 10% from 20%. Millions of dollars in business is at stake, L.A. Times, Dec. 23, 1995, at 1.

[269] *See* Al Knight, *Affirmative Action Programs Stay a Step Ahead of the Posse*, Denver Post, Nov. 19, 1995, at G01.

[270] *See* Clint Bolick, *For Equality and Opportunity. . .*, Wash. Times (D.C.), July 27, 1995 at A23.

[271] Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion).

However, "[w]e are not yet all equals"[272] and the future challenge for America will be to acknowledge the reality of racial discrimination rather than deny it because for as "long as there are distinct races there will inevitably be racial categorization."[273]

Jen-L A. Wong[274]

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[272] Tony Mauro, *More Than Equal Opportunity, Less Than Quotas*, USA TODAY, Mar. 24, 1995 at 3A (quoting Thurgood Marshall).

[273] James Pinkerton, *Why Affirmative Action Won't Die*, FORTUNE, Nov. 13, 1995, at 191.

[274] Class of 1997, William S. Richardson School of Law. The author would like to express her sincere appreciation to Professor Eric K. Yamamoto for his time, patience, and guidance in writing this Note.

Seller Beware: New Law Protects Hawai'i Home Buyers

I. Introduction

John Cifarelli, his wife Linda, and their four year old daughter died of carbon monoxide poisoning while sleeping in their recently purchased Vermont home.[1] The Cifarellis died because the seller, Stephen Brooks, failed to disclose a carbon monoxide leak in the home's snow-melting driveway heater.[2] Brooks learned of the leak prior to the sale when his girlfriend and daughter became ill after breathing the heater's fumes.[3] A repairman told Brooks that he was playing "Russian roulette" by not repairing the heater.[4] But, instead of making the necessary repairs, Brooks hired a real estate agent and sold his home to the Cifarellis without disclosing the defective heater.[5] The Brooks case is an extreme example of the consequences of non-disclosure in residential real estate transactions.[6]

Hawai'i became the 25th state[7] to enact real property disclosure legislation on July 1, 1995.[8] Codified at Hawaii Revised Statutes chapter 508D, Hawai'i's mandatory seller disclosure act (Hawaii Revised Statutes sections 508D-1 to 20) protects Hawai'i's home buyers in what the legislature considered to be "the single largest investment that most people make in a lifetime."[9] The 1992 Committee on Consumer Protection and

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[1] State v. Brooks, 658 A.2d 22, 25-26 (Vt. 1995).

[2] *Id.* at 29-30.

[3] *Id.* at 24-25.

[4] *Id.* at 29.

[5] *Id.* at 25. In 1995, the Supreme Court of Vermont upheld a conviction of involuntary manslaughter against Stephen Brooks. *Id.* at 24.

[6] Alain Metzger, *Seller Disclosure Law Goes Into Effect July 1*, Pacific Business News, June 12, 1995, at 21.

[7] Christina Nifong, *Sellers Who Hide Defects Could Face a Lawsuit*, Christian Science Monitor, Mar. 14, 1995, at 9.

[8] Haw. Rev. Stat. § 508D-1 to 20 (Supp. 1994).

[9] H.R. Con. Res. 400, 16th Leg., Reg. Sess. (1992) (enacted).

Business Regulation found that disclosure of material facts was "one of the most important issues in real estate transactions due to the increasing complexity of real estate transactions, precedent-setting court cases, well-informed consumers, and the increasing number of items that are considered material facts."[10] The committee also found that although the real estate broker has a duty to "ascertain and disclose all material facts concerning every property for which the licensee accepts agency, the seller is often better informed about material facts concerning the property."[11]

Real estate disclosure laws are a relatively new phenomenon.[12] In June of 1991, Harley E. Rouda, the president of the Chicago-based National Association of Realtors (NAR) "undertook a campaign to promote disclosure laws."[13] At that time, only California[14] and Maine[15] had real estate disclosure legislation. The disclosure campaign was designed to "heighten member and public awareness of the widespread benefits of mandatory [seller disclosure laws]."[16] The NAR encouraged "state [realtor] associa-

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[10] S. STAND. COMM. REP. No. 2950, 16th Leg., 1992 Reg. Sess., *reprinted in* 1992 HAW. SENATE J. 1271.

[11] *Id.*

[12] Nifong, *supra*, note 7, at 9.

[13] *Id.* at 9.

[14] In 1986, California became the first state to pass a mandatory seller disclosure law. Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DE PAUL L. REV. 381, 408-409 (1995). *See also* James D. Lawlor, *Seller Beware*, 78-AUG A.B.A.J. 90 (1992). California's Easton v. Strassburger, 199 Cal. Rptr. 383, (Cal. Ct. App. 1984), which held that an agent has the duty to reasonably investigate and disclose any defects found, "'rocked' the real estate industry" and prompted California to implement a seller disclosure law. H. Jane Lehman, *Lobby Effort To Focus on Home Defects; Real Estate Agents Seek Seller-Disclosure Law*, WASH. POST, June 6, 1991, at E1. The California statute is made up of two articles. One article requires disclosure by the seller and the other sets the broker's duties. CAL. CIV. CODE § § 1102-1102.15, 2079-2709.10 (West Supp. 1994). The seller disclosure article includes the seller disclosure form. The form provides a check list of material items such as walls, ceilings, floors, plumbing, and electrical systems. CAL. CIV. CODE § 1102.6 (West Supp. 1994). The form also has a section for agent's inspection disclosure. CAL. CIV. CODE § 1102.6 (West Supp. 1994). The broker duty article sets the standard for brokers: "the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination required to obtain license." CAL. CIV. CODE § 2079.2 (West Supp. 1994). The California legislation is comprehensive because the seller's disclosure obligations are complete and there is a duty on the broker to inspect and disclose. Washburn, *supra*, at 437 (1995).

[15] ME. REV. STAT. ANN. tit. 32, § 13001-13251 (West 1988 & Supp. 1994) (regulation promulgated 1988; effective 1988).

[16] *NAR Answers Questions About Seller Disclosure*, REALTOR NEWS, Sept. 16, 1991, at 5.

tions . . . to develop and support legislation or regulations mandating the use of property condition disclosure forms by sellers.''[17]

There are presently 25 states with real property disclosure legislation: Alaska,[18] California,[19] Delaware,[20] Hawai'i,[21] Idaho,[22] Illinois,[23] Indiana,[24] Iowa,[25] Kentucky,[26] Maine,[27] Maryland,[28] Michigan,[29] Mississippi,[30] Nebraska,[31] New Hampshire,[32] Ohio,[33] Oklahoma,[34] Oregon,[35] Rhode Is-

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[17] *Id.* at 5.

[18] ALASKA STAT. § 34.70.010-.70.200 (Supp. 1994) (''Disclosures in Residential Real Property Transfers'') (enacted in 1992; effective in 1993).

[19] CAL. CIV. CODE § 1102-1102.15 (West Supp. 1994) (''Article 1.5. Disclosures Upon Transfer of Residential Property''); CAL. CIV. CODE § 2079-2079.10 (West Supp. 1994) (''Article 2. Duty to Prospective Purchaser of Residential Property'') (enacted in 1985; effective in 1987).

[20] DEL. CODE ANN. tit. 6 § 2570-2578 (1993) (''Buyer Property Protection Act'') (enacted in 1993; effective on Jan. 1, 1994).

[21] HAW. REV. STAT. § 508D-1 to 20 (Supp. 1994) (''Mandatory seller Disclosures in Real Estate Transactions'') (enacted in June, 1994; effective on July 1, 1995).

[22] IDAHO CODE § 55-2501 to 2518 (Supp. 1995) (''Property Condition Disclosure Act'') (enacted in Mar., 1994; effective on July 1, 1994).

[23] ILL. ANN. STAT. ch. 765, para. 5-35 (Smith-Hurd Supp. 1995) (''Residential Real Property Disclosure Act'') (enacted in 1993; effective on Oct. 1, 1994).

[24] IND. CODE ANN. § 24-4.6-2-1 to 13 (West 1994) (''Residential Real Estate Sales Disclosure'') (enacted in 1993; effective on July 1, 1994).

[25] IOWA CODE ANN. § 558A.1-558A.8 (West 1992 & Supp. 1994) (''Real Estate Disclosures'') (enacted in 1993; effective on July 1, 1994).

[26] KY. REV. STAT. ANN. § 324.360 (Michie Supp. 1994) (enacted in 1992; effective in 1992).

[27] ME. REV. STAT. ANN. tit. 32, § 13001-13251 (West 1988 & Supp. 1993) (regulation promulgated in 1988; effective in 1988).

[28] MD. CODE ANN., [REAL PROP.] § 10-702 (Supp. 1994) (''Sales or Real Property'') (enacted in 1993; effective on Jan. 1, 1994).

[29] MICH. COMP. LAWS. ANN. § 565.951 to 565.966 (West 1995) (''Seller Disclosure Act'') (enacted in 1993; effective on Jan. 1994).

[30] MISS. CODE ANN. § 89-1-501 to 523 (Supp. 1993) (''Real Estate Transfer Disclosure Requirements'') (enacted in 1993; effective in 1993).

[31] NEB. REV. STAT. § 76-2,120 (1994) (enacted in Apr., 1994; effective on Jan. 1, 1995).

[32] N.H. REV. STAT. ANN. § 477:4-C (Supp. 1993) (enacted in 1992, effective in 1994). N.H. CODE ADMIN. R. § 701.04 (1992) (regulation promulgated in 1992; effective in 1993).

[33] OHIO REV. CODE ANN. § 5302.30 (Anderson Supp. 1993) (''Real Property-Transferor Disclosure'') (enacted in 1992; effective in 1993).

[34] OKLA. STAT. ANN. tit. 60, § 831-839 (West 1995) (''Residential Property Condition Disclosure Act'') (enacted in May, 1994; effective on July 1, 1995).

[35] OR. REV. STAT. § 105.465-.490 (Supp. 1994) (''Seller's Property Disclosure and Disclaimer Statements'') (enacted in 1993; effective on Jan. 1, 1994).

land,[36] South Dakota,[37] Tennessee,[38] Texas,[39] Virginia,[40] Washington,[41] and Wisconsin.[42] This article analyzes Hawai'i's new seller disclosure statute. The article begins with a discussion of the common law of real estate transactions from the traditional doctrine of caveat emptor to the various causes of action and remedies that shifted the risk from buyers to sellers and agents. The article then provides the history of real estate disclosure legislation and discusses its impact on the development of the law. This is followed by an analysis of Hawaii Revised Statutes section 508D's relevant sections and a discussion of the statute's ramifications for buyers, sellers, and seller's agents.

II. The Common Law Of Real Estate Transactions

A. Misrepresentation

Misrepresentation is a leading form of liability for real estate agents.[43] Under common law, a home buyer can bring an action against sellers and agents for non-disclosure under three theories: fraud,[44] negligent misrepresentation,[45] and innocent misrepresentation.[46] The buyer must prove that the misrepresented fact was material to recover on an action

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[36] R.I. Gen. Laws § 5-20.8-1 to 11 ("Real Estate Sales Disclosures") (enacted in 1992; effective in 1993).

[37] S.D. Codified Laws Ann. § 43-4-40 to 44 (Supp. 1994) (enacted in 1993; effective in 1993).

[38] Tenn. Code Ann. § 66-5-201 to 210 (Supp. 1994) ("Residential Property Disclosures") (enacted in 1994; effective on July 1, 1994).

[39] Tex. Prop. Code Ann. § 5.008 (Supp. 1993) (enacted in 1993; effective on Jan. 1, 1994).

[40] Va. Code Ann. § 55-512 (Michie Supp. 1994) (enacted in 1992; effective in 1993).

[41] Wash. Rev. Code Ann. § 64.06.005-.900 (West 1995) ("Residential Real Property Transfers-Seller's Disclosures") (enacted in Feb., 1994; effective on Jan. 1, 1995).

[42] Wis. Stat. Ann. § 709.01-.08 (West 1995) (enacted in 1991; effective in 1991).

[43] National Association Of Realtors, Property Condition Disclosure: To Everyone's Advantage 4 (1991). According to a 1991 study published by the National Association of Realtors, 67% of lawsuits in real estate transactions were for misrepresentation. *Id.* at 4.

[44] *See, e.g.*, Sodal v. French, 531 P.2d 972 (Colo. Ct. App. 1974).

[45] *See, e.g.*, Easton v. Strassburger, 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).

[46] *See, e.g.*, Bevins v. Ballard, 655 P.2d 757 (Alaska 1982).

for misrepresentation in a real estate transaction.[47] The buyer must also prove justifiable reliance on the representations.[48]

Whether a fact is material generally "depends on the facts of the particular case."[49] Courts balance various factors such as: (1) the gravity of the harm, (2) fairness to the buyer, and (3) impact on contract stability.[50] A fact is material if it influences the conduct or judgment of a reasonable person;[51] a material fact is a fact important to a reasonable person.[52] In residential real estate cases, courts have found the following facts to be material: flooding,[53] water problems,[54] structural defects,[55] heater and cooling system defects,[56] termites,[57] dangerous chemicals,[58] boundaries,[59] septic tanks[60] and sewage,[61] electrical systems,[62] roof leaks,[63] zoning,[64]

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[47] Millikin v. Green, 583 P.2d 548, 550 (Or. 1978).

[48] Lengyel v. Lint, 280 S.E.2d 66, 69 (W. Va. 1981).

[49] Reed v. King, 193 Cal. Rptr. 130, 132 (Cal. Ct. App. 1983) (quoting Lingsch v. Savage, 29 Cal. Rptr. 201, 205 (Cal. Ct. App. 1963)). In *Reed*, the seller's agent failed to disclose to seller fact that the property had been the site of a multiple murder. *Id.*

[50] *Id.* at 132.

[51] Millikin v. Green, 583 P.2d 548, 550 (Or. 1978); Cousineau v. Walker, 613 P.2d 608, 613 (Alaska 1980).

[52] Nader v. Allegheny Airlines, Inc., 445 F. Supp. 166, 174 (D.D.C. 1978).

[53] Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970) (not disclosed that basement flooded on two occasions prior to sale); Clouse v. Gordon, 445 S.E.2d 428 (N.C. Ct. App. 1994) (property located in a federal flood hazard zone).

[54] Sodal v. French, 531 P.2d 972 (Colo. Ct. App. 1974) (water supply insufficient for buyers domestic needs); Bevins v. Ballard, 655 P.2d 757 (Alaska 1982) (well on property was insufficient so water needed to be hauled to property).

[55] Kubinsky v. Van Zandt Realtors, 811 S.W.2d 711 (Tex. Ct. App. 1991) (defective foundation caused cracks above doors, around windows and in the slab); Prichard v. Reitz, 223 Cal. Rptr. 734 (Cal. Ct. App. 1986) (foundation so defective that home could not be legally occupied).

[56] State v. Brooks, 658 A.2d 22, (Vt. 1995) (defective driveway heater leaked carbon monoxide); Epperson v. Roloff, 719 P.2d 799 (Nev. 1986) (solar heating system was not properly installed and was not functional); Fennell Realty Company Inc. v. Martin, 529 So.2d 1003 (Ala. 1988) (air conditioning and heating system inoperable).

[57] Dicker v. Smith, 523 P.2d 371 (Kan. 1974) (active termites and report of termite inspector finding termites was not disclosed).

[58] Copland v. Diamond, 624 N.Y.S.2d 514 (N.Y. Sup. Ct. 1995) (chlordane, a termite treatment chemical harmful to people, was found on the premises).

[59] Franchey v. Hannes, 207 A.2d 268 (Conn. 1965) (swimming pool and driveway were partially located on neighbors land); Rockley Manor v. Strimbeck, 382 S.E.2d 507 (W. Va. 1989) (neighbor owned land where property only had easement for access to house).

[60] Tennant v. Lawton, 615 P.2d 1305 (Wash. Ct. App. 1980) (septic tank permit

building code violations,[65] noise pollution,[66] and soil problems.[67] In an action for misrepresentation, the buyer must also prove justifiable reliance on the representations.[68] In *Lengyel v. Lint*,[69] the court observed that: "It is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff. If the representation contributed to the formation of the conclusion in plaintiff's mind, that is enough . . . ."[70]

The remedies for misrepresentation include recission[71] and damages.[72] The buyer can receive the contractual remedy of recission[73] if (1) the buyer's consent to enter into the contract was obtained through fraud, (2) the buyer exercised reasonable diligence in rescinding promptly upon discovery of fraud; and (3) the buyer restored the status quo.[74] The buyer also can seek damages under common law.[75] The general measure of damages for misrepresentation in the sale of realty is the difference between the actual market value of the property and the value of the property as

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not issued); Wedig v. Brinster, 469 A.2d 783 (Conn. Ct. App. 1983) (septic system disapproved and corrections ordered).

[61] Boris v. Hill, 375 S.E.2d 716 (Va. 1989) (raw sewage backed up into the drains of the house); McRae v. Bolstad, 646 P.2d 771 (Wash. Ct. App. 1982) (neighbor's sewage spilled onto yard).

[62] Brewer v. Brothers et. al., 611 N.E.2d 492 (Ohio Ct. App. 1992) (vendor misrepresented quality of home's electrical system; system was defective).

[63] Barker v. Stoner, 650 N.E.2d 1372 (1994) (seller failed to disclose leaking roof).

[64] Holcomb v. Zinke, 365 N.W.2d 507 (N.D. 1985) (home violated local zoning ordinance to which no variance was granted); Lingsch v. Savage, 29 Cal. Rptr. 201 (Cal. Ct. App. 1963) (violated zoning regulations).

[65] Millikin v. Green, 583 P.2d 548 (Or. 1978) (roof needed to be replaced because it violated the city's building code).

[66] Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (Cal. Ct. App. 1992) (history of excessive noise from 'difficult neighbors' conducting a tree trimming business at their residence reduced the value of the surrounding houses and required sellers to disclose the neighborhood noise problem).

[67] Easton v. Strassburger, 199 Cal. Rptr. 383 (Cal. Ct. App. 1984) (the property had a history of land slides); Gutelius v. Sisemore, 365 P.2d 732 (Okla. 1961).

[68] RESTATEMENT (SECOND) OF TORTS § 533 (1977).

[69] 280 S.E.2d 66, 69 (W. Va. 1981).

[70] *Lengyel*, 280 S.E.2d at 69.

[71] *Id.* at 69 (quoting Horton v. Tyree, 139 S.E. 737, Syl. pt. 3 (W. Va. 1927)).

[72] Sodol v. French, 531 P.2d 972, 975 (Colo. Ct. App. 1974). *See also* Johnson v. Healy, 405 A.2d 54 (Conn. 1978).

[73] Holcomb v. Zinke, 365 N.W.2d 507, 510 (N.D. 1985).

[74] *Id.* at 510.

[75] *Sodol*, 531 P.2d at 975. *See also* Johnson v. Healy, 405 A.2d 54 (Conn. 1978).

represented.[76] In addition, punitive damages may be awarded where there is "fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of plaintiff's rights, or other circumstances tending to aggravate injury."[77] Punitive damages in a fraud case can include reasonable attorney's fees.[78]

Caveat emptor, "let the buyer beware,"[79] is the traditional rule governing the physical condition of the premises in real estate transactions. Under caveat emptor, it is the buyer's duty to make independent inquiries and examinations to discover all material facts.[80] Caveat emptor applies to a buyer in a real estate transaction when (1) the defect is open to observation or discoverable upon reasonable inspection, (2) the buyer had an unobstructed opportunity to examine the premises, and (3) there is no fraud by the seller or agent.[81]

Even though the trend is away from caveat emptor and toward granting buyers relief, some states continue to apply caveat emptor in real estate transactions.[82] The policy behind caveat emptor is that it slows litigation by preventing disgruntled buyers from bringing lawsuits.[83] Caveat emptor

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[76] *Id.*

[77] Remeikis v. Boss & Phelps, Inc., 419 A.2d 986, 992 (D.C. Cir. 1980).

[78] Brower v. Perkins, 68 A.2d 146 (Conn. 1949).

[79] Holmes v. Worthey, 282 S.E.2d 919, 924-925 (Ga. Ct. App. 1981).

[80] Layman v. Binns, 519 N.E.2d 642 (Ohio 1988).

[81] *Id.*

[82] *Id.* Belmer v. Petrella, No. 93-CA-96-2, 1994 WL 249822, at * 1 (Ohio Ct. App. May 31, 1994), followed the reasoning in *Layman*. In *Belmer*, the Ohio Appellate court upheld summary judgment for the sellers against buyers who brought an action for breach of contract and fraud in failing to disclose foundation problems. The court held that the buyers had sufficient information to make a decision or investigate the structural problems. The court reasoned that the doctrine of caveat emptor applies to the purchase of real estate in Ohio. "The doctrine of caveat emptor precludes recovery in an action by the purchaser for a structural defect in real estate where (1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser has the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor." *Id.* at *1 (quoting Layman v. Binns, 519 N.E.2d 642 (Ohio 1988)). *See also* Holmes v. Worthey, 282 S.E.2d 919 (Ga. Ct. App. 1981).

[83] Layman v. Binns, 519 N.E.2d 642 (Ohio 1988). In *Layman*, the court provided policy reasons for following caveat emptor:

> The doctrine of caveat emptor is one of long standing. Since problems of varying degree are likely to be found in most dwellings and buildings, the doctrine performs a function in the real estate marketplace. Without the doctrine nearly every sale would invite litigation instituted by a disappointed buyer. Accordingly, we are not disposed to abolish the doctrine of caveat emptor. A seller of realty

does not condone fraud but holds buyers responsible for their own investigations.[84]

B. Modern Causes of Action

Fraud based on intentional misrepresentation occurs when a material misrepresentation of a pre-existing or past fact is made with: (1) knowledge of the falsity;[85] (2) intent that the other party rely on the representation;[86] and (3) actual reliance to the other party's detriment.[87] In an action for fraud based on intentional misrepresentation, the buyer is not required to prove that the representation was made with actual knowledge of its falsity.[88] A vendor who makes a representation without knowing whether it is true or false is liable for fraud.[89]

Non-disclosure becomes fraud only if there is a duty to disclose.[90] Under the Restatement (Second) of Torts section 551, one has a duty to disclose facts in a business transaction, such as the sale of residential real property, if: (a) there is privity; (b) disclosure would prevent a partial or ambiguous statement from being misleading; (c) subsequent information makes a previously relied upon representation from being misleading; (d) one learns a false representation not meant to be acted upon is being acted

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> is not obligated to reveal all he or she knows upon the purchaser to make inquiry and examination.

Id. at 644.

[84] *Id.*

[85] The person making the representation (1) knows or believes that the representation is not what he believes it to be; (2) does not have confidence in the accuracy of the information; or (3) knows that there is no basis for the representation. RESTATEMENT (SECOND) OF TORTS § 526 (1977).

[86] RESTATEMENT (SECOND) OF TORTS § 531 (1977) (entitled "Expectation of Influencing Conduct") states:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced. *Id.*

[87] Jewish Center of Sussex County v. Whale, 86 N.J. 619, 624, 432 A.2d 521, 524 (N.J. 1981).

[88] Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970); Pumphrey v. Quillen, 135 N.E.2d 328 (Ohio 1956); Lawlor v. Scheper, 101 S.E.2d 269 (S.C. 1957); Sodal v. French, 531 P.2d 972 (Colo. Ct. App. 1974).

[89] *See supra* note 88.

[90] RESTATEMENT (SECOND) OF TORTS § 551(1) (1977).

upon with reliance; or (e) facts basic to the transaction are mistaken and one would reasonably expect the disclosure of those facts.[91] The elements of an action for fraud based on non-disclosure without privity[92] between the parties are: (1) non-disclosure of a material fact affecting the value of the property; (2) knowledge of the material fact and the lack of knowledge or undiscoverability of the fact to the buyer; (3) intent to induce the action of the buyer; (4) inducement of the buyer to act caused by the non-disclosure; and (5) resulting damages.[93] Some courts have found a duty to disclose absent privity between the parties.[94] Other courts have found no duty to disclose.[95]

The Restatement definition of negligent misrepresentation is:

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[96]

Reasonable care or competence for a broker includes making a reasonable effort to confirm or refute information the seller knows or should know.[97]

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[91] *Id.* § 551(2).

[92] Neither a contractual relationship nor a fiduciary relationship is required in an action for fraudulent non-disclosure. Lingsh v. Savage, 29 Cal. Rptr. 201, 205 (Cal. Ct. App. 1963).

[93] *Id.* at 206.

[94] Lingsh v. Savage, 29 Cal. Rptr. 201, 206 (Cal. Ct. App. 1963); *see also*, Easton v. Strassburger, 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).

[95] Clouse v. Gordon, 445 S.E.2d 428 (N.C. Ct. App. 1994). In *Clouse*, the Court of Appeals of North Carolina affirmed a judgment for the sellers and the seller's agent against the buyer who brought a claim for failure to disclose a material fact. The buyer brought the action after learning that the property was within a flood zone. The court reasoned that in an arms-length transaction where the buyer had the opportunity to and made no inquiry, the seller and the seller's agent is not under a duty to disclose facts when no fiduciary relationship exists. *Id.*

[96] RESTATEMENT (SECOND) OF TORTS § 552 (1977).

[97] Tenant v. Lawton, 615 P.2d 1305 (Wash. Ct. App. 1980) (The court found the broker guilty of negligence in not obtaining information requested by the buyers regarding the legality of a septic tank on the property). *See also* Sawyer v. Tildahl, 148 N.W.2d 131 (Minn. 1967). The court held that the agent misrepresented the property when he told the buyer it was free from flooding. The court reasoned that the buyer had asked about seepage and the broker should have known whether the house flooded or not because that is the type of information an agent should know. *Id.*

The broker must take steps to avoid providing false information.[98]

Easton v. Strassburger[99] was a landmark case that imposed a duty on the seller's broker to investigate and disclose material facts. In *Easton*, a buyer brought an action against seller and the seller's broker for fraudulent concealment, intentional misrepresentation, and negligent misrepresentation in failing to disclose foundation problems.[100]

The *Easton* court undertook a negligence analysis rather than a contractual one in deciding whether the broker's duty of due care in a residential real estate transaction includes a duty to conduct a reasonably competent and diligent inspection of property that he has listed for sale.[101] The court held that there is a duty to disclose facts that are "accessible only to him (broker) and his principal (seller)."[102]

The court supported this holding by finding that it was an implicit duty in two early cases: *Cooper v. Jevne*[103] and *Lingsch v. Savage*.[104] The court imposed the duty to "protect the buyer from the unethical broker and seller and to insure that the buyer is provided sufficient accurate information to make an informed decision whether to purchase."[105] Otherwise the broker would be "shielded by his ignorance . . . reward[ed] . . . for incompetence . . . and . . . [given] the unilateral ability to protect himself at the expense of the inexperienced and unwary who rely upon him."[106] The court observed that a contrary holding might result in a "disincentive for seller's broker to make diligent inspection."[107]

Innocent misrepresentation is a form of strict liability.[108] Granting relief to buyers for innocent misrepresentation in real estate transactions is a

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[98] *Id.*

[99] 199 Cal. Rptr. 383 (Cal. Ct. App. 1984).

[100] *Id.*

[101] *Id.* at 390.

[102] *Id.* at 388.

[103] *Id.* at 387 (citing Cooper v. Jevne, 128 Cal. Rptr. 724 (Cal. Ct. App. 1976)).

[104] Easton v. Strassburger, 199 Cal. Rptr. 383 (Cal. Ct. App. 1984) (citing Lingsch v. Savage, 29 Cal. Rptr. 201 (Cal. Ct. App. 1963)). *Lingsch* imposed a duty of disclosure when building was in a state of disrepair. Court held that "an action of deceit does not require privity of contract" and there was a duty since the broker's conduct in the transaction "amounted to a representation of the nonexistence of facts which he has failed to disclose." *Lingsch*, 29 Cal. Rptr. at 205.

[105] *Easton*, 199 Cal. Rptr. at 388.

[106] *Id.* at 388.

[107] *Id.*

[108] RESTATEMENT (SECOND) OF TORTS § 552C (1977).

move away from caveat emptor.[109] The Restatement (Second) of Torts section 552C, entitled Misrepresentation in Sale, Rental, or Exchange Transaction, states that:

> One who, in the sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon misrepresentation, *even though it is not made fraudulently or negligently.*[110]

In *Bevins v. Ballard*,[111] the Alaska Supreme Court held that a buyer who relied on an agent's innocent misrepresentation had a cause of action against a real estate agent for misrepresentation.[112] In *Bevins*, the buyer inquired about a well on the property.[113] The agent replied that the well was "good," based on information from the sellers.[114] The buyer brought the action for misrepresentation against the broker and the court upheld judgment for the buyers.[115] The court reasoned that to hold otherwise would allow agents to make misrepresentations and have no liability by remaining ignorant about the condition of the property.[116] Connecticut[117] and Wisconsin[118] also recognized actions for innocent misrepresentation in residential real estate transactions.[119]

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[109] Frona M. Powell, *Relief for Innocent Misrepresentation: A Retreat from the Traditional Doctrine of Caveat Emptor*, 19 REAL EST. L.J. 130 (1990).

[110] RESTATEMENT (SECOND) OF TORTS § 552C (1977) (emphasis added).

[111] 655 P.2d 757 (Alaska 1982).

[112] *Bevins*, 655 P.2d at 763.

[113] *Id.* at 759.

[114] *Id.*

[115] *Id.* at 763.

[116] *Id.*

[117] Johnson v. Healy, 405 A.2d 54 (Conn. 1978) In *Johnson*, the vendor represented that the home was constructed of the best material and "nothing was wrong with it." *Id.* at 55. The court held vendor liable for innocent misrepresentation when foundation damage occurred due to improper fill. *Id.*

[118] Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983) (brokers misrepresented the acreage of the property to the buyers; the court held the brokers strictly liable for facts that a broker could be expected to know).

[119] *But see* Hoffman v. Connall, 736 P.2d 242 (Wash. 1987). In *Hoffman*, the Washington Supreme Court held that real estate agents and brokers are not liable for innocent misrepresentations. The court reasoned that the broker "was not the guarantor of the seller's representations." *Id.* at 246. *See also* Linda S. Whitten, Note, *Realtor Liability for Innocent Misrepresentation and Undiscovered Defects: Balancing the Equities Between Broker and Buyer*, 20 VAL. U. L. REV. 255 (1986).

C. The Legal Effects of an "As Is" Clause

The term "As Is," or similar terms to the same effect,[120] means that there are no warranties and the property is sold in its then-existing physical condition.[121] Whether an "As Is" clause bars a claim of non-disclosure, misrepresentation, or fraud depends on the jurisdiction.[122] Some courts have held that an "As Is" clause protects the vendor from liability for physical defects in the property.[123] Other courts have held that an "As Is" clause does not bar claims for fraud, misrepresentation, or non-disclosure.[124]

In the Vermont case *Silva v. Stevens*,[125] the court held that an "As Is" clause does not affect tort liability.[126] The court observed that an "As Is" clause means that there are no implied warranties. The court further observed that "the presence of an "As Is" clause in a sales contract does not as a matter of law defeat a fraud claim."[127] Similarly, in the Wisconsin case *Grube v. Daun*,[128] the court held that an "As Is" clause was not a defense to a claim for negligent misrepresentation.[129] The court explained that:

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[120] Such as "in present condition" or "in existing condition."

[121] *In re* Hawaii Daiichi-Kanko, Inc. v. Makaha Valley, Inc., 24 B.R. 163, 166 (D. Haw. 1982) (citing Johnson v. Waisman, 36 A.2d 634, 636 (N.H. 1944); Williams v. McClain, 176 So. 717, 719 (Miss. 1937)).

[122] Frank J. Wozniak, *Construction and Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property "As Is" or in Its Existing Condition*, 8 A.L.R.5th 312.

[123] *Id.* at 331.

[124] *Id.* at 336.

[125] 589 A.2d 852 (Vt. 1991).

[126] *Silva*, 589 A.2d at 862.

[127] *Id.* at 862. *See* Slater v. KFC Corp., 621 F.2d 932, 935 (8th Cir. 1980) (Missouri law); L. Luria & Son, Inc. v. Honeywell, Inc., 460 So.2d 521, 523 (Fla. Ct. App. 1984); Bill Spreen Toyota, Inc. v. Jenquin, 294 S.E.2d 533, 536 (Ga. Ct. App. 1982) (en banc); Moore v. Swanson, 556 P.2d 1249, 1253 (Mont. 1976); MacFarlane v. Manly, 264 S.E.2d 838, 840 (S.C. 1980). The same principle applies if the claim is based on negligence or strict liability. *See* Badger Bearing Co. v. Burroughs Corp., 444 F. Supp. 919, 923 (E.D. Wis. 1977), *aff'd*, 588 F.2d 838 (7th Cir. 1978) (negligent misrepresentation); *see also* Vicon, Inc. v. CMI Corp., 657 F.2d 768, 775 (5th Cir. 1981) (tortious misrepresentation without intent or negligence) (Tennessee law); Archuleta v. Kopp, 562 P.2d 834, 836 (N.M. Ct. App. 1977) *cert. denied*, 567 P.2d 485 (N.M. 1977) (innocent misrepresentation).

[128] 496 N.W.2d 106 (Wis. Ct. App. 1992).

[129] *Grube*, 496 N.W.2d at 111.

> as a matter of public policy, tort disclaimers in contracts will not be honored unless the disclaimer is specific as to the tort it wishes to disclaim. In order to be effective, the disclaimer must make apparent that an express bargain was struck to forgo the possibility of tort recovery in exchange for negotiated alternate economic damages.[130]

The court observed that the waiver of contractual rights such as warranties is distinguished from the waiver of tort liability.[131]

However, in *Copland v. Diamond*,[132] the New York court held that an "As Is" clause, when taken together with a specific disclaimer clause on the physical condition of the property, the merger clause, the integration language, and inspection by the buyer was sufficient to bar any claim as to actual or constructive fraud.[133] In Ohio, where caveat emptor still applies to real estate transactions,[134] the courts protect the seller and the broker.[135] In *Kaye v. Buehrle*,[136] the buyers signed a contract with an "As Is" clause and encountered flooding after they took possession.[137] The court held that an "As Is" clause bars a claim for fraudulent non-disclosure in a real estate contract.[138]

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[130] *Id.* at 117.

[131] *Id.* at 117. *See also* Lingsch v. Savage, 29 Cal. Rptr. 201 (Cal. Ct. App. 1963) (holding that an 'As Is' clause does not relieve the seller of "affirmative" or "negative" fraud). In *Lingsch*, the court observed that "an 'as is' provision may therefore be effective as to a dilapidated stairway but not as to a missing structural member, a subterranean creek in the backyard or an unexploded bomb buried in the basement, all being known to the seller." *Id.* at 209.

[132] 624 N.Y.S.2d 514 (N.Y. Sup. Ct. 1995).

[133] *Id.* at 521 (citations omitted).

[134] Layman v. Binns, 519 N.E.2d 642 (Ohio 1988).

[135] Carolyn L. Mueller, Comment, *Ohio Revised Code Section 5302.30: Real Property Transfer Disclosure—a Form Without Substance*, 19 DAYTON L. REV. 783, 809-810 (1994).

[136] 457 N.E.2d 373 (Ohio Ct. App. 1983).

[137] *Kaye*, 457 N.E.2d at 374.

[138] *Id.* at 376. A later Ohio case, Mancini v. Gorick, 536 N.E.2d 8 (Ohio Ct. App. 1987), created an exception to the *Kaye* holding. In *Mancini*, the buyer, Mancini, brought a claim for fraudulent non-disclosure against Gorick for failure to disclose structural defects in the roof. *Id.* at 8. In reversing summary judgment for the seller, the court held that "[n]on-disclosure will become the equivalent of fraudulent concealment when it becomes the duty of a person to speak in order that the party with whom he is dealing may be placed on an equal footing with him . . . [regardless of] the existence of a fiduciary relationship." *Id.* at 10. The court observed that this situation might arise where "one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Id.* at 10. The court found that there was a question of fact as to whether the Mancini's confidence in Gorick, as the designer and builder of the home, "was reasonable and sufficient to nullify the effect of the 'as is' clause." *Id.* at 10.

D. Hawai'i Case Law

In Hawai'i, home buyers have an action for fraud against brokers and sellers who intentional misrepresent or intentional fail to disclose material facts.[139] Hawai'i's judicial constructions of fraud are (1) "constructive fraud,"[140] (2) "fraud in the factum,"[141] and (3) "fraud in the inducement."[142] "Constructive fraud is characterized by the breach of fiduciary duty or confidential relationship."[143] "Fraud in the factum is fraud which goes to the nature of the document itself."[144] Hawai'i recognizes misrepresentation as "fraud in the inducement."[145] The elements to prove "fraud in the inducement" are "(1) representation of a material fact,[146] (2) made for the purpose of inducing the other party to act, (3) known to be false but reasonably believed to be true by the other party; and (4) upon which the other party relies and acts to [his] damage."[147]

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[139] Shaffer v. Thacker, 6 Haw. App. 188, 716 P.2d 163, (1986); Silva v. Bisbee, 2 Haw. App. 188, 192, 628 P.2d 163, 214 (1986). *See generally* NICHOLAS ORDWAY, HAWAII REAL ESTATE RESEARCH AND EDUCATION CENTER, MANDATORY SELLER DISCLOSURES OF MATERIAL FACTS IN REAL ESTATE TRANSACTIONS: A FEASIBILITY STUDY IN RESPONSE TO HOUSE CONCURRENT RESOLUTION NO. 400, H.D. 1, 12 (1993).

[140] Silva v. Bisbee, 2 Haw. App. 188, 192, 628 P.2d 163, 214 (1986). In *Silva*, a broker sold her client's property to a joint venture at a price less than she thought it was worth without disclosing to the client that she managed the joint venture. The Hawaii Court of Appeals held that the non-disclosure of the broker's pecuniary interest was a breach of fiduciary duty and therefore "constructive fraud." *Id.* at 190, 628 P.2d at 216. The court held that it was not error to deny a motion for a new trial where the evidence was sufficient for the jury to find that the broker's actions were done "willfully, wantonly, or maliciously or characterized by some aggravating circumstances." *Id.* at 192, 628 P.2d at 217. The court upheld an award of punitive damages and emotional distress damages. *Id.* at 189, 628 P.2d at 215.

[141] Adair v. Hustace, 64 Haw. 314, 320 n.4, 640 P.2d 294, 299 n.4 (1982).

[142] *Id.* at 320 n.4, 640 P.2d at 299 n.4.

[143] Honolulu Federal Savings and Loan Assoc. v. Murphy, 7 Haw. App. 196, 201 n.6, 753 P.2d 807, 811 n.6 (1988) (citing Silva v. Bisbee, 2 Haw. App. 188, 190, 628 P.2d 163, 216 (1986)).

[144] *Adair*, 64 Haw. at 320, 640 at 299 n.4.

[145] *Id.* at 320 n.4, 640 P.2d at 299 n.4. (emphasis added) (footnote omitted). "Fraud in the inducement is fraud which 'induces the transaction by *misrepresentation* of motivating factors[.]'" *Id.* at 320 n.4, 640 P.2d at 299 n.4.

[146] *See also* Peine v. Murphy, 46 Haw. 233, 377 P.2d 708 (1962). "Where misrepresentations are made to form the basis of relief, they must be shown to have been made with respect to a material fact which was actually false." *Id.* at 238, 377 P.2d at 712.

[147] Honolulu Federal Savings and Loan Assoc. v. Murphy, 7 Haw. App. 196, 201,

The Hawaii Supreme Court recognized negligent misrepresentation in *Chun v. Park*.[148] In *Chun*, an action was brought by buyers against a title company for negligence in preparing a certificate of title.[149] The court adopted the then tentative draft of the Restatement (Second) of Torts section 552, entitled "Information Negligently Supplied for the Guidance of Others."[150] The Restatement defined negligent misrepresentation as:

> [o]ne who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[151]

The court held that the Restatement was a "fair and just restatement of the law on the issue of negligent misrepresentation."[152]

In *Shaffer v. Earl Thacker Co.*,[153] the Hawaii Intermediate Court of Appeals recognized negligent misrepresentation in the context of real estate brokers representing the sellers of residential real property.[154] In *Shaffer*, the buyer brought a claim for negligent misrepresentation against the seller's brokers for representing to him that encroachment problems would be corrected.[155] The problems could not be corrected due to a seaward boundary in dispute and resulted in a loss of 3,800 square feet.[156] The circuit court held that the seller and agent owed no duty to the buyer.[157] The Hawaii Intermediate Court of Appeals relied on Hawaii Revised

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753 P.2d 807, 811 (1988) (citations omitted). *See also* Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1978). In *Kang*, the Court stated that:

> To support a finding of fraud, it must be shown that "the representations were made and that they were false, . . . (and) that they were made by the defendant with the knowledge that they were false, (or without knowledge whether they were true or false) and in contemplation of the plaintiff's relying upon them and also that the plaintiff did rely upon them."

Id. at 656, 587 P.2d at 289 (quoting Hong Kim v. Hapai, 12 Haw. 185, 188 (1899)).

[148] 51 Haw. 462, 46 P.2d 905 (1969).

[149] *Chun*, 51 Haw. at 465, 46 P.2d at 907.

[150] *Id.* at 467, 46 P.2d at 909.

[151] *Id.* at 467 n.4, 46 P.2d at 909 n.4.

[152] *Id.* at 467, 46 P.2d at 909.

[153] 6 Haw. App. 188, 716 P.2d 163 (1986).

[154] *Shaffer*, 6 Haw. App. at 192, 716 P.2d at 166.

[155] *Id.* at 190, 716 P.2d at 164.

[156] *Id.*

[157] *Id.* at 190, 716 P.2d at 165.

Statutes section 467[158] and the 1984 Real Estate Commission Rules[159] in reversing summary judgment for the seller's brokers.[160] Both the Hawaii Revised Statutes section 467 and the Real Estate Commission Rules supported the finding that the seller's broker had a duty and could be liable for negligent misrepresentation.[161] The Hawai'i courts have not addressed innocent misrepresentation. There are no Hawai'i cases dealing with "As Is" clauses in real estate transaction under the context of fraud, misrepresentation, or non-disclosure.[162]

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[158] HAW. REV. STAT. § 467 (1976 & Supp. 1984) (governing the licensing and conduct of real estate brokers and salesmen). Hawaii Revised Statutes § 467 gave the "real estate commission [the power to] revoke . . . or suspend . . . [the broker's] license for . . . making any misrepresentation concerning any real estate transaction . . . false promises . . . flagrant misrepresentation." Shaffer v. Earl Thacker Co., 6 Haw. App. 188, 192-193, 716 P.2d 163, 166 (1986) (citing HAW. REV. STAT. § 467-14 (1976 & Supp. 1984)).

[159] HAW. ADMIN. R. § 16-99-3 (1984). Under the 1984 Hawaii Administrative Regulation Rules adopted by the Real Estate Commission to "clarify and implement Hawaii Revised Statutes section 467," it is the broker's duty to "disclose all pertinent facts concerning every property for which the licensee accepts the agency, so that the licensee may fulfill obligation to avoid error, misrepresentation, or concealment of pertinent facts." Shaffer v. Earl Thacker Co., 6 Haw. App. 188, 192, 716 P.2d 163, 166 (1986).

[160] Shaffer v. Earl Thacker Co., 6 Haw. App. at 192, 716 P.2d at 166 (1986).

[161] *Id.* at 192, 716 P.2d at 166. *See generally* disciplinary cases held by the Real Estate Commission pursuant to Hawaii Revised Statutes chapter 91 applying Hawaii Revised Statutes § 467-14: *In re* Middleton, REC 90-215, REC 91-138 (1993) (real estate agent misrepresented covenants); *In re* Knutson, REC 91-2 (1992) (real estate agent misrepresented and failed to disclose square footage); *In re* Nariyoshi, REC 83-215 (1985) (real estate agent failed to ascertain and disclose pertinent fact when agent did not obtain exact deposit on contract).

[162] *But see In re* Hawaii Daiichi-Kanko, Inc. v. Makaha Valley, Inc., 24 B.R. 163 (D. Haw. 1982) (federal case apparently applying Hawaii law to an "As Is" clause). In *In re Hawaii Daiichi-Kanko*, the debtor filed for Chapter X of the Bankruptcy Act of 1898 and agreed to an Amended Plan of Reorganization ("Plan") that was approved by the court. Under the Plan, property was to be conveyed in an "As Is" condition. The court quoted the language in Redner v. City of New York, 278 N.Y.S.2d 51 (N.Y. Civ. Ct. 1962): "It ("As Is") merely means that the purchaser must take that for which he bargained, reasonable use, wear, tear and natural deterioration excepted." *In re Hawaii Daiichi-Kanko*, 24 B.R. at 167 (quoting Redner v. City of New York, 278 N.Y.S.2d 51 (N.Y. Civ. Ct. 1962)). The court held that the defendant did not have to provide water to the property because the land was conveyed "As Is." *In re Hawaii Daiichi-Kanko*, 24 B.R. at 167. The district court holding interprets Hawaii law as siding with the general view that the "As Is" clause protects the vendor from liability for physical defects in the property. *See also* Frank J. Wozniak, *Construction and Effect of Provision in Contract for Sale of Realty by Which Purchaser Agrees to Take Property "As Is" or in Its Existing Condition*, 8 A.L.R.5th 312, 332.

Hawai'i home buyers also have an action for unfair trade practices against a seller's agent who misrepresents material facts.[163] In *Cieri v. Leticia Query Realty, Inc.*,[164] the Hawaii Supreme Court extended the scope of Hawai'i's consumer protection statute, Hawaii Revised Statutes chapter 480 (chapter 480),[165] to protect Hawai'i home buyers.[166] The court made two key holdings to bring residential real estate transactions within the purview of chapter 480.[167] First, the court held that "as a matter of law . . . a broker or salesperson actively involved in a real estate transaction invariably engages in 'conduct in any trade or commerce.'"[168] This holding subjected the real estate agents to liability under chapter 480.[169] Second, the court held that "real estate or residences qualify as 'personal investments' pursuant to HRS § 480-1."[170] This holding provided the home buyers with standing to sue under chapter 480.[171] Given the holdings in *Cieri*, home buyers can recover treble damages and attorney fees under chapter 480[172] or damages under a common law action, which ever is greater.[173]

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[163] Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 905 P.2d 29 (1995).

[164] *Id.* In *Cieri*, Defendants Leticia Query and Leticia Query Realty were the real estate agents for the Yamajis (sellers) who sold a residence to the Cieris (buyers). After moving into the residence, the Cieris discovered undisclosed plumbing problems and a roof leak. The Cieris brought an action for breach of contract, fraud/misrepresentation, and unfair trade practices under the Hawaii consumer protection statutes Hawaii Revised Statutes §§ 480-1, 480-2, 480-13 (Supp. 1994). The Yamajis filled out a "Sellers of Real Property Disclosure Statement" with the Deposit Receipt Offer and Acceptance form (DROA) but failed to disclose the home's plumbing problems and a leaky roof. *Id.*

[165] HAW. REV. STAT. ch. 480 (Supp. 1994).

[166] *Cieri*, 80 Hawai'i at 68-69, 905 P.2d at 43-44.

[167] *Id.*

[168] *Id.*

[169] HAW. REV. STAT. § 480-2(a) (Supp. 1994). "Unfair methods of competition and unfair deceptive acts or practices in the conduct of any trade or commerce are unlawful." *Id.*

[170] *Cieri*, 80 Hawai'i at 69, 905 P.2d at 44.

[171] *Id.* at 68-69, 905 P.2d at 43-44. Hawaii Revised Statutes § 480-2(c) limits standing to consumers, the attorney general and the director of the office of consumer protection. Under Hawaii Revised Statutes § 480-1, a "consumer" is defined as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." In *Cieri*, the court held that the home buyers in *Cieri* qualified "as 'consumers' who 'committed money in a personal investment,' and therefore ha[d] standing to sue under HRS chapter 480." *Id.*

[172] HAW. REV. STAT. § 480-13(b) (Supp. 1994). Hawaii Revised Statutes § 480-

III. The Statute - Hawaii Revised Statutes Section 508D[174]

A. Scope

Hawaii Revised Statutes section 508D is titled "Mandatory Seller Disclosures in Real Estate Transactions." Section 508D applies to the "transfer or disposition" of residential real property.[175] "Transfer or disposition"[176] includes a sale, exchange, auction, or long-term lease.[177]

13(b) reads in pertinent part as follows:

> (b) Any consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by section 480-2:
>
> (1) May sue for damages sustained by the consumer, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is greater, and reasonable attorneys fees together with the costs of suit.
>
> (2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorneys fees together with the costs of the suit.

Id.

[173] Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 905 P.2d 29 (1995); Eastern Star, Inc. v. Union Building Materials Corp., 6 Haw. App. 125, 712 P.2d 1148 (1985).

[174] Haw. Rev. Stat. § 508D-1 to 20 (Supp. 1994). Please note that Hawaii Revised Statutes § 508D might be amended by Senate Bill number 3266, dated Jan. 26, 1996. This bill seeks to revise Hawaii Revised Statutes § 508D by clarifying 508D's language to make it less ambiguous. The bill also seeks to narrow the scope of the statute to the disclosure of facts which "(1) Are within the knowledge or control of the seller; (2) Are disclosed by documents recorded in the bureau of conveyances; or (3) Can be observed from visible, accessible areas." S. 3266, 18th Leg., Reg. Sess. (Haw. 1996). The bill also seeks to limit the buyer's recission rights under 508D by adding language such as: "After recordation of the sale of residential real property, a buyer shall have no right under this chapter to rescind the real estate purchase contract despite the seller's failure to comply with the requirements of this chapter." S. 3266, 18th Leg., Reg. Sess. (Haw. 1996).

[175] Haw. Rev. Stat. § 508D-2 (Supp. 1994).

[176] *Id.*

[177] *Id.* A long term lease may be with or without an option to buy. *Id. But see Hearings on H.B. 873*, 18th Leg., Reg. Sess. (1995) (testimony of Carl J. Schlack, Jr., Hawaii State Bar Association). [hereinafter *H.B. 873 Hearings*] The Real Property and Financial Services Section of the Hawaii State Bar Association suggests:

> The words 'long-term lease' should be deleted. There is no definition of this term and there are other laws specifically addressing leasehold disclosures. For the same reason a long-term lease without option to buy should be deleted as well as exchange transactions. An exchange facilitator should not be required to provide the disclosure.

Id. at Exhibit A, p.1.

Residential real property includes property with one to four dwelling units, residential lots,[178] condominiums, and cooperative apartments.[179] Section 508D allows for exemptions where there are "no obvious consumer protection benefits . . . from requiring disclosures."[180]

Hawaii Revised Statutes section 508D-3 exempts arms-length transactions where the "purchaser has the same level of information as the seller."[181] Section 508D-3 exempts: transfers to co-owners, spouses, parents, children; transfers by devise, descent, or court order; transfers by operation of law;[182] transfers by fee conversions; transfers made pursuant to the residential landlord-tenant code;[183] initial sales of new single family dwelling units[184] under a current public offering statement;[185] and initial

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[178] HAW. REV. STAT. § 508D-2 (Supp. 1994). This includes residential lots that are improved or unimproved. *Id. But see H.B. 873 Hearings.* The Real Property and Financial Services Section of the Hawaii State Bar Association suggests:

> Chapter 508D . . . lacks a definition of "residential lot" or "residential real property" thus requiring disclosures in the sale of unimproved agricultural property upon which a single-family residence may or may not be constructed, as well as multiple acre lots sold to developers who, presumably, do not need the protections of Chapter 508D.

Id.

[179] HAW. REV. STAT. § 508D-1, 508D-2 (Supp. 1994).

[180] NICHOLAS ORDWAY, HAWAII REAL ESTATE RESEARCH AND EDUCATION CENTER, MANDATORY SELLER DISCLOSURES OF MATERIAL FACTS IN REAL ESTATE TRANSACTIONS: A FEASIBILITY STUDY IN RESPONSE TO HOUSE CONCURRENT RESOLUTION NO. 400, H.D. 1, 12 (1993).

[181] *Id.* at 18. *But see H.B. 873 Hearings.* The Real Property and Financial Services Section of the Hawaii State Bar Association suggests: "Transfers without consideration should be exempt . . . A gift to a charitable institution, for example, should not result in claims against the donor or fines. Why should someone who donates their house to the State to help cover the budget deficit be subject to civil penalty?" *Id.*

[182] HAW. REV. STAT. § 508D-3 (Supp. 1994) This includes but is not limited to any transfer by foreclosure, bankruptcy, or partition sales. *Id.*

[183] *Id.*

[184] HAW. REV. STAT. § 508D-3 (Supp. 1994). New homes are exempt, even though they might have more defects then a previously occupied home, because new homes easily can be warrantied against defects. Ordway, *supra* note 180, at 18. *But see H.B. 873 Hearings.* The Real Property and Financial Services Section of the Hawaii State Bar Association suggests:

> In clause (9) exempting "initial sales of condominium apartments" the word "initial" should be deleted, as well as in the . . . time share exemption. A developer may sell apartments by sales contract, agreement of sale or other means which then are recovered and must be resold pursuant to the registration. Buyer's receipt of a registration report for the apartment or time share interval should be sufficient disclosure (even if it is not an "initial sale").

Id. at 2.

[185] HAW. REV. STAT. § 508D-3 (Supp. 1994).

sales of condominium apartments under an unexpired public report.[186] In addition, the 1995 Hawaii legislature exempted from section 508D-3 "the sale of time share interests duly registered under a current effective disclosure statement pursuant to Hawaii Revised Statutes chapter 514E."[187] Hawaii Revised Statutes section 508D-10,[188] exempts absentee owners[189] who issue disclaimers.[190] The absentee owner and the buyer can agree to substitute a third party's inspection report[191] or waive the disclosure requirements.[192] With the exception of absentee owners, the disclosure requirements of section 508D cannot be waived is by express agreement of the parties.[193]

B. Requirements

Hawaii Revised Statutes section 508D requires sellers of residential real property to prepare and deliver a "disclosure of real property condition statement" (statement) to the buyer.[194] The seller or the seller's agent must provide the statement to the buyer within ten calendar days from acceptance of the Deposit Receipt Offer Acceptance (DROA).[195] The buyer has fifteen calendar days to examine the disclosure statement or

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[186] *Id.* No amendment was made to this provision because of testimony from the Real Estate Commission indicating that the "exemption of initial sales of new condominiums not under a current public offering statement would defeat the intent of the law and was inconsistent with other statutes with similar disclosure requirements." S. STAND. COMM. REP. No. 1237, 18th Leg., 1995 Reg. Sess.

[187] S. STAND. COMM. REP. No. 1235, 18th Leg., 1995 Reg. Sess.

[188] HAW. REV. STAT. § 508D-10 (Supp. 1994).

[189] *Id.* An "absentee owner" is a "seller who has not lived in the property for at least one hundred eighty days prior to the date of receiving an offer." *Id.*

[190] *Id.* The disclaimer must state that the seller does not have the "requisite personal knowledge to make accurate disclosures" about the real property, or provide a statement subject to section 508D-9(a)(4). *Id.*

[191] *Id.* The substituted report is a report by a "home inspector, licensed contractor, or licensed appraiser covering the same matters as would have been included in a statement." *Id.*

[192] *Id.* The disclosure requirements are contained in section 508D-4, titled "Prohibitions on transfers or disposition of residential real property." HAW. REV. STAT. § 508D-4 (Supp. 1994).

[193] HAW. REV. STAT. § 508D-10 (Supp. 1994). The seller and buyer can agree in writing that the transfer will not be covered under this chapter as outlined in section 508D-10. *Id.*

[194] HAW. REV. STAT. § 508D-1 (Supp. 1994).

[195] HAW. REV. STAT. § 508D-5(a) (Supp. 1994).

rescind the offer to purchase the property.[196] The buyer and seller may reduce or extend the delivery or examination and recission time periods by written agreement.[197] The statement must be signed and dated by the seller within six months of the DROA.[198]

The statement must "fully and accurately" disclose "any material fact, defect, or condition . . . that may influence" the buyer's decision of whether to purchase.[199] These disclosures should be "based on the seller's, or the seller's agent's, observation of: (1) visible, accessible areas; (2) related recorded and unrecorded documents; (3) information available from government agencies; and (4) information within the knowledge and control of the seller."[200] However, certain material facts are excluded from the disclosure requirements.[201] The seller does not have to disclose: AIDS, ARC, or HIV occupants;[202] acts or occurrences that do not affect the property physically;[203] and homicides, felonies, or suicides on the property more than three years before statement.[204] The statement must include a notice to the buyer and the seller that they "may wish to obtain professional advice and inspections,"[205] a notice to the buyer that repre-

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[196] HAW. REV. STAT. § 508D-5(b) (Supp. 1994). All deposits must be immediately returned to the buyer upon rescission of the offer. *Id.*

[197] HAW. REV. STAT. § 508D-5(c) (Supp. 1994). "The seller and buyer, in writing, may agree to reduce or extend the time period provided for the delivery or examination and rescission period. The language in this subsection shall be included in the receipt for the statement." *Id.*

[198] HAW. REV. STAT. § 508D-4(A) (Supp. 1994). *But see H.B. 873 Hearings.* The Real Property and Financial Services Section of the Hawaii State Bar Association suggests: "The language in Section 508D-4(1)(A) is not clear whether the statement may be dated before or after the offer to purchase." *Id.*

[199] HAW. REV. STAT. § 508D-1 (Supp. 1994). This includes anything "past or present, relating to the residential real property being offered for sale." *Id.*

[200] HAW. REV. STAT. § 508D-1 (Supp. 1994).

[201] HAW. REV. STAT. § 508D-8 (Supp. 1994).

[202] HAW. REV. STAT. § 508D-8(1) (Supp. 1994). The statement may exclude the fact that an "occupant of the subject property was afflicted with acquired immune deficiency syndrome (AIDS) or AIDS related complex (ARC), or had been tested for human immunodeficiency virus (HIV)." *Id.*

[203] HAW. REV. STAT. § 508D-8(2) (Supp. 1994). The statement may exclude the fact that the "real property was the site of an act or occurrence that had no effect on the physical structure or the physical environment of the real property, or the improvements located on the real property." *Id.*

[204] HAW. REV. STAT. § 508D-8(3) (Supp. 1994). The statement may exclude the fact that a "homicide, felony, or suicide occurred on the real property more than three years before the date the seller signed the statement." *Id.*

[205] HAW. REV. STAT. § 508D-11(1) (Supp. 1994). "Because the complexity of real

sentations in the statement are sellers and not the seller's agents', and "a notice of the buyer's rescission rights."[206] The statement should also give the buyer notice if the property is within a special flood hazard area,[207] a noise exposure area,[208] an Air Installation Compatibility Use Zone,[209] or an anticipated tsunami inundation area.[210] However, failure to provide notice of these designated areas, by itself, "does not affect the validity of title to real property transferred."[211] In addition, Hawaii Revised Statutes section 508D-13 requires the seller to inform the buyer of subsequent changes that make the statement inaccurate.[212] The seller must give the buyer an amended corrected statement within ten calendar days after the discovery of a "material change"[213] in the accuracy of the statement.[214]

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estate transactions requires very specialized knowledge, neither the property owners or the real estate licensees may be competent to make judgments about certain property conditions." Ordway, *supra* note 180, at 40.

[206] HAW. REV. STAT. § 508D-11(3) (Supp. 1994).

[207] HAW. REV. STAT. § 508D-15(a)(1) (Supp. 1994). The statement should give notice of a "special flood hazard area as officially designated on Flood Insurance Administration maps promulgated by the United States Department of Housing and Urban Development for the purposes of determining eligibility for emergency flood insurance programs." *Id.*

[208] HAW. REV. STAT. § 508D-15(a)(2) (Supp. 1994). The statement should give notice of a "noise exposure area shown on maps prepared by the department of transportation in accordance with Federal Aviation Regulation Part 150-Airport Noise Compatibility Planning (14 Code of Federal Regulations Part 150) for any public airport." *Id.*

[209] HAW. REV. STAT. § 508D-15(a)(3) (Supp. 1994). The statement should give notice of a "Air Installation Compatibility Use Zone of any Air Force, Army, Navy, or Marine Corps airport as officially designated by military authorities." *Id.*

[210] HAW. REV. STAT. § 508D-15(a)(4) (Supp. 1994). The statement should give notice of an "anticipated inundation areas designated on the department of defense's civil defense tsunami inundation maps; subject to the availability of maps that designate the four areas by tax map key (zone, section, parcel)." *Id.*

[211] HAW. REV. STAT. § 508D-15(c) (Supp. 1994). Non-disclosure of these facts does not "affect the validity of title to real property transferred." *Id.*

[212] HAW. REV. STAT. § 508D-6 (Supp. 1994).

[213] HAW. REV. STAT. § 508D-1 (Supp. 1994). "Material change" is defined in section 508D-1 but does not appear anywhere else in the statute. However, its definition suggests that it belongs with section 508D-13. "Material change" is defined as "any change which affects the information contained in a disclosure of real property condition statement in any one of the following ways: (1) Renders it misleading; (2) Substantially affects the rights or obligations of a buyer; or (3) May reasonably affect a buyer's decision to buy, including changes in the use, size, value, restrictive covenants, and encumbrances." HAW. REV. STAT. § 508D-1 (Supp. 1994).

[214] HAW. REV. STAT. § 508D-6 (Supp. 1994).

C. The Seller's Agent[215]

The seller's agent has limited duties under Hawaii Revised Statutes section 508D.[216] A seller's agent who is responsible for delivering the statement must maintain a record of the actions taken. If the "seller's agent cannot obtain the statement and does not have written assurances from the buyer that the statement was received,"[217] then section 508D-7 directs the seller's agent to provide a written notice to the buyer.[218] The written notice must contain notice of the buyer's rights to the disclosure statement and the buyer's rights of rescission under the statute.[219] The seller's agent must also disclose[220] any inconsistent or contradictory facts between the agent's own inspection and the disclosure statement or a third party inspection.[221]

D. Remedies

Under Hawaii Revised Statutes section 508D-13, the buyer may rescind[222] the "real estate purchase contract"[223] within fifteen calendar days of

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[215] HAW. REV. STAT. § 508D-7 (Supp. 1994). The "seller's agent" does not include escrow agents unless expressly agreed to:

> Any person or entity, other than a real estate licensee, acting in the capacity of an escrow agent for the transfer or disposition of real property subject to this chapter, shall not be deemed the agent of the seller or buyer for purposes of the disclosure requirements of this chapter unless the seller or buyer and the escrow agent agree in writing to the establishment of the agency.

Id. But see H.B. 873 Hearings. The Real Property and Financial Services Section of the Hawaii State Bar Association suggests: "Subsection (a) should exempt attorneys and real estate licensees acting in the capacity of an escrow agent from liability under Chapter 508D." *H.B. 873 Hearings.*

[216] HAW. REV. STAT. § 508D-7 (Supp. 1994).

[217] HAW. REV. STAT. § 508D-7(a) (Supp. 1994).

[218] HAW. REV. STAT. § 508D-7(b) (Supp. 1994).

[219] *Id.*

[220] HAW. REV. STAT. § 508D-7(c) (Supp. 1994). Inconsistent or contradictory facts must be disclosed "to the seller, the buyer, and their agents." *Id.*

[221] *Id.*

[222] HAW. REV. STAT. § 508D-5(b)2 (Supp. 1994). Rescission of the offer or contract must be in "writing to the seller or through the seller's agent." *Id.*

[223] HAW. REV. STAT. § 508D-1 (Supp. 1994). Under Hawaii Revised Statutes § 508D-1, "'Real estate purchase contract' means a contract, including a deposit, receipt, offer, acceptance, or other similar agreement for the sale, exchange, long-term lease without option to buy, or lease with option to buy of real property, and any amendments to the contract." *Id.*

discovering an inaccuracy[224] in the statement.[225] The buyer may also rescind the "real estate purchase contract" within fifteen calendar days of the receipt of an amended corrected statement.[226] The 1995 Hawaii Legislature passed an amendment that restricts the buyer's section 508D-13 recission rights to inaccuracies discovered before the "recorded sale of real property."[227] When the seller provides a timely good faith statement to the buyer and the buyer decides to rescind the "real estate purchase contract," damages are limited to the return of all deposits.[228] The buyer can recover actual damages when the seller is negligent in providing the statement.[229] The buyer can recover up to three times the actual damages if the seller willfully violates Hawaii Revised Statutes section 508D.[230] In addition to these remedies, the court may also award the buyer attorney fees, court costs, and administrative fees.[231]

Any person[232] who violates Hawaii Revised Statutes section 508D is liable to the buyer for a civil penalty[233] of $1,000 plus actual damages, if any.[234] Violators are also liable for reasonable attorney's fees, court costs,

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[224] HAW. REV. STAT. § 508D-13 (Supp. 1994). An inaccuracy is a failure "to disclose material facts or defects" or "an inaccurate assertion that an item is not applicable." *Id.*

[225] *Id.*

[226] *Id.*

[227] S. STAND. COMM. REP. No. 1237, 18th Leg., 1995 Reg. Sess. "[A]ny action for recission brought under this chapter [Hawaii Revised Statutes section 508D] shall commence prior to the recorded sale of the real property." *Id.*

[228] HAW. REV. STAT. § 508D-16(b) (Supp. 1994).

[229] HAW. REV. STAT. § 508D-16(c) (Supp. 1994).

[230] HAW. REV. STAT. § 508D-16(d) (Supp. 1994).

[231] HAW. REV. STAT. § 508D-16(e) (Supp. 1994).

[232] HAW. REV. STAT. § 508D-20 (Supp. 1994). Sellers and seller's agents are liable under this section. *Id.*

[233] HAW. REV. STAT. § 508D-20 (Supp. 1994). *But see H.B. 873 Hearings.* The Real Property and Financial Services Section of the Hawaii State Bar Association suggests:

> A "civil penalty" in Section 508D-20 typically refers to a penalty levied by an administrative agency with authority to enforce the statute. See, for example, Section 482E-10.5, HRS, which provides that the director of commerce and consumer affairs may enforce the franchise investment law and impose a civil penalty for violations thereof. However, no agency is given enforcement authority for Chapter 508D. Consequently, it is unclear whether this penalty applies to an administrative proceeding or whether it applies to a rescinding buyer's damages awarded in court. This section should specify an agency with authority to enforce Chapter 508D or be subsumed in Section 508D-16.

Id.

[234] HAW. REV. STAT. § 508D-20 (Supp. 1994).

and administrative fees. This is in addition to any other remedies provided in Hawaii Revised Statutes section 508D and remedies otherwise provided by law.[235] Hawaii Revised Statutes section 508D-14 states that the "requirements of this chapter are in addition to all other disclosure obligations required by law relating to the transfer or disposition of residential real property."[236] This is consistent with the legislative intent to "increase the protection to the buyer and not lessen it."[237]

E. Limits to Liability

Under Hawaii Revised Statutes section 508D-17,[238] any action must commence within two years[239] from the receipt of the statement.[240] If no statement is received and the section 508D requirements have not been waived,[241] the action must commence within two years of the recorded sale or buyer's occupancy of the property.[242] All claims under Hawaii Revised Statutes section 508D must be submitted to arbitration[243] or mediation before an action may proceed in the courts.[244]

Hawaii Revised Statutes section 508D-9 requires the seller or the seller's agent to prepare the disclosure statement in good faith.[245] Good faith acts

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[235] *Id.*

[236] HAW. REV. STAT. § 508D-14 (Supp. 1994).

[237] Ordway, *supra* note 180, at 46.

[238] HAW. REV. STAT. § 508D-17(b) (Supp. 1994). "This chapter supersedes all other laws relating to the time for commencement of actions for failure to make the *disclosures* required by this chapter." *Id.*

[239] Ordway, *supra* note 180, at 49. The legislature chose two years because "most housing defects are found within two years of occupancy" and two years is "consistent with home owner warranty periods and errors and omission insurance coverage provisions found in many policies." *Id.*

[240] HAW. REV. STAT. § 508D-17(a) (Supp. 1994).

[241] *Id.* Waived by the parties in writing pursuant to section 508D-10. *Id.*

[242] *Id.*

[243] HAW. REV. STAT. § 508D-18 (Supp. 1994). Arbitration is pursuant to chapter 658. *Id.*

[244] HAW. REV. STAT. § 508D-18 (Supp. 1994). It is "not the intent of this section [508D-18 Arbitration or mediation] to limit the buyer's remedies pursuant to this chapter." *Id.*

[245] HAW. REV. STAT. § 508D-9(a) (Supp. 1994). Under the statute, "good faith" includes honesty in fact in the investigation, research, and preparation of the statement. "Good faith" also includes: facts based on only the seller's personal knowledge; facts provided by governmental agencies and departments; reports prepared for the seller by a licensed engineer, land surveyor, geologist, wood-destroying insect control expert,

as a safe harbor to limit liability.[246] Under section 508D-9(a), the buyer has no cause of action against a seller (or seller's agent) when the statement is prepared with due care and in good faith.[247] To be acting in good faith, the seller must make an honest effort to fill out the disclosure form.[248] The disclosure statement cannot be construed as a "warranty of any kind, or a substitute for any expert inspection, professional advice, or warranty that the buyer may wish to obtain."[249] Furthermore, the representations contained in the disclosure statement are "construed to be made only to, and to be used only by, a buyer whose identity has been made known to the seller, a lending institution,[250] or an escrow company involved in processing a real estate purchase contract."[251]

IV. The Impact of Hawaii Revised Statutes Section 508D

A. Agent's Liability

The Hawaii Supreme Court recently upheld punitive damages of $325,000 against a listing agent and the sellers in *Kuhnert v. Allison*,[252] a

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contractor, or other home inspection expert dealing with matters within the scope of the professional's license or expertise for the purpose of the disclosure of real property condition statement, and an approximation of the information, when material information required to be disclosed is unknown or not available to the seller, and the seller or seller's agent make reasonable efforts to ascertain the information; provided the approximation is clearly identified as an approximation, reasonable, based on the best information available to the seller or seller's agent; and not used for the purpose of circumventing or evading the requirements of this chapter. *Id.*

[246] Ordway, *supra* note 180, at 35.

[247] Haw. Rev. Stat. § 508D-9(a) (Supp. 1994).

[248] *Id.* "Leaving blanks or stating that one does not know, would not be good faith if the seller actually had (or could easily have had) information on that item." Ordway, *supra* note 180, at 34.

[249] Haw. Rev. Stat. § 508D-1 (Supp. 1994).

[250] Ordway, *supra* note 180, at 24. Mandatory Seller Disclosure statements are important to lenders. "As reported by the National Association of REALTORS 'HUD Mortgage Letter 90-26 mandates that, in states which require property disclosure statements to be completed on residential purchases, a copy of the disclosure statement must be furnished by the lender to either the HUD Fee or Direct Endorsement staff appraiser.'" *Id.* at 24.

[251] Haw. Rev. Stat. § 508D-9(b) (Supp. 1994).

[252] 76 Haw. 39, 868 P.2d 457 (1994). The Kuhnerts received a condominium and cash in a exchange for their property. The sellers (Ostermans) and brokers (Kamisugi and Libbie & Company) gave the Kuhnerts an inflated condominium value. The sellers brought suit for fraud against the condominium sellers, the brokers, and the listing agent (Allison). *Id.*

memorandum opinion.[253] In *Kuhnert*, the listing agent's liability alone was $200,000.[254] In 1989, the Hawaii Real Estate Research and Education Center[255] surveyed the principal brokers in Hawai'i and found that the leading cause of real estate litigation from 1984 to 1989 was a failure to disclose material facts.[256] In 1989, non-disclosure caused 45.6 percent of all real estate litigation.[257] As a result, the Hawaii Association of Realtors provided voluntary seller disclosure forms to its members.[258] In 1993, the estimated use of disclosure forms was between 25% and 40%.[259] One of the arguments made by Nicholas Ordway[260] in favor of Hawaii Revised Statutes section 508D was that it "is a great deal more cost effective to disclose potential defects before a transaction is consummated than to burden the legal system with more litigation."[261] Ordway predicted that Hawaii Revised Statutes section 508D would "reduce the risk of legal liability."[262] He also predicted a "drop in the price of errors and omissions insurance."[263]

"The fact that the National Association of Realtors is the champion of seller disclosure indicates the trade association expects the new law to benefit real estate agents."[264] Critics of seller disclosure predict that sellers

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[253] HAW. R. APP. P. 35(c). "A memorandum opinion shall not be cited in any action or proceeding except when the opinion establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent." *Id.*

[254] *Id.*

[255] Ordway, *supra* note 180, at 15. The Hawaii Real Estate Research and Education Center is located at the University of Hawai'i at Manoa's College of Business Administration. *Id.* at Cover Sheet.

[256] *Id.* at 15.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] Metzger, *supra* note 6, at 21. Nicholas is an "international real property authority and . . . a business professor at the University of Hawai'i at Manoa." *Id.*

[261] Ordway, *supra* note 180, at 15.

[262] Shirley Iida, *New Law Requires Home Seller to Disclose Property's Defects*, WINDWARD SUN PRESS, June 29-July 5, 1995, at A3.

[263] Metzger, *supra* note 6, at 21. The article quoted Ordway as saying: "I think just this last year the cost of errors and omissions insurance has nearly doubled . . . Our lawsuits involving real estate are larger than the typical cases on the Mainland because our houses are more expensive, and so our errors and errors and omissions carriers are just jacking up the premiums to reflect the risk of doing business in the state." *Id.*

[264] T.J. Howard, *Seller Disclosure Lets Buyer Know the Score*, CHICAGO TRIBUNE, May 14, 1993, at C3.

will become the target of more lawsuits.[265] One critic was quoted as saying: "I don't think the client should be in the role of protecting the broker. . .This would erode still further what brokers need to do for their clients."[266] Donald Berman, a law professor at Northeastern University in Boston, speculated that disclosure laws might not be effective in reducing litigation.[267] He reasoned that an open ended disclosure law would pose the question: "when does disclosure end?"[268] As a point of contention, Berman asked, "does a disclosure law protect you or open you up?"[269] John Ackman, general counsel for the Kentucky Real Estate Commission, expressed a similar view when explaining why Kentucky did not include a catch-all phrase to disclose all material facts in their disclosure law.[270] The catch-all phrase was not inserted for fear that "a broad document would actually encourage lawsuits. . .because the seller is almost certain to leave something out."[271] What happens when the seller thinks a basement leak covered up with paint took care of the problem but a knowledgeable agent would recognize it as a defect that the buyer needs to know about?[272] Who will be liable?

Even with mandatory seller disclosure, real estate agents must perform all the duties required under state laws, state regulations, and the Realtor Code of Ethics.[273] Therefore, a real estate agent in Hawaii must comply with Hawaii Revised Statutes section 508D and Hawaii Revised Statutes section 467 as well as the Realtor Code of Ethics.[274] Seller disclosure does not remove the agent's duty to disclose.[275] Nor does it free the agent from liability to a buyer for negligent behavior by the agent.[276]

Before mandatory seller disclosure, Hawai'i had rejected the doctrine of caveat emptor.[277] Under caveat emptor, a seller's agent's fiduciary duty

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[265] Jane Lehman, *Lobby Effort to Focus on Home Defects; Real Estate Agents Seek Seller-Disclosure Law*, WASH. POST, July 6, 1991, at E1.

[266] *Id.*

[267] Nifong, *supra* note 7, at 9.

[268] *Id.*

[269] *Id.*

[270] David Royse, *Seller Disclosure Law Protects Home Buyers, Lowers Litigation Rate*, BUSINESS FIRST-LOUISVILLE, Oct. 18, 1993, at 1.

[271] *Id.*

[272] Lehman, *supra* note 265, at E1.

[273] *NAR answers questions about seller disclosure*, REALTOR NEWS, Sept. 16, 1991, at 5.

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] Ordway, *supra* note 180, at 11-12.

was to the seller: the agent could not undermine the seller by disclosing too much information to the buyer.[278] Hawai'i later adopted full disclosure.[279] Real estate agents had a duty to "be fair to all parties in a real estate transaction" and "disclose material facts."[280] Around 1989, a buyer representative trend began in Hawai'i and California.[281] In 1994, about 95 percent of residential transactions in Hawaii involved a buyer broker or representative.[282]

Hawaii Revised Statutes section 467-14[283] gives the Real Estate Commission[284] the authority to revoke or suspend a real estate broker's or salesman's license for any cause authorized by law. The section provides circumstances under which the commission can take disciplinary action against the broker.[285] These include, but are not limited to: making a misrepresentation, making a false promise, pursuing a continued and flagrant course of misrepresentation, unauthorized dual agency, fraudulent or dishonest dealings, failure to "ascertain and disclose all material facts[286] concerning every property for which the licensee accepts the agency,"[287]

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[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] Shelly D. Coolidge, *Home Buyers Seek Brokers Who Will Represent Them*, CHRISTIAN SCIENCE MONITOR, Oct. 18, 1994, at 9.

[282] *Id.*

[283] HAW. REV. STAT. § 467-14 (Supp. 1994) (governing the licensing and conduct of real estate brokers and salesmen).

[284] PAGE B. VISTOUSEK ET AL., PRINCIPLES & PRACTICES OF HAWAIIAN REAL ESTATE 5 (1982-1983).

> The Real Estate Commission is the state agency empowered to grant licenses, issue rules, and regulations, and generally monitor the licensing laws. The Commission consists of nine members appointed by the Governor, of which at least four must be licensed real estate brokers with three years of experience accrued immediately prior to their appointment. All nine must be U.S. citizens, and must have been legal residents of Hawaii for at least three years. The Governor's appointments are made for a term of four years, and are so staggered that at least one appointment is required each year. The members serve without pay, and any five members may constitute quorum to do business. There are two public members.

Id. at 5.

[285] HAW. REV. STAT. § 467-14 (Supp. 1994).

[286] *Id.* In this section, material facts do not include the fact the occupant has AIDS or AIDS Related Complex (ARC) or has been tested for HIV (human immunodeficiency virus). *Id.*

[287] *Id.* The licensee must obtain material facts so that the licensee may fulfill the licensee's obligation to avoid error, misrepresentation, or concealment of material facts. *Id.*

and "failure to maintain a reputation for honesty, truthfulness, financial integrity, and fair dealing."[288]

Hawaii Revised Statutes section 508D expands the agent's obligations under Hawaii Revised Statutes section 467-14 by requiring agents to make additional[289] disclosure and providing additional penalties for non-disclosure.[290] Under Hawaii Revised Statutes section 508D, when the seller's agent cannot get the disclosure statement and has no written assurance that the buyer has received the disclosure statement, the seller's agent must disclose in a written statement to the buyer, the buyer's rights to the disclosure statement and the buyer's rights of recission.[291] Upon the seller's agent's own inspection, the seller's agent must also disclose to the seller, the buyer and their agents, any inconsistent or contradictory facts in the disclosure statement or third party inspection report.[292] If the seller's agent does not meet these requirements, then the seller's agent is liable for the Hawaii Revised Statutes section 508D-20 civil penalty of $1,000, reasonable attorney's fees, court costs, and administrative fees[293] in addition to any other liabilities provided by the law.[294]

Article 2 of the National Association of Realtor's 1995 Code of Ethics and Standards of Practice[295] requires realtors to "avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction."[296] The Code of Ethics does not require that realtors "discover latent defects in the property, to advise on matters outside the scope of their real estate license, or to disclose facts which are confidential under the scope of agency duties owed to their clients."[297] Under the Standards of Practice 2-1,[298] the realtor must "discover and disclose adverse

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[288] *Id.*

[289] HAW. REV. STAT. § 508D-14 (Supp. 1994). The requirements of Hawaii Revised Statutes § 508D are in addition to all other disclosure obligations required by law relating to the transfer or disposition of residential real property. *Id.*

[290] HAW. REV. STAT. § 508D-20 (Supp. 1994).

[291] HAW. REV. STAT. § 508D-7 (Supp. 1994).

[292] *Id.*

[293] HAW. REV. STAT. § 508D-20 (Supp. 1994).

[294] *Id.*

[295] NATIONAL ASSOCIATION OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE (1995). "Accepting this standard as their own, pledge to observe its spirit in all of their activities and to conduct their business in accordance with the tenets set forth below." *Id.* at preamble.

[296] *Id.*

[297] *Id.*

[298] *Id.* "The Standards of Practice serve to clarify the ethical obligations imposed by the various Articles and supplement." *Id.* at Explanatory Notes.

factors reasonably apparent to someone with expertise in only those areas required by the real estate licensing authority."[299]

The court in *Shaffer v. Thacker*[300] found that a real estate agent could be guilty of negligent misrepresentation by applying the duties codified in Hawaii Revised Statutes section 467[301] and enhanced by the 1984 Real Estate Commission Rules.[302] The 1984 Real Estate Commission Rules ("Rules") served to "clarify and implement Hawaii Revised Statutes section 467."[303] Under the Rules, the broker must "disclose all pertinent facts concerning every property for which the licensee accepts the agency, so that the licensee may fulfill obligation to avoid error, misrepresentation, or concealment of pertinent facts."[304] In *Shaffer*, the Hawaii Revised Statutes section 467-14 and the Rules were sufficient to create a duty to disclose thereby making the agent liable for negligent misrepresentation.[305]

There are various defenses and precautionary measures that real estate agents can use to protect themselves from claims for non-disclosure, intentional and negligent misrepresentation.[306] Contributory negligence, comparative negligence, knowledge of the buyer, immateriality of the information, and statute of limitations are all possible defenses to negligence against the agent.[307]

Comparative negligence is a possible defense to a claim of negligence by the agent.[308] *Evans v. Teakettle Realty*[309] is a Montana Supreme Court case where the buyer brought a claim under the Consumer Protection Act against the seller's agent for failure to disclose a dangerous located, illegal septic tank.[310] The court held that the buyer's negligence reduced any negligence awards.[311]

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[299] *Id.*

[300] Shaffer v. Earl Thacker Co., 6 Haw. App. 188, 716 P.2d 163 (1986).

[301] HAW. REV. STAT. § 467-14 (1976 & Supp. 1984) (governing the licensing and conduct of real estate brokers and salesmen).

[302] HAW. ADMIN. R. § 16-99-3 (1984).

[303] *Shaffer*, 6 Haw. App. at 192, 716 P.2d at 166.

[304] *Id.* at 193, 716 P.2d at 166 (citing HAW. REV. STAT. § 467-14 (1976 & Supp. 1984)).

[305] *Id.* at 192, 716 P.2d at 166.

[306] Robert Treece & Carolyn Clawson, *The Real Estate Broker's Duty to Investigate*, FOR THE DEFENSE, May 1988, at 16-18.

[307] *Id.*

[308] *Id.* at 16.

[309] 736 P.2d 472 (Mont. 1987).

[310] *Evans*, 736 P.2d at 473.

[311] *Id.* at 474. "The law . . . does not allow us to separate Teakettle's actions in violation of the Consumer Protection Act from its actions which were negligent." *Id.* at 474.

If the buyer knows that representations made by the agent are those of the seller and not the representations of the agent, then the court might not find the broker liable.[312] A disclaimer clause in the DROA is a precaution that puts the buyer on notice that the representations are not those of the agent.[313] The Hawaii Association of Realtors' Standard Forms include a disclaimer by the brokers.[314] The Hawaii Realtors' Standard Form disclaimer states that:

> Buyer and Seller understands that the Brokers have not made any representations or warranties, and have not rendered any opinions about: (a) the legal or tax consequences of this transaction; (b) the legality, validity, correctness, status or lack of any building permits which may have been required for the property; (c) the size of any improvements on the property, or the land area of the Property or the location of the boundaries.[315]

The disclaimer also limits the scope of the brokers service by stating that "Buyer and Seller understand and acknowledge that neither party is relying on the Brokers for" advice outside the scope of their knowledge.[316] The disclaimer further provides that the Brokers recommend that "Buyer and Seller each consult their own estate planner, accountant, appraiser, insurance advisor, designer, land use professional, attorney, zoning expert, contractor, home inspector, surveyor, title insurer, pest control expert, and other professionals should they have questions within those fields about this sale."[317]

The Statute of Limitations is a defense for the agent.[318] In Hawai'i, the statute of limitations is six years from the time the buyer discovers the problem in a claim for fraudulent or negligent misrepresentation.[319] The statute of limitations for a breach of contract is also six years.[320] However, the Statute of Limitations under Hawaii Revised Statutes section 508D limits claims for non-disclosure to two years.[321]

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[312] Treece, *supra* note 306, at 17.

[313] *Id.* at 16-18.

[314] Hawaii Association of Realtors' Standard Forms (June 1995), DROA Standard Form, at 6, paragraphs C-68 to C-72.

[315] Hawaii Association of Realtors' Standard Forms (June 1995), DROA Standard Form, at 6, paragraph C-69.

[316] Hawaii Association of Realtors' Standard Forms (June 1995), DROA Standard Form, at 6, paragraph C-68.

[317] *Id.*

[318] Treece, *supra* note 306, at 16-18.

[319] Ordway, *supra* note 180, at 18 (citing Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981) (interpreting HAW. REV. STAT. § 657-1(4)).

[320] *Id.* at 18 (citing HAW. REV. STAT. § 657-1(1)).

[321] HAW. REV. STAT. § 508D-17 (Supp. 1994).

The principles of agency law provide one overlooked defense to misrepresentation by an agent. In *Hoffman v. Connall*, the Supreme Court of Washington held that real estate agents were not liable for innocent misrepresentations to the buyer.[322] The court reasoned that a "real estate broker is an agent of the seller, not of the buyer, and is protected from liability under agency law. Thus, an agent would be permitted to repeat misinformation from his principal without fear of liability unless the agent knows or has reason to know of its falsity."[323] This agency law defense was extended in *Delmonte v. Zandee Van Rilland*,[324] a June 28, 1993 case before the First Circuit Court of the State of Hawaii. In *Delmonte*, the Zandee Van Rillands ("the buyers") brought claims for negligent and intentional misrepresentation in concealing the severity of leaks and the disrepair of the house at the time of sale.[325] The Delmontes, ("the sellers") brought claims for indemnification against third party defendants Dempsey West Realty and Kent Bein ("the agents").[326] The circuit court dismissed those claims against the agents on the theory that the principal failed to give the agents the information necessary to carry out their agency.[327]

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[322] Hoffman v. Connall, 736 P.2d 242, 246 (Wash. 1987).

[323] *Id.* at 244 (footnotes omitted) (citing RESTATEMENT (SECOND) OF AGENCY § 348, cmt. b (1958)). The Supreme Court of Washington observed that "[t]his principle has been upheld by approximately half the jurisdictions that have addressed innocent misrepresentations." *Id.* at 244. *Accord* Provost v. Miller, 473 A.2d 1162 (Vt. 1984).

[324] No. 90-1134-04 (Haw. 1st Cir. Ct. June 28, 1993).

[325] *Id.* (Trial Memorandum of Third Party Defendants Dempsey West Realty and Kent Bein).

[326] *Id.*

[327] *Id.* Chapter 14 of the RESTATEMENT (SECOND) OF AGENCY § 435 (1958) states that:

> Unless otherwise agreed, it is inferred that a principal contract to use care to inform the agent of risks of physical harm or pecuniary loss which, as the principal has reason to know, exist in the performance of authorized acts and which he has reason to know are unknown to the agent.

Id.

Comment (a) of the Restatement section further provides that:

> a. the duty stated in this section rests upon the common understanding that the principal will use care to prevent harm coming to the agent in the prosecution of the enterprise. It is the same duty of warning which is most frequently illustrated in cases involving master and servant (see § 510), and an agent ordinarily has an action of tort as well as an action of contract against the principal for failure to perform this duty. See § 471. The duty may require not only warning the agent against physical dangers, as when the principal directs an agent to go to a place which is dangerous, but also disclosing facts which, if unknown, would be likely to subject the agent to pecuniary loss. Thus, a

The court in *Delmonte* also relied on the Restatement (Second) of Agency section 348, entitled "Fraud and Duress."[328] Under the Restatement, the agent is liable for torts of fraud and duress committed in a transaction on behalf of the principle.[329] However, comment (b)[330] of the Restatement section, Innocent Agent of Guilty Principal, states that an agent is not liable for misrepresentations unless he knows or should have known that the information was untrue.[331] An agent is not liable simply because the principal knew the information was untrue.[332]

B. Seller's Liability

Prior to the implementation of Hawaii Revised Statutes section 508D, buyers could sue sellers for up to six years after the discovery of a non-disclosed home defect.[333] The limitations provision of Hawaii Revised Statutes section 508D restricts the amount of time buyers can bring an action to two years.[334] The language of section 508D's limitations provision suggests that 508D supersedes all other limitations in actions dealing with disclosures of home defects. Whether this section would limit an action for fraud or negligent misrepresentation by the seller or agent is questionable. Hawaii Revised Statutes section 508D-14 states that the requirements of section 508D are *in addition* to all other disclosure requirements under the existing law.[335] Actions for misrepresentation, might still be brought six years from the date of discovery if the intent of the legislature is interpreted to provide this additional protection to buyers.[336]

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principal employing a factor to sell goods which appear to be but are not sound is subject to liability to the agent if the agent is led to incur personal liability to a buyer through mistaken statements concerning the condition of goods.

RESTATEMENT (SECOND) OF AGENCY § 435 cmt. a (1958).

[328] RESTATEMENT (SECOND) OF AGENCY § 348 (1958).

[329] *Id.*

[330] RESTATEMENT (SECOND) OF AGENCY § 348, cmt. b (1958). Comment (b) states that an "agent can properly rely upon statements based on the information given to him by the principal to the same extent as upon statements from any other reputable source." *Id.*

[331] *Id.*

[332] *Id.*

[333] Iida, *supra* note 262, at A3.

[334] HAW. REV. STAT. § 508D-17 (Supp. 1994).

[335] HAW. REV. STAT. § 508D-14 (Supp. 1994).

[336] Ordway, *supra* note 180, at 18 (citing Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981) (interpreting HAW. REV. STAT. § 657-1(4))).

The disclosure law exposes the seller and the broker to litigation.[337] The open-ended nature of the seller's duty to disclose all material facts without specification as to what is material might encourage lawsuits.[338] The amended Hawaii Association of Realtors' Standard Form disclosure statement provides a comprehensive and specific list of items for disclosure that ought to prevent most claims for non-disclosure.[339] However, it was the legislature's intent to "protect the buyer in what often is the most important investment in most people's lifetimes."[340] The language in Hawaii Revised Statutes section 508D-14 increases the protection to the buyer and does not lessen it in any way.[341] The seller is still liable to the buyer for fraud under the common law.[342]

A California Court of Appeals recently held that a buyer cannot construe the state's mandatory disclosure form to be a warranty.[343] Like California, Hawai'i's disclosure form is not a warranty and cannot be treated as one.[344] The specific language[345] of the statute expressly states that it shall not be construed as a warranty and prevents attorneys from creating theories of liability where none was intended.[346] Additionally, sellers can limit their liability by making a good faith effort to complete the disclosure statement.[347] Answering all questions and disclosing all material facts within the seller's knowledge is sufficient to meet the requirements of Hawaii

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[337] Royse, *supra* note 270, at 1.

[338] *Id.*

[339] Hawaii Association of Realtors' Standard Forms (June 1995), DROA Standard Form, at 4-5, paragraphs C-44 to C-50.

[340] H.R. Con. Res. 400, 16th Leg., Reg. Sess. (1992) (enacted).

[341] HAW. REV. STAT. § 508D-14 (Supp. 1994).

[342] *Id.*

[343] Brasier v. Sparks, 22 Cal. Rptr.2d 1 (Cal. Ct. App. 1993). The buyers brought an action for fraud, misrepresentation, and negligence against the seller of a mobile home. *Id.* at 1. The seller filled out California's mandatory disclosure form and indicated that he had no knowledge of any building code violations on the property. *Id.* at 2. After purchasing the home, a county building inspection uncovered several violations. *Id.* at 2. The trial court held that the disclosure statement could not be relied on as part of the purchase contract. *Id.* at 3. The court of appeals held that the "plain language of the disclosure form refutes plaintiffs' contention that the disclosure statement can be relied upon as part of the purchase contract or as a separate contract containing conditions upon which the formation of the primary contract is based." *Id.* at 3.

[344] HAW. REV. STAT. § 508D-1 (Supp. 1994).

[345] *Id.* "The statement shall not be construed as a warranty of any kind . . . ." *Id.*

[346] Ordway, *supra* note 180, at 56.

[347] HAW. REV. STAT. § 508D-9 (Supp. 1994).

Revised Statutes section 508D.[348] The paper trail in a disclosure statement made in good faith might protect the seller from claims of non-disclosure in the future.[349]

Some brokers believe that disclosure is beneficial to the seller because it accelerates the sale of the real estate.[350] "Without written disclosure, if a flaw shows up during a walk-through after the contract is signed, the buyer may want to renegotiate. If the flaw is noted on the disclosure form, the buyer has no excuse for requesting new terms."[351] Hawaii Revised Statutes section 508D brings uniformity to what must be disclosed. Under the common law, the seller was uncertain as to the disclosure requirements. The HAR Standard Form gives the seller in Hawaii a good idea of what needs to be disclosed and provides uniformity to the type of information being disclosed.[352]

C. Other Impacts of Hawaii Revised Statutes section 508D

Hawaii Revised Statutes section 508D might cause an increase in the number of professional home inspections for real estate transactions.[353] Hawaii Revised Statutes section 508D includes specific language that requires a notice to the buyer and seller that the parties "may wish to obtain professional advice and inspections of the property."[354] Some agents recommended that: "If buyers want to protect themselves from defects not covered by the state's form, they should have the house professionally inspected."[355] Sellers also should obtain professional inspections to help them fill out the disclosure forms and protect themselves in case of litigation.[356] Hawaii Revised Statutes section 508D also allows for absentee owners to substitute a professional inspection for the disclosure statement.[357] This provision by itself may increase the number of inspections because of the large number of mainland and foreign investors who don't live in

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[348] HAW. REV. STAT. § 508D-9(a) (Supp. 1994).

[349] Howard, *supra* note 264, at C3.

[350] *Id.*

[351] *Id.*

[352] Hawaii Association of Realtors' Standard Forms (July 1995), Seller's Real Property Disclosure Statement Single Family Residence, at 1-4.

[353] Royse, *supra* note 270, at 1.

[354] HAW. REV. STAT. § 508D-11(1) (Supp. 1994).

[355] Royse, *supra* note 270, at 1.

[356] *Id.*

[357] HAW. REV. STAT. § 508D-10(1) (Supp. 1994).

their Hawai'i properties.[358] However, Baltimore home inspectors reported that they did not receive the expected increase in home inspections when their disclosure law went into effect.[359] There, the number of home inspectors increased when the disclosure law was enacted but the demand for inspections remained consistent.[360]

Liability to home inspectors could increase because of increased inspections and proposed state licensing laws for inspectors.[361] The State will need to regulate home inspectors more closely as a result of the Hawaii Revised Statutes section 508D language.[362] Standards will be set to meet the demands of the buyers and sellers of residential real estate transactions.[363]

V. CONCLUSION

Hawaii Revised Statutes section 508D will provide more protection to Hawai'i home buyers. Section 508D expressly states that the section is in addition to all other remedies provided by law. Therefore, buyers can only benefit from the additional remedies of section 508D. Section 508D also puts buyers in a better position to make informed decisions about the purchase of a home. Buyers will be able to estimate the value of a home more easily and bargain accordingly.

Hawaii Revised Statutes section 508D protects sellers by creating a "paper trail" that limits a buyer's claims for oral misrepresentation. Section 508D also provides a safe harbor of good faith that allows for "honest" mistakes by sellers in complying with the statute. The use of the Hawaii Association of Realtors' Standard Forms reduces potential litigation by setting uniform expectations of what must be disclosed. The disclosure forms also limit the number of items overlooked in disclosures.

Hawaii Revised Statutes section 508D codifies the duty that seller's owe agents; sellers must provide their agents with the information necessary to protect the agents from pecuniary losses in conducting the seller's

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[358] Ordway, *supra* note 180, at 19.

[359] Adriane B. Miller, *Expected Windfall from Disclosure Law Turns Out to be a Drop in the Bucket*, THE (BALTIMORE) SUN, July 24, 1994, at 1L.

[360] *Id.* Baltimore's disclosure statute is different from Hawaii Revised Statutes § 508D because it allows for a disclaimer instead of a disclosure statement. This could be the reason that home inspections did not increase. *Id.*

[361] Ordway, *supra* note 180, at 40.

[362] *Id.*

[363] *Id.*

business. Under section 508D, agents should have fewer surprises and should be able to sell properties more quickly than before. The agent's duties under Hawaii Revised Statutes section 508D are in addition to the duties imposed by the Hawai'i case law, Hawaii Revised Statutes section 467-14, the Real Estate Commission Rules, and the National Association of Realtors' Code of Ethics. Therefore, like the sellers they represent, an agent's liability to the buyer is increased by section 508D.

Hawaii Revised Statutes section 508D is a comprehensive seller disclosure law. It employs Hawai'i's existing real estate laws and provides additional remedies to the buyer. The Hawaii Revised Statutes section 508D should be effective in reducing litigation by providing a uniformity that the common law did not possess.

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